

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

-----	X	
In re:	:	Chapter 11
	:	
LINCOLN POWER, L.L.C., <i>et al.</i> , <sup>1</sup>	:	Case No. 23-10382 (LSS)
	:	
Debtors.	:	(Jointly Administered)
	:	
	:	<b>Re: Docket Nos. 251 &amp; 277</b>
-----	X	

**NOTICE OF FILING OF EXECUTED VERSIONS OF THE ASSET PURCHASE AGREEMENT ATTACHED AS EXHIBIT C TO THE PLAN SUPPLEMENT**

**PLEASE TAKE NOTICE** that, on June 22, 2023, the above-captioned debtors and debtors in possession (collectively, the “**Debtors**”) filed the *Joint Plan of Reorganization of Lincoln Power, L.L.C. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 251] (as may be amended, supplemented, or modified from time to time, the “**Plan**”).<sup>2</sup>

**PLEASE TAKE FURTHER NOTICE** that, on July 14, 2023, the Debtors filed the *Notice of Filing of Plan Supplement* [Docket No. 277] (the “**Plan Supplement**”). As noted in the Plan Supplement, the Debtors stated they would file an executed version of the Asset Purchase Agreement attached thereto as Exhibit C.

**PLEASE TAKE FURTHER NOTICE** that the Debtors hereby submit executed versions of the Asset Purchase Agreement between the Debtors and Middle River Power VI LLC, attached hereto as Exhibit C-1, and the Debtors and Middle River Power VII LLC, attached hereto as Exhibit C-2.

**PLEASE TAKE FURTHER NOTICE** that copies of the Plan and the Plan Supplement may be obtained upon request of the undersigned counsel for the Debtors at the address specified below, and are on file with the Clerk of the Bankruptcy Court, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801, where they are available for review between the hours of 8:00 a.m. to 4:00 p.m. (ET). The Plan and the Plan Supplement are also available for inspection on the Bankruptcy Court’s website at <https://pacer.uscourts.gov>, or free of charge on the website of the Debtors’ claims and noticing agent, Omni Agent Solutions, dedicated to the Chapter 11 Cases, <https://omniagentsolutions.com/LincolnPower>.

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<sup>1</sup> The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Lincoln Power, L.L.C. (6449); Cogentrix Lincoln Holdings, LLC (6060); Cogentrix Lincoln Holdings II, LLC (4004); Elgin Energy Center Holdings, LLC (N/A); Elgin Energy Center, LLC (4819); Valley Road Holdings, LLC (N/A); Valley Road Funding, LLC (1587); and Rocky Road Power, LLC (2701). The Debtors’ address is 13860 Ballantyne Corporate Place, Suite 300, Charlotte, North Carolina 28277.

<sup>2</sup> Capitalized terms used but not defined herein or in the exhibit attached hereto shall have the meanings ascribed to them in the Plan.

**PLEASE TAKE FURTHER NOTICE** that subject to the terms and conditions of the Plan, the Debtors reserve all rights to amend, revise, or supplement the Plan Supplement, and any of the documents and designations contained herein, at any time before the Effective Date of the Plan, or any such other date as may be provided for by the Plan or by order of the Bankruptcy Court.

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Dated: July 24, 2023  
Wilmington, Delaware

Respectfully Submitted,

*/s/ Heather P. Smillie*

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**Exhibit C-1**

**Asset Purchase Agreement – Middle River Power VI LLC**

**ASSET PURCHASE AGREEMENT**

**by and among**

**Middle River Power VI LLC,**

**as Purchaser,**

**the Persons Identified on Annex A hereto,**

**as Sellers,**

**and**

**solely in its capacity as the initial Seller Representative,**

**Lincoln Power, L.L.C.**

**Dated as of July 24, 2023**

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**EXHIBITS**

Exhibit A	[Reserved]
Exhibit B	Form of Deed
Exhibit C	Form of Bill of Sale
Annex A	Sellers

## ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT is made as of July 24, 2023 (this “**Agreement**”) by and among Middle River Power VI LLC, a Delaware limited liability company (“**Purchaser**”), the Persons (as defined below) identified on Annex A hereto (collectively, “**Sellers**” and each individually, a “**Seller**”), and Lincoln Power, L.L.C., a Delaware limited liability company, solely in its capacity as the initial Seller Representative (as defined below) hereunder. Each of Purchaser and Sellers are sometimes referred to herein collectively as the “**Parties**”, and each as a “**Party**”.

### WITNESSETH:

WHEREAS, Sellers and certain of their Affiliates (as defined below) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the “**Bankruptcy Code**”), on March 31, 2023 in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**” and such cases commenced by the petitions, the “**Bankruptcy Cases**”);

WHEREAS, immediately prior to the execution of this Agreement, certain Sellers are the owners of a natural gas fired 483 MW combustion turbine power plant and associated facilities in Elgin, Illinois known as the Elgin facility (the “**Project**”); and

WHEREAS, upon the terms and subject to the conditions set forth in this Agreement, Sellers desire to sell to Purchaser, and Purchaser desires to purchase from Sellers, for itself or for transfer into an Affiliate of Purchaser, the Acquired Assets (as defined below), and Sellers desire to assign to Purchaser or such Affiliate of Purchaser, and Purchaser through itself or such Affiliate desires to assume, the Assumed Liabilities (as defined below).

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

## ARTICLE I DEFINITIONS

**Section 1.01 Definitions.** As used in this Agreement, the following defined terms have the meanings indicated below:

“**Acquired Assets**” has the meaning ascribed thereto in **Section 2.01(a)**.

“**Actions**” means any action, litigation, suit, proceeding, arbitration or investigation, by or before any Governmental Authority.

“**Affiliate**” means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the Person specified. For purposes of this definition, “control” of a Person means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person whether through ownership of voting securities or ownership interests,

by Contract or otherwise, and specifically with respect to a corporation, partnership or limited liability company, means direct or indirect ownership of securities having the power to elect a majority of the board of directors or similar body governing the affairs of such Person; provided, however, that with respect to any Seller “Affiliate” shall not include (a) Carlyle Investment Management L.L.C. or any of its Affiliates or any investment fund or investment vehicle doing business as “The Carlyle Group”, (b) any investment fund or investment vehicle advised or managed by the Persons listed in clause (a) or the general partner or similar entity affiliated with any of the foregoing or (c) any Affiliate of any Person identified in clauses (a) or (b), in each case, excluding each Seller. Notwithstanding the foregoing, the proviso above shall not apply for purposes of any indemnitees, disclaimers, releases or waivers hereunder in favor of or for the benefit of Sellers or their Affiliates, and for purposes of **Section 3.19**, **Section 3.22**, **Section 12.03**, **Section 12.04** and **Section 12.20** the term “Affiliates” shall include the Persons specified in the above proviso.

“**Agreement**” has the meaning ascribed thereto in the preamble to this Agreement.

“**Allocation**” has the meaning ascribed thereto in **Section 7.01(c)**.

“**Alternative Transaction**” means, the sale, transfer or disposition of all or any material portion of the Acquired Assets (whether effected pursuant to a reorganization, merger, consolidation, business combination, joint venture, partnership, sale of assets, plan of reorganization or liquidation, or restructuring or similar transaction), other than (a) the transactions contemplated by and in accordance with this Agreement and (b) sales of Inventory in the ordinary course of business.

“**Anti-Corruption Laws**” means any applicable domestic or international Laws relating to anti-bribery, anti-money laundering or anti-corruption (governmental or commercial), including Laws that prohibit the corrupt payment, offer, promise, or authorization of the payment or transfer of anything of value (including gifts or entertainment), directly or indirectly, to any representative of a foreign Governmental Authority or commercial entity to obtain a business advantage, including the U.S. Foreign Corrupt Practices Act.

“**Asset Manager**” means, collectively, Cogentrix Energy Power Management, LLC and Lincoln Operating Services, LLC.

“**Assets**” means, with respect to a Person, all assets and properties of every kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible and wherever situated), including the goodwill related thereto, operated, owned or leased by such Person.

“**Assumed Liabilities**” has the meaning ascribed thereto in **Section 2.01(c)**.

“**Auction**” means an auction or auctions, if any, for the sale of each Seller’s assets conducted pursuant to the terms and conditions of the Bid Procedures Order.

“**Back-up Bidder**” means the bidder for the Acquired Assets with the next-highest or otherwise second-best bid for the Acquired Assets following the conclusion of the Auction, as determined in accordance with the Bid Procedures.

“**Back-Up Termination Date**” means the earliest to occur of (a) if Purchaser is not the Successful Bidder, the date of consummation of the Transaction (as defined in the Bid Procedures) with the Successful Bidder at the Auction, (b) Purchaser’s receipt of notice from each Seller of the release of Purchaser’s obligations under **Section 7.02(a)** and (c) the End Date.

“**Balance Sheet Date**” has the meaning ascribed thereto in **Section 3.07**.

“**Bankruptcy Cases**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Bankruptcy Code**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Bankruptcy Costs**” means any fees and expenses of Sellers associated with the administration of the Bankruptcy Cases (including attorneys’ fees and other fees and expenses incurred by retained professionals for such purposes).

“**Bankruptcy Court**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Base Purchase Price**” has the meaning ascribed thereto in **Section 2.03**.

“**Bid Procedures**” means the bid procedures attached to the Bid Procedures Order as Exhibit 1 thereto.

“**Bid Procedures Motion**” means, the *Motion of Debtors for Entry of an Order (I) Approving Bid Procedures in Connection with the Sale of All or Substantially All of the Debtors’ Assets, (II) Scheduling Bid Deadlines and An Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (V) Granting Related Relief* [Docket No. 131], filed in the Bankruptcy Cases on May 1, 2023.

“**Bid Procedures Order**” means, the *Order (I) Approving Bid Procedures in Connection with the Sale of All or Substantially All of the Debtors’ Assets, (II) Scheduling Bid Deadlines and an Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (V) Granting Related Relief* [Docket No. 205], entered by the Bankruptcy Court in the Bankruptcy Cases on May 26, 2023.

“**Business**” means the business and operations of the Project and the Acquired Assets as conducted on the date hereof.

“**Business Day**” means a day other than Saturday, Sunday or any day on which banks located in New York, New York are obligated to close.

“**Cash**” means all of any Seller’s cash, checking account balances, marketable securities, certificates of deposits, time deposits, bankers’ acceptances, commercial paper, security entitlements, securities accounts, commodity accounts, government securities and any other cash

equivalents, whether on hand, in transit, in banks or other financial institutions, or otherwise held by such Seller.

“**CFIUS**” means the Committee on Foreign Investment in the United States.

“**CFIUS Clearance**” means (a) Purchaser and Sellers have received written notice from CFIUS that (i) CFIUS has conducted an assessment, review, or investigation of the transactions contemplated by this Agreement and determined that there are no unresolved national security concerns, and has concluded all action under the DPA, (ii) pursuant to 31 C.F.R. § 800.407(a)(2), CFIUS has determined that it is not able to conclude action under the DPA with respect to the transactions contemplated by this Agreement based on a CFIUS Declaration but has not requested the filing of a CFIUS Notice or (iii) the transactions contemplated by this Agreement are not covered transactions, as defined in the DPA; or (b) CFIUS has sent a report to the President of the United States (the “**President**”) requesting the President’s decision on the transactions contemplated by this Agreement and either (i) the period under the DPA during which the President may announce his decision to take action to suspend or prohibit the transactions contemplated by this Agreement has expired without any such action being announced or taken or (ii) the President has announced a decision not to take any action to suspend or prohibit the transactions contemplated by this Agreement.

“**CFIUS Declaration**” means a declaration prepared jointly by Purchaser and Sellers with respect to the transactions contemplated by this Agreement and submitted to CFIUS pursuant to 31 C.F.R. Part 800 Subpart D.

“**CFIUS Denial**” means that CFIUS has notified Purchaser and any Seller that it (a) intends to recommend to the President that the transactions contemplated by this Agreement be prohibited and (b) has been unable to identify conditions mitigating the risk of the transactions contemplated by this Agreement sufficient to alter its recommendation.

“**CFIUS Notice**” means a joint voluntary notice prepared by Purchaser and Sellers with respect to the transactions contemplated by this Agreement and submitted to CFIUS pursuant to 31 C.F.R. Part 800 Subpart E.

“**Closing**” has the meaning ascribed thereto in **Section 2.04**.

“**Closing Date**” means (a) the fourteenth (14th) day or if such date is not a Business Day, the next Business Day thereafter or (b) such other date as Purchaser and the Seller Representative may mutually agree in writing, in each case following the date on which the last of the conditions set forth in **Article VIII** and **Article IX** are satisfied or waived by Purchaser or Sellers, as the case may be (except for such conditions that by their nature can only be satisfied at the Closing and subject to the satisfaction or waiver of such conditions as provided herein).

“**Code**” means the Internal Revenue Code of 1986, as may be amended, modified, supplemented or replaced from time to time, and the rules and regulations promulgated thereunder.

“**Confidential Information**” has the meaning ascribed thereto in **Section 12.03(a)**.

“**Confidentiality Agreement**” means that certain Confidentiality Agreement, dated as of May 4, 2023, by and between Lincoln Power, L.L.C. and Avenue Capital Management II, L.P.

“**Confirmation Hearing**” means a hearing before a Bankruptcy Court to (a) approve, among other things, this Agreement and the transactions contemplated hereby and (b) entry of the Confirmation Order.

“**Confirmation Order**” means an Order of the Bankruptcy Court, in form and substance reasonably acceptable to the Purchaser and the Seller Representative, among other things, granting the relief set forth in **Section 7.02(c)**.

“**Continuation Period**” has the meaning ascribed thereto in **Section 7.04(b)**.

“**Contract**” means any legally binding contract, agreement, lease, license, evidence of Indebtedness, mortgage, indenture, security agreement or other legally binding arrangement, whether written or oral, including any amendments and other modifications thereto.

“**Cure Costs**” has the meaning ascribed thereto in **Section 2.05(d)**.

“**Deposit**” has the meaning ascribed thereto in **Section 2.02**.

“**Deposit Account**” has the meaning ascribed thereto in **Section 2.02**.

“**Designation Deadline**” means the date that is fourteen (14) days prior to the Closing, or such other date as Purchaser and the Seller Representative mutually agree in writing and, if applicable, as the Bankruptcy Court may authorize.

“**DPA**” means Section 721 of the Defense Production Act of 1950, as amended, including all implementing regulations thereof.

“**Easement**” has the meaning ascribed thereto in **Section 3.11(c)**.

“**Easement Real Property**” has the meaning ascribed thereto in **Section 3.11(c)**.

“**Employee Plan**” means any “employee benefit plan,” as such term is defined in Section 3(3) of ERISA, whether or not subject to any provision of ERISA, including Title IV of ERISA, and each change in control, retention, severance, bonus, incentive, profit-sharing, retirement, equity or equity-based, deferred compensation, paid time off, health, welfare, material fringe benefits or other material benefit or compensation plan, program, policy, agreement or arrangement.

“**Enforceability Limitations**” means any Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors’ rights generally and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforceability is considered in any Action in equity or at Law).

“**Environmental Claim**” means any and all administrative, regulatory or judicial Actions, Orders or notices of noncompliance or violation by any third party (including any Governmental Authority) alleging liability (including liability for enforcement, investigatory costs, damages, Losses, contribution, indemnification, cost recovery, compensation, injunctive relief, cleanup costs, governmental resource costs, removal costs, remedial costs, natural resources damages, property damages, personal injuries or penalties) arising out of, based on or resulting from: (a) any violation or alleged violation of, or liability under, any Environmental Law or Environmental Permit; or (b) the presence, Release or threatened Release of, or exposure to, any Hazardous Substances at any location.

“**Environmental Laws**” means any and all Laws or binding agreements with any Governmental Authority relating to pollution or protection of the environment, natural resources, endangered, threatened or candidate species, biological or cultural resources, or occupational and public human health and safety (as it relates to exposure to Hazardous Substances), including those relating to the generation, manufacture, use, handling, treatment, storage, disposal, distribution, labeling, discharge, Release, threatened Release, control, cleanup, recycling, transportation or exposure to any Hazardous Substances.

“**Environmental Permit**” means any Permit required by or from a Governmental Authority under Environmental Law.

“**Equity Commitment Letter**” has the meaning ascribed thereto in **Section 4.07**.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as may be amended, modified, supplemented or replaced from time to time.

“**Excess Seller Costs**” means an amount equal to the amount by which any Seller Costs exceed \$1,312,500.00.

“**Excluded Assets**” has the meaning ascribed thereto in **Section 2.01(b)**.

“**Excluded Contracts**” means all Contracts to which any Seller is a party other than the Purchased Contracts, including the Contracts set forth in **Section 1.01(d) of the Seller Disclosure Schedule**.

“**Excluded Deposits**” has the meaning ascribed thereto in **Section 2.01(b)(xii)**.

“**Excluded Liabilities**” has the meaning ascribed thereto in **Section 2.01(d)**.

“**Executory Contract**” means any executory Contract (including any unexpired lease) related to the Acquired Assets and Assumed Liabilities to which any Seller or an Affiliate of any Seller is a party or a beneficiary or by which any Acquired Assets are bound.

“**EWG**” means “exempt wholesale generator” as that term is defined in PUHCA.

“**FERC**” means the Federal Energy Regulatory Commission, and any successor thereto.

“**Final Order**” means an Order of the Bankruptcy Court or other court of competent jurisdiction, which is in full force and effect, which has not been modified, amended, reversed, vacated or stayed and as to which the time to file an appeal, a motion for rehearing or reconsideration or a petition for writ of certiorari has expired and no such appeal, motion or petition is pending; provided that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Code, may be filed with respect to such order will not preclude such order from being a Final Order.

“**Financial Statements**” has the meaning ascribed thereto in **Section 3.07**.

“**Flip Date**” means the date that is fourteen (14) days after the Partial Satisfaction Date.

“**FPA**” means the Federal Power Act, 16 U.S.C. §§ 791a, et seq., as amended, and the implementing regulations of FERC thereunder.

“**Fraud**” means an actual (and not constructive or imputed) and intentional common law fraud under Delaware Law by a Party in the making of the representations and warranties by a Party in **Article III** or **Article IV**, as applicable, and not with respect to any other matters, with the intent to deceive the other Party; provided that such actual and intentional common law fraud of such Party specifically excludes any statement, representation or omission made negligently or recklessly.

“**GAAP**” means generally accepted accounting principles in the United States, consistently applied throughout the specified period.

“**Good Industry Practice**” means any of the practices, methods, standards, procedures and acts engaged in or approved by a significant portion of the electric generation industry and applicable to gas-fired power generation resources comparable to the Project during the relevant time period, or any of the practices, methods and acts that, in the exercise of reasonable judgment in light of the applicable manufacturer’s recommendations and the facts known at the time the decision is made, would reasonably have been expected to accomplish the desired result in a manner consistent with good business practices, Law, reliability and safety. “**Good Industry Practice**” is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather is intended to include practices, methods or acts that meet the foregoing qualifications.

“**Governance Document**” means, with respect to any Person, (a) the articles of incorporation or organization, certificates of formation and by-laws, the limited partnership agreement, the partnership agreement or the limited liability company agreement, or such other organizational documents of such Person, including those that are required to be registered or kept in the place of incorporation, organization or formation of such Person and that establish the legal personality of such Person and (b) any voting trust, shareholder agreement, voting agreement, pledge agreement, buy-sell agreement, right of first refusal, preemptive right or proxy or other agreement, right, instrument or understanding with respect to any purchase, sale, issuance, transfer, repurchase, redemption or voting of such equity interests, or any other similar governing document with respect to such Person.



**“Governmental Approval”** means any authorization, consent, approval, ruling, tariff, rate, certification, waiver, exemption, filing, variance or Order of, or any notice to or registration by or with, any Governmental Authority, including those required with respect to the transfer and reissuance of Transferred Permits.

**“Governmental Authority”** means any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any governmental authority, agency, department, board, commission, official, tribunal, court or arbitrator(s) of competent jurisdiction or other instrumentality of the United States or any state, county, city or other political subdivision or similar governing entity thereof, including FERC, the Federal Communications Commission, NERC, PJM, and any other governmental, quasi governmental or non-governmental body, administering, regulating or having general oversight over gas and power markets, including any regional transmission operator, independent system operator and any market monitor thereof, and compliance with Environmental Laws.

**“Hazardous Substance”** means any waste or other chemical, material or substance that is listed, defined, or regulated, as hazardous, radioactive, toxic, or a pollutant or a contaminant, or words of similar import, under or pursuant to any Environmental Law, including petroleum or petroleum by-products, asbestos or asbestos-containing materials, any radioactive materials, per- or polyfluoroalkyl substances or polychlorinated biphenyls.

**“Hedging Arrangements”** means any forward, futures, swap, collar, put, call, floor, cap, option or other Contract, that are intended to benefit from, or reduce or eliminate the risk of, fluctuations in the price of commodities, including electric power, natural gas or securities.

**“Improvements”** means all buildings, structures, improvements, facilities, fixtures, furnishings, furniture, offices, building systems and equipment, and all components thereof, in each case, owned or leased by Seller or any Affiliate thereof for use primarily at or in connection with the Project.

**“Indebtedness”** of any Person means, without duplication, all obligations of such Person (a) for borrowed money, (b) evidenced by notes, bonds, debentures or other debt security, (c) for the deferred purchase price of goods or services (other than trade payables or accruals incurred in the ordinary course of business), (d) as lessee under finance or capital leases, (e) any obligations, contingent or otherwise, under acceptance, letters of credit or similar facilities, obligations under any Hedging Arrangement, any other interest rate or other derivative securities, and any commitments by which a Person assures a creditor against loss (including contingent reimbursement obligations with respect to letters of credit), or (f) in the nature of guarantees of the obligations described in clauses (a) through (e) above of any other Person, in each case, including all unpaid interest, premiums, make-whole payments, yield maintenance fees, penalties and similar amounts relating to the obligations described in clauses (a) through (f) above.

**“Independent Accountant”** means a nationally recognized firm of independent certified public accounts reasonably acceptable to Purchaser and the Seller Representative.

**“Initial Contract Notice”** has the meaning ascribed thereto in **Section 2.05**.

**“Insurance Policies”** has the meaning ascribed thereto in **Section 3.16**.

“**Insurance Proceeds**” has the meaning ascribed thereto in **Section 5.08**.

“**Interim Period**” has the meaning ascribed thereto in **Section 5.01**.

“**Inventories**” means (a) any fuel inventories, materials, consumable supplies, chemical and gas inventories or similar raw materials located at the Project, in transit to the Project or stored offsite for use at the Project and (b) all inventories, parts, materials and supplies, including spare parts, that are for use at or in connection with the Project, in each case, in which Sellers have any right, title or interest.

“**Intellectual Property**” means all intellectual property and rights therein protected in any jurisdiction throughout the world, including all (a) patents, patent applications, invention disclosures and all related continuations, continuations-in-part, divisionals, reissues, re-examinations, substitutions and extensions thereof, (b) trademarks, service marks, corporate names, domain names, logos, slogans, trade dress, design rights, and other similar designations of source or origin, (c) copyrights and designs, (d) trade secrets and know-how, (e) to the extent not included in the foregoing, software (including source code) and related documentation and data and (f) all applications and registrations for any of the foregoing.

“**Knowledge of Purchaser**” means the actual knowledge, after reasonable inquiry by such Persons of their respective direct reports with overall responsibility for the specific subject matter, of those Persons listed in **Section 1.01(a) of the Purchaser Disclosure Schedule**.

“**Knowledge of Seller**” means the actual knowledge, after reasonable inquiry by such Persons of their respective direct reports with overall responsibility for the specific subject matter, of those Persons listed on **Section 1.01(b) of the Seller Disclosure Schedule**.

“**Latham**” has the meaning ascribed thereto in **Section 12.19**.

“**Laws**” means all laws, statutes, rules, regulations, ordinances, codes, Orders and constitutions of any Governmental Authority.

“**Liabilities**” means, with respect to any Person, all Indebtedness, obligations and other liabilities of such Person (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due).

“**Liens**” means any mortgage, deed of trust, pledge, assessment, security interest, lease, lien, adverse claim, levy, charge, easement, restrictive covenant, encroachment, protrusion, right-of-way, right-of-first offer or refusal, royalty, franchise, defect to title or other encumbrance, or any conditional sale contract, title retention contract or other contract to give any of the foregoing.

“**LOS**” has the meaning ascribed thereto in **Section 7.04(a)**.

“**LOS Plan**” has the meaning ascribed thereto in **Section 7.04(b)**.

“**LOS 401(k) Plan**” has the meaning ascribed thereto in **Section 7.04(d)**.

“**Loss**” means any and all damages, fines, penalties, deficiencies, liabilities, losses and expenses (including interest, court costs, fees of attorneys, accountants and other experts).

“**Material Permits**” has the meaning ascribed thereto in **Section 3.18**.

“**MBR Authority**” means authorization issued by FERC pursuant to Section 205 of the FPA to sell electric energy, capacity and certain ancillary services at market-based rates, acceptance by FERC of a tariff providing for such sales, and approval by FERC of such regulatory waivers and blanket authorizations as are customarily granted by FERC to “persons,” as defined in the FPA, authorized to sell electric power at market-based rates, including blanket authorization under Section 204 of the FPA and FERC’s regulations at 18 C.F.R. Part 34 to issue securities and assume liabilities.

“**NERC**” means the North American Electric Reliability Corporation, or any successor thereto, and any of its regional entities, including ReliabilityFirst Corporation.

“**Net Insurance Proceeds**” means, with respect to any Insurance Proceeds in respect of any Acquired Asset that is not repaired or restored to its prior condition prior to the Closing in accordance with **Section 5.08**, an amount equal to (a) such Insurance Proceeds, *minus* (b) the Seller Costs, *minus* (c) the amount of any such Insurance Proceeds applied to the restoration or repair of the applicable casualty.

“**Non-Party Affiliates**” has the meaning ascribed thereto in **Section 12.13(b)**.

“**Offer Terms**” has the meaning ascribed thereto in **Section 7.04(a)**.

“**Operating Expenses**” means all operating expenses of Sellers related to the Acquired Assets (including the Project) attributable to the conduct of the Business during the Post-Flip Period (including all real estate and personal property taxes, amounts owed under vendor or similar service provider contracts, fuel or utility expenses and any other expenses, including accrued expenses, arising in connection with any activities used to support or maintain the operations of the Acquired Assets (including the Project) and the Business), all calculated in accordance with GAAP.

“**Operating Profit**” means an amount equal to Operating Revenues received by Sellers from PJM Settlement, Inc. attributable to the operation of the Project during the Post-Flip Period, *minus* Operating Expenses, all calculated in accordance with GAAP.

“**Operating Revenues**” means (x) all revenue derived from the ownership and/or operation of the Acquired Assets (including the Project) from whatever source, including, accrued revenue, all consistent with the Financial Statements and as calculated in accordance with GAAP, *plus* (y) the amount of any Bankruptcy Costs funded from the Deposit in accordance with **Section 2.08(a)**.

“**Order**” means any writ, judgment, decree, injunction or award issued, or otherwise put into effect by or under the authority of any Governmental Authority (in each such case whether preliminary or final).

“**Owned Real Property**” has the meaning ascribed thereto in **Section 3.11(a)**.

“**Partial Satisfaction Date**” means date on which all of the conditions to Closing set forth in **Article VIII** are satisfied or waived by Purchaser, except for (a) the condition set forth in **Section 8.05** (solely as it relates to CFIUS) or **Section 8.09** and (b) any conditions that by their nature can only be satisfied at the Closing and subject to the satisfaction or waiver of such conditions as provided herein.

“**Party**” has the meaning ascribed thereto in the preamble to this Agreement.

“**Permits**” means all licenses, permits, certificates of authority, authorizations, approvals, registrations, franchises, variances, exemptions, waivers and similar consents of, or granted by, any Governmental Authority.

“**Permitted Liens**” means (a) any Lien for Taxes (i) not yet delinquent, (ii) being contested in good faith by appropriate proceedings and both (A) set forth on **Section 1.01-PL of the Seller Disclosure Schedule** and (B) for which adequate reserves have been established in accordance with GAAP or (iii) the nonpayment of which is permitted or required under the Bankruptcy Code (so long as such Liens will be released by operation of the Agreement), (b) any statutory Lien arising in the ordinary course of business by operation of Law with respect to a Liability that is not yet delinquent (including mechanics’, materialmen’s, warehousemen’s, repairmen’s, landlord’s and other similar liens to the extent arising by operation of Law) or that is being contested in good faith by appropriate proceedings, (c) in the case of Real Property, (i) any immaterial imperfection of title or other minor encumbrance, (ii) any Lien that is disclosed in a title report or survey of any Project that has been made available to Purchaser, (iii) restrictive covenants, building restrictions and zoning restrictions or other restrictions affecting title to, or possession of, any of the Real Property that exist generally with respect to properties of a similar character in the jurisdiction in which the Real Property is located and (iv) the rights of lessees and lessors of the Real Property pursuant to the terms and conditions of the applicable lease, that, in the case of each of clause (i) through (iv), (A) would not reasonably be expected to materially detract from the value of the affected property or the Acquired Assets or interfere with the Business or the ability to utilize the affected property for its intended purpose and (B) does not secure Indebtedness of any Seller and (d) Liens created by Purchaser, or its successors and assigns or otherwise expressly consented to by Purchaser in writing in accordance with the terms hereof.

“**Person**” means any individual, corporation, company, voluntary association, partnership, joint venture, trust, enterprise, unincorporated organization, limited liability company, other business or similar entity or Governmental Authority.

“**PJM**” means, collectively, PJM Interconnection, L.L.C. and PJM Settlement, Inc., and any successors thereto.

“**PJM Manuals**” means any of the manuals established by PJM, and posted on PJM’s website, for the operation, planning and accounting requirements of the PJM region and PJM energy markets, as amended from time to time.

“**PJM Open Access Transmission Tariff**” means, collectively, the PJM Open Access Transmission Tariff, including any schedules, appendices or exhibits attached thereto, on file with FERC and as amended from time to time thereafter, and the PJM Manuals.

“**PJM Settlement**” means the settlement by and among PJM and Sellers, the terms of which are set forth in that certain PJM Settlement Term Sheet, dated as of May 3, 2023, approved by the Bankruptcy Court pursuant to the *Order (I) Approving the Settlement with PJM Interconnection, L.L.C. and PJM Settlement, Inc. and (II) Granting Related Relief* [Docket No. 198].

“**Post-Closing Credits**” means any credit, refund, reimbursement, rebate or cash proceeds from any third party (whether in connection with an allowance, adjustment or otherwise), including any Governmental Authority, or any class action or other settlement payment or award granted by any third party, including any Governmental Authority, that becomes payable or is paid to Sellers post-Closing, if the Flip Date does not occur, or on or following the Flip Date, if the Flip Date does occur, and that is attributable to the ownership or operation of any Acquired Asset or the Project during any pre-Closing period, if the Flip Date does not occur, or any pre-Flip Date period, if the Flip Date does occur. For the avoidance of doubt, “Post-Closing Credits” expressly includes any capacity payments related to any pre-Closing period, if the Flip Date does not occur, or any pre-Flip Date period, if the Flip Date does occur.

“**Post-Closing Representation**” has the meaning ascribed thereto in **Section 12.19**.

“**Post-Closing Tax Period**” means any taxable period beginning after the Closing and the portion of any Straddle Period beginning after the Closing.

“**Post-Flip Period**” has the meaning ascribed to thereto in **Section 2.08(a)**.

“**Pre-Closing Tax Period**” means any taxable period ending at or before the Closing and the portion of any Straddle Period ending at the Closing.

“**President**” has the meaning ascribed thereto in the definition of CFIUS Clearance.

“**Project Personnel**” means the employees listed on **Section 1.01(e) of the Seller Disclosure Schedule** (to the extent such employee is not terminated for cause during the Interim Period) and any other employee employed by LOS during the Interim Period to replace any employee terminated for cause during the Interim Period.

“**Project**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Property Taxes**” means all real property Taxes, personal property Taxes and similar ad valorem Taxes.

“**PUHCA**” means the Public Utility Holding Company Act of 2005, as amended and FERC’s implementing regulations thereunder at 18 C.F.R. § 366.1 et seq.

“**Purchase Price**” has the meaning ascribed thereto in **Section 2.03**.

“**Purchased Contracts**” means the Contracts set forth in **Section 1.01(c) of the Seller Disclosure Schedule** (except those that expire or are terminated prior to the Closing), as amended pursuant to **Section 2.05(c)**.

“**Purchaser**” has the meaning ascribed thereto in the preamble to this Agreement.

“**Purchaser Employee**” has the meaning ascribed thereto in **Section 7.04(c)**.

“**Purchaser Parent**” means Avenue MIC Power Opportunities Master Fund, L.P.

“**Purchaser Disclosure Schedule**” has the meaning ascribed thereto in the introduction to **Article IV**.

“**Purchaser Released Parties**” means, collectively, and in each case in its capacity as such: (a) Purchaser and (b) each of Purchaser’s predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, and each of their current and former (i) officers, (ii) directors, (iii) managers, (iv) principals, (v) shareholders, (vi) members, (vii) partners, (viii) employees, (ix) agents, (x) advisory board members, (xi) financial advisors, (xii) attorneys, (xiii) accountants, (xiv) investment bankers, (xv) consultants, (xvi) representatives, (xvii) management companies, (xviii) fund advisors and (xix) other professionals, and such entities’ respective heirs, executors, estate, servants and nominees.

“**Purchaser Material Adverse Effect**” means a (a) material impairment or delay of the ability of Purchaser to perform its material obligations under this Agreement or the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby or (b) a material and adverse effect on the ability of Purchaser to retain or operate the businesses, operations, or assets of the Project.

“**Purchaser Transaction Documents**” means, collectively, this Agreement and the other agreements and instruments to be executed and delivered by Purchaser in connection with this Agreement.

“**Real Property**” has the meaning ascribed thereto in **Section 3.11(c)**.

“**Real Property Rights**” has the meaning ascribed thereto in **Section 3.11(d)**.

“**Records**” has the meaning ascribed thereto in **Section 2.01(a)(xi)**.

“**Release**” means, any release, spill, emission, leaking, pumping, pouring, emptying, discharging, injecting, escaping, leaching, dumping, deposit, disposal, discharge, dispersal or migration of any Hazardous Substance into or through the indoor or outdoor environment.

“**Released Claims**” means all Liabilities, claims and causes of action related to, or in any manner arising from, in whole or in part, (a) the Bankruptcy Cases, and (b) the Acquired Assets or the Assumed Liabilities, including any Liabilities, claims and causes of action constituting Acquired Assets.

**“Replacement Support Obligation”** has the meaning ascribed thereto in **Section 5.06**.

**“Representatives”** means, as to any Person, its officers, directors, managers, employees, agents, partners, members, stockholders, counsel, accountants, financial advisors, engineers, consultants, and other advisors, and, with respect to Sellers, the Asset Manager.

**“Secondary End Date”** has the meaning ascribed thereto in **Section 10.01(k)**.

**“Seller Contracts”** has the meaning ascribed thereto in **Section 3.13(a)**.

**“Seller Costs”** means, in respect of any Insurance Proceeds, an amount equal to (a) any deductible or retention under the applicable insurance policy, *plus* (b) any costs and expenses of Sellers related to recovering such Insurance Proceeds, *plus* (c) any income, franchise or similar Taxes in respect of such Insurance Proceeds payable by any Seller, any Affiliate of any Seller or any of their respective direct or indirect equityholders.

**“Seller Disclosure Schedule”** has the meaning ascribed thereto in the introduction to **Article III**.

**“Sellers’ Marks”** means Cogentrix and any mark, word or expression incorporating such term, similar thereto or constituting an abbreviation or extension thereof.

**“Seller Material Adverse Effect”** means any circumstance, fact, development, change, event, effect or occurrence that has had or would reasonably be expected to (a) have, individually or in the aggregate, a material adverse effect on, the Project, the Acquired Assets or the Assumed Liabilities, taken as a whole, or (b) prevent or otherwise is materially adverse to, or has a material adverse effect on, Sellers’ ability to perform their respective obligations hereunder or to consummate the transactions contemplated hereunder; provided that a “Seller Material Adverse Effect” shall not include circumstances, facts, developments, changes, events, effects or occurrences (individually or taken together) resulting from or arising out of (i) any change generally affecting the national, local or regional (A) electric generating, transmission or distribution industry, (B) wholesale or retail markets for electric energy, capacity or ancillary services, or natural gas, (C) electrical or natural gas transmission and distribution systems or the operation thereof, and related rates and charges, (D) markets for commodities or supplies, including electric power, natural gas, emissions, fuel or water or (E) design or pricing of the wholesale or retail electric power and natural gas; (ii) [reserved]; (iii) [reserved]; (iv) any change in the financial, banking or securities markets or any change in the general international, national or regional economic conditions, including as a result of terrorist activity, acts of war or acts of public enemies; (v) the execution of this Agreement or announcement or pendency of the transactions contemplated hereby or any actions contemplated to be taken pursuant to or in accordance with this Agreement; (vi) the consequences of actions taken upon Purchaser’s written request; or with the Purchaser’s written consent; (vii) (reserved); (viii) the consequences of actions taken by Purchaser or any Affiliate of Purchaser; (ix) changes in any industry standards, Law, GAAP or regulatory accounting requirements, including NERC reliability standards, or changes in the official interpretation thereof; (x) earthquakes, hurricanes, floods, acts of God or other natural disasters; (xi) the Excluded Assets or Excluded Liabilities; (xii) the failure or inability of

Seller to meet any internal or public projections, forecasts or estimates of revenues or earnings (it being understood that this clause (xii) shall not exclude the facts or circumstances giving rise to such failure, inability or change in ability, in each case to the extent any such fact or circumstance is not otherwise excluded from this definition of Seller Material Adverse Effect); (xiii) the consequences of the filing or commencement of the Bankruptcy Cases, including Sellers' inability to pay certain obligations as a result of the filing of the Chapter 11 Cases or (xiv) [reserved]; provided, however, (A) that in the case of clauses (i) through (iv), (ix) and (x) such occurrence, development, circumstance effect, change or event does not have a materially disproportionate effect on the Project or on Acquired Assets, taken as a whole, relative to other Persons operating in the same industry and geographic region, and (B) the exception described in clause (v) shall not apply in connection with any representation or warranty of Sellers' in this Agreement addressing the execution, delivery, announcement or performance of this Agreement or the consummation of the transactions contemplated hereby, or any condition with respect thereto.

**"Seller Released Parties"** means, collectively, and in each case in its capacity as such: (a) each Seller, (b) the Seller Representative, (c) the Asset Manager and (d) with respect to each of the entities in clause (a) and (b), each such entities' predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, and each of their current and former (i) officers, (ii) directors, (iii) managers, (iv) principals, (v) shareholders, (vi) members, (vii) partners, (viii) employees, (ix) agents, (x) advisory board members, (xi) financial advisors, (xii) attorneys, (xiii) accountants, (xiv) investment bankers, (xv) consultants, (xvi) representatives, (xvii) management companies, (xviii) fund advisors and (xix) other professionals, and such entities' respective heirs, executors, estate, servants, and nominees.

**"Seller Representative"** has the meaning ascribed thereto in **Section 11.02(a)**.

**"Seller Transaction Documents"** has the meaning ascribed thereto in **Section 3.01**.

**"Sellers"** has the meaning ascribed thereto in the preamble to this Agreement.

**"Seller Property Tax Amount"** has the meaning ascribed thereto in **Section 7.01(d)**.

**"Service Provider"** means each current or former individual that performs, or has performed, services for the Business.

**"Signing Deposit"** has the meaning ascribed thereto in **Section 2.02(a)**.

**"Specified Support Obligation"** has the meaning ascribed thereto in **Section 3.22**.

**"Straddle Period"** means a taxable period that begins before or at and ends after the Closing.

**"Successful Bidder"** means the bidder for the Acquired Assets with the highest or otherwise best bid for the Acquired Assets as determined in accordance with the Bid Procedures.



“**Support Obligation**” means any letter of credit, guarantee, surety, performance bond, escrow arrangement, cash collateral, security arrangement or other credit support.

“**Surviving Covenants**” has the meaning ascribed thereto in **Section 11.01**.

“**Tangible Personal Property**” means all machinery, mobile or otherwise, equipment, spare parts, vehicles, pumps, fittings, tools, furniture or furnishings, meter equipment and other tangible personal property owned or leased by Sellers or any of their respective Affiliates for use or consumption primarily at or in connection with the Project.

“**Tax**” means any and all federal, state, provincial, local, foreign and other taxes, levies, fees, imposts, duties, and similar governmental charges (including any interest, fines, assessments, penalties, deficiency assessments or additions to tax imposed in connection therewith or with respect thereto) including (a) taxes imposed on, or measured by, net income, gross income, franchise, profits or gross receipts, and (b) ad valorem, value added, capital gains, sales, goods and services, use, real or personal property (tangible and intangible), capital stock, license, branch, payroll, withholding, employment, social security (or similar), unemployment, disability, occupational, excise, compensation, utility, severance, production, excise, stamp, registration, occupation, premium, windfall profits, excess profits, fuel, gas import, environmental, transfer and gains, lease, service, service use, alternative or add on minimum, and estimated taxes and customs duties.

“**Tax Return**” means any return, report, information return, declaration, claim for refund, election, disclosure, estimate, or other document, together with all schedules, attachments, amendments and supplements thereto (including all related or supporting information), supplied to or required to be supplied to any Governmental Authority responsible for the administration of Taxes.

“**Taxing Authority**” shall mean any Governmental Authority having or purporting to exercise jurisdiction with respect to any Tax.

“**Termination Date**” has the meaning ascribed thereto in **Section 10.01(b)(i)**.

“**Transaction Transfer Taxes**” has the meaning ascribed thereto in **Section 7.01(b)**.

“**Transfer Taxes**” has the meaning ascribed thereto in **Section 7.01(b)**.

“**Transferred Employee**” has the meaning ascribed thereto in **Section 7.04(a)**.

“**Transferred Permits**” has the meaning ascribed thereto in **Section 2.01(a)(x)**.

“**U.S. Dollars**” means the lawful currency of the United States.

“**Waiving Parties**” has the meaning ascribed thereto in **Section 12.19**.

**Section 1.02 Certain Principles of Interpretation.** In this Agreement, unless otherwise indicated, all words defined in the singular have the corresponding meaning in the plural and vice

versa; words importing any gender include the other gender; references to statutes or regulations are to be construed as including all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to; references to “writing” include printing, typing, lithography and other means of reproducing words in a tangible visible form; the words “including”, “includes” and “include” shall be deemed to be followed in each instance by the words “without limitation”; the words “shall” and “will” have the same meaning; references to articles, sections (or subdivisions of sections), the words “hereof,” “herein,” “hereby,” “hereto,” “hereunder” and derivative or similar words refer to this entire Agreement; the word “or” shall be disjunctive but not exclusive; the phrase “to the extent” means “the degree by which” and not “if”; exhibits, annexes or schedules are to articles, sections (or subdivisions of sections), exhibits, annexes or schedules of or to this Agreement; references to agreements and other contractual instruments shall be deemed to include all amendments, extensions and other modifications to such instruments prior to the date of this Agreement and any such amendments, extensions and other modifications to such instruments that are expressly permitted hereunder; references to Persons include their respective successors and permitted assigns and, in the case of Governmental Authorities, Persons succeeding to their respective functions and capacities; the phrase “ordinary course of business” refers to the Business, unless otherwise indicated; all accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP; the terms “indemnification,” “indemnify” and derivative words shall be deemed to include reference to any related reimbursement obligations (whether or not related to a claim by a third party); and “made available” with reference to any document provided by Seller hereunder means made available to Purchaser or its Representatives in the “Lincoln Restructuring” electronic data room established on behalf of Sellers and hosted by firmex.com in connection with the transactions contemplated under this Agreement, as updated as of 5:00 P.M. (prevailing Eastern time) on the date that is one (1) day prior to the date of this Agreement. Any deadline or the date of performance of any right or obligation set forth herein shall be calculated exclusive of the first date from which such time period commences and inclusive of the date on which such time period ends. To the extent that any deadline or date of performance of any right or obligation set forth herein shall fall on a day other than a Business Day, then such deadline or date of performance shall automatically be extended to the next succeeding Business Day.

## ARTICLE II PURCHASE AND SALE OF ACQUIRED ASSETS; CLOSING

### Section 2.01 Purchase and Sale of Acquired Assets.

(a) At the Closing, upon the terms and subject to the conditions set forth in this Agreement, Purchaser agrees to purchase, acquire and accept from Sellers, and Sellers agree to sell, assign, transfer, convey and deliver to Purchaser, free and clear of all Liens (other than Permitted Liens) all of Sellers’ right, title and interest in, to and under the following Assets owned, used or held for use in the operation of, or comprising, the Project (collectively, the “**Acquired Assets**”):

(i) all deposits and expenses that have been prepaid by any Seller (or a predecessor owner), including as set forth or disclosed in **Section 2.01(a)(i) of the Seller Disclosure Schedule** and all other security deposits with third-party suppliers or vendors,

prepaid lease and rental payments and prepaid Property Taxes, postage, utility deposits, and expenses, in each case, solely to the extent attributable to the ownership and operation of the Acquired Assets or the Assumed Liabilities, but excluding, for the avoidance of doubt, the Excluded Deposits;

(ii) all accounts receivable, notes, negotiable instruments and chattel paper owned or held by any Seller, together with any unpaid interest or fees accrued thereon or other amounts due with respect thereto related to the Acquired Assets, but excluding for the avoidance of doubt, the Post-Closing Credits;

(iii) any operating claims, refunds or adjustments related principally to the Acquired Assets or the Business, but excluding, for the avoidance of doubt, the Post-Closing Credits;

(iv) all Inventories, including those set forth or disclosed in **Section 2.01(a)(ii) of the Seller Disclosure Schedule**;

(v) the Owned Real Property and all Improvements located therein or thereon;

(vi) all rights, title and interest of Seller in and to any property subject to a personal property lease that is primarily used in or held for use in the operation of the Business, to the extent any such personal property lease is a Purchased Contract;

(vii) Sellers' interests in the Easements and all Improvements located therein or thereon;

(viii) all items of Tangible Personal Property, including as set forth or disclosed in **Section 2.01(a)(vi) of the Seller Disclosure Schedule**;

(ix) all Purchased Contracts;

(x) to the extent transferable pursuant to applicable Law (including upon request or application to a Governmental Authority or which will pass to Purchaser as successor in title to any other Acquired Assets by operation of Law), all Permits (including Environmental Permits) related to the ownership and operation of the Acquired Assets, including as set forth or described in **Section 2.01(a)(x) of the Seller Disclosure Schedule** and including all pending applications for any new Permit or renewal, extension or modification of any existing Permit (the "**Transferred Permits**");

(xi) all documents, books, records and files, including all documents, instruments, papers, electronic correspondence, records and files stored on computer disks or tapes or any other storage medium, studies, reports, drawings, microfilms, photographs, letters, journals, title policies, regulatory filings, purchase orders, invoices, shipping records, operating records, operating, safety and maintenance manuals, engineering design plans, blueprints and as-built plans, user documentation (installation guides, user manuals, training materials, release notes, working papers, etc.), equipment repair, safety, maintenance or service records, technical data, business plans, financial and operating data,

environmental records, plans and studies, accounting and Tax records (including Tax Returns), ledgers, filings or other documentation relating to any litigation or other Liability, internal and external correspondence and other books and records, whether in paper, e-mail, digital or other tangible form (collectively, the “**Records**”), in each case, to the extent used in the ownership or operation of the Acquired Assets or Assumed Liabilities, but excluding any Excluded Contracts and any Records described in **Section 2.01(b)(iv)**;

(xii) all rights of Seller under non-disclosure or confidentiality, non-compete, or non-solicitation agreements with employees and agents of Seller or any Affiliate thereof or with third parties, in each case, to the extent relating to the Business or the Acquired Assets (or any portion thereof);

(xiii) all right, title and interest of any Seller in and to the Intellectual Property set forth or described in **Section 2.01(a)(xiii) of the Seller Disclosure Schedule** and the rights of any Seller to the use of the names of the Project;

(xiv) all causes of action (including counterclaims), defenses, claims, credits, demands, remedies or rights of set-off of any kind against third parties to the extent relating to or arising from any Assumed Liability or the ownership or operation of the Acquired Assets, including all such rights under or pursuant to warranties, representations, covenants, agreements, indemnities or guarantees made or provided in any Purchased Contracts or otherwise, but excluding, for the avoidance of doubt, the Post-Closing Credits;

(xv) all applicable warranties against manufacturers or vendors and all items of personal property due under applicable warranties, in each case as in existence on the date hereof, but excluding such items disposed of by Sellers or their respective Affiliates in the ordinary course of business prior to the Closing in accordance with this Agreement, and including such additional items as may be acquired by Sellers or their respective Affiliates for use in connection with the ownership or operation of the Acquired Assets in the ordinary course of business prior to the Closing in accordance with this Agreement;

(xvi) all goodwill relating to the ownership or operation of the Acquired Assets;

(xvii) all emissions allowances described on **Section 2.01(a)(xvii) of the Seller Disclosure Schedule**;

(xviii) all rights of any Seller against any current or former directors, officers, members, partners, equityholders, managers, advisors or other professionals of such Seller, including any Actions;

(xix) other than any Excluded Asset, all of the right, title and interest of Seller and its Affiliates in and to all other property and assets used or held for use principally in, or that principally arise from, the conduct of the Business, including that which is moveable and immovable, real and personal, tangible or intangible, of every kind and description and wheresoever situated, including the full benefit of all representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and

all security therefore received by Seller on the purchase or other acquisitions of any part of the Acquired Assets.

(xx) the Assets listed on **Section 2.01(a)(xx) of the Seller Disclosure Schedule**; and

(xxi) all other Assets of Sellers, and all assets of Affiliates of Sellers that relate solely to the Project, in each case, that do not constitute Excluded Assets.

(b) Notwithstanding any other provision of this Agreement, Sellers shall not sell, assign, transfer, convey or deliver to Purchaser, and Purchaser shall not purchase, acquire or accept, any right, title and interest in or to any Assets, goodwill or rights of Sellers or any of their respective Affiliates not related to the Acquired Assets, including the following (collectively, the “**Excluded Assets**”):

(i) Sellers’ rights under this Agreement (including the right to receive the Purchase Price) and under any of the Seller Transaction Documents or Purchaser Transaction Documents to be entered into in connection with the transactions contemplated hereby;

(ii) the Sellers’ Marks and all right, title and interest of any Seller in and to the Intellectual Property set forth or described in **Section 2.01(b)(ii) of the Seller Disclosure Schedule**;

(iii) all insurance policies relating to the Acquired Assets, including all insurance recoveries and return of premiums, claim deposits and security deposits due thereunder, rights to assert claims with respect to any such policies and proceeds thereof;

(iv) any Records (A) relating to any Service Provider and any materials to the extent containing information about any Service Provider, disclosure of which to Purchaser as the acquirer of the Business would violate applicable Law, (B) subject to the attorney-client privilege or attorney work product protection of any Seller or associated with its businesses, (C) to the extent relating to any Excluded Asset or Excluded Liabilities and (D) other than those other than those described in **Section 2.01(a)(xi)**;

(v) the Governance Documents, qualifications to do business as a foreign corporation, arrangements with registered agents relating to foreign qualifications, taxpayer and other identification numbers, seals, minute books, blank stock certificates and other documents relating to the organization, maintenance and existence of any Seller or any of its Affiliates, whether before, on or after the Closing Date;

(vi) Excluded Contracts, Permits that are not Transferred Permits and Intellectual Property or Intellectual Property licenses not included among the Acquired Assets;

(vii) all shares of capital stock or other equity interests of any Seller or any of its Affiliates or securities convertible into or exchangeable or exercisable for shares of capital stock or other equity interests of any Seller or any of its Affiliates;

(viii) all claims or causes of action that any Seller may have against any third party with respect to any Excluded Assets or Excluded Liabilities;

(ix) Tax refunds, credits, abatement or similar offsets against Taxes of Seller, other than prepaid Property Taxes as provided in **Section 2.01(a)(i)**;

(x) all bank accounts of any Seller;

(xi) all Cash and all proceeds received from the sale or liquidation of any Excluded Asset;

(xii) all deposits and expenses that have been prepaid by any Seller (or a predecessor owner) (including security deposits with third-party suppliers or vendors, prepaid lease and rental payments and prepaid Property Taxes, postage, utility deposits, and expenses), in each case, solely to the extent attributable to the ownership and operation of the Excluded Assets or Excluded Liabilities (collectively, the “**Excluded Deposits**”);

(xiii) all Post-Closing Credits; and

(xiv) any Asset that would otherwise constitute an Acquired Asset that Purchaser designates in writing to the Seller Representative to be an Excluded Asset at least fourteen (14) days prior to the Closing Date.

(c) Effective at the Closing, upon the terms and subject to the conditions set forth in this Agreement, Purchaser agrees to assume and become responsible for the following Liabilities (solely to the extent that they do not constitute Excluded Liabilities) (collectively, the “**Assumed Liabilities**”):

(i) all Liabilities relating to or arising out of the ownership or operation of the Acquired Assets by Purchaser for periods following the Closing;

(ii) all Liabilities of any Seller under the Purchased Contracts arising after the Closing Date, other than relating to breaches by any Seller or its Affiliate prior to the Closing;

(iii) all Liabilities with respect to the Transferred Permits arising after the Closing Date, other than relating to breaches by any Seller or its Affiliate prior to the Closing;

(iv) (a) all Transaction Transfer Taxes and (b) all Property Taxes allocable to any Post-Closing Tax Period;

(v) all Cure Costs assumed under **Section 2.05(d)** up to an aggregate amount not to exceed \$250,000.

(vi) [reserved];

(vii) all Liabilities set forth or described in **Section 2.01(c)(vii)** of the Seller Disclosure Schedule.

(d) Notwithstanding any other provision of this Agreement, Sellers shall retain, and shall be responsible for paying, performing and discharging when due, and Purchaser shall not assume or have any responsibility for, any of the following Liabilities, whether arising prior to, on or after the Closing Date (collectively, the “**Excluded Liabilities**”):

(i) except as assumed pursuant to **Section 2.01(a)(ix)**, all Indebtedness of Sellers and their respective Affiliates;

(ii) all Liabilities relating to or arising, whether before, on or after the Closing, out of, or in connection with, any of the Excluded Assets or any other Assets of Sellers or their respective Affiliates that are not Acquired Assets;

(iii) all Liabilities arising under (A) any Excluded Contract or (B) Purchased Contract, to the extent relating to breaches by any Seller or its Affiliate prior to the Closing;

(iv) all Liabilities arising under Permits, Environmental Laws or Environmental Claims to the extent arising out of or related to any Sellers’ ownership or operation of the Business or Acquired Assets prior to the Closing;

(v) Liabilities arising from the operation of any successor or transferee liability Laws, including “bulk sales” statutes, to the extent that noncompliance therewith or the failure to obtain necessary clearances would subject Purchaser or the Acquired Assets to the claims of any creditors of Seller, or would subject any of the Acquired Assets to any Liens or other restrictions;

(vi) all Taxes of Sellers and their respective Affiliates, including any such Taxes that Purchaser is liable for as a withholding agent or a transferee (but excluding all Property Taxes allocable to any Post-Closing Tax Period and all Transaction Transfer Taxes);

(vii) all Cure Costs not otherwise assumed under **Section 2.05(d)** in excess of \$250,000 in the aggregate; and

(viii) all Liabilities that are not Assumed Liabilities or that relate to an Excluded Asset, whether arising prior to or after the Closing.

## **Section 2.02 Deposit.**

(a) Simultaneously with the execution of this Agreement, and as security for Purchaser’s performance hereunder, Purchaser will deliver an amount equal to a mutually agreed estimate of ten percent (10%) of the Purchase Price (such amount, the “**Signing Deposit**”) to the Seller Representative, by wire transfer of immediately available funds in U.S. dollars, to be held in one or more segregated accounts (the “**Deposit Account**”, and the amount of funds in the Deposit Account from time to time, the “**Deposit**”). To the extent the Parties agree to increase

Purchase Price before, during or after the Auction, (i) the Parties shall execute and deliver an amendment to this Agreement documenting the same and (ii) Purchaser shall deliver additional cash to the Seller Representative such that the Deposit equals ten percent (10%) of such increased Purchase Price in accordance with the Bid Procedures.

(b) If the Closing occurs, the Seller Representative shall retain the Deposit for further distribution to Sellers and the Deposit shall be applied as a reduction to the Purchase Price payable at the Closing.

(c) If this Agreement is terminated in accordance with **Section 10.01**, the Deposit shall be paid pursuant to, and in accordance with, **Section 10.02(c)**.

**Section 2.03 Purchase Price.** The aggregate purchase price payable by Purchaser to Sellers at Closing for the Acquired Assets and assumption of Assumed Liabilities shall be an amount equal to (a) \$13,125,000.00 (the “**Base Purchase Price**”), *less* (b) the Seller Property Tax Amount, *less* (c) the Net Insurance Proceeds (if any), *less* (d) Operating Profit (if any), *less* (e) the Excess Seller Costs (if any) (such amount, the “**Purchase Price**”).

**Section 2.04 Closing.** The closing of the purchase and sale of the Acquired Assets and the assumption of the Assumed Liabilities (the “**Closing**”) shall take place at the offices of Latham, at 1271 Avenue of the Americas, New York, NY 10020 at 10:00 A.M. (prevailing Eastern time) on the Closing Date, or at such other time and place as Purchaser and the Seller Representative shall mutually agree; provided that the Closing shall be deemed effective for all purposes hereunder as of 12:01 A.M. (prevailing Eastern time) on the Closing Date. At the Closing, Purchaser shall pay an amount equal to (a) the Purchase Price *minus* (b) the Deposit, by wire transfer of immediately available funds in U.S. Dollars to Sellers, to the account(s) designated in writing by the Seller Representative. At the Closing, Purchaser and Sellers shall cause to be delivered to the other the documents and instruments required to be delivered by such Party under **Article VIII** and **Article IX**.

**Section 2.05 Contract Designation; Cure Amounts.**

(a) **Section 2.05 of the Seller Disclosure Schedule** sets forth each Executory Contract and Sellers’ good faith estimate of the amount of the cure amounts payable in respect of each such Executory Contract. In accordance with the Bid Procedures Order, Sellers have delivered written notice of the Executory Contracts to be assumed by Sellers and assigned to Purchaser at the Closing to all non-debtor parties to such Executory Contracts (the “**Initial Contract Notice**”). Until the date that is fifteen (15) Business Days following the date of this Agreement, and subject to Purchaser’s rights under **Section 2.05(c)**, Purchaser shall have the right to deliver to the Seller Representative a list of the Executory Contracts to be assumed by Sellers and assigned to Purchaser at the Closing. To the extent that any objections are received from non-debtor parties to the assignment to Purchaser of such Executory Contracts, Sellers and Purchaser shall use their commercially reasonable efforts to resolve such disputes with the applicable non-debtor party.

(b) In no event shall Sellers reject, or seek to reject, any Contract related to the Acquired Assets or Assumed Liabilities, unless prior written approval has been obtained from



Purchaser; provided that, after the Designation Deadline, Sellers may reject Excluded Contracts without the consent of Purchaser so long as such Executory Contracts were identified to Purchaser in writing prior to the Designation Deadline. Notwithstanding anything to the contrary herein, in the event that any Seller identifies (whether before or after the Designation Deadline) any additional Executory Contracts capable of being assumed or rejected that were not previously identified as such, the Seller Representative shall promptly notify Purchaser of (i) such Executory Contract and (ii) Sellers' good faith estimate of the amount of the Cure Costs payable in respect of each such Executory Contract, and following such notice, Purchaser may designate each such Executory Contract described in the immediately preceding sentence as a Purchased Contract or an Excluded Contract pursuant to this **Section 2.05**, notwithstanding the Designation Deadline.

(c) Notwithstanding anything to the contrary herein, Purchaser may from time to time following service of the Initial Contract Notice and prior to the Designation Deadline, in its sole discretion, by providing written notice to the Seller Representative, (i) designate any Purchased Contract as an Excluded Contract or (ii) to the extent not already rejected, designate any Executory Contract as a Purchased Contract. Such Contract shall (x) in the case of the foregoing clause (i), be added to the schedule of Excluded Contracts on Section 1.01(d) of the Seller Disclosure Schedule and, to the extent applicable, removed from the schedule of Purchased Contracts on **Section 1.01(c) of the Seller Disclosure Schedule** and (y) in the case of the foregoing clause (ii), be added to the schedule of Purchased Contracts on Section 1.01(c) of the Seller Disclosure Schedule and, to the extent applicable, removed from the schedule of Excluded Contracts on **Section 1.01(d) of the Seller Disclosure Schedule**. Any Purchased Contract designated as an Excluded Contract pursuant to this **Section 2.05(c)**, shall be deemed to be an "Excluded Contract" and shall not be deemed to be a "Purchased Contract," for all purposes hereunder, in each case, without further action by the Parties, and Purchaser shall have no liability therefor.

(d) Unless waived by a counterparty to an Executory Contract, at the Closing, Purchaser shall pay in cash an amount and on terms agreed between Purchaser and such counterparty, or otherwise satisfy as agreed between Purchaser and such counterparty, in each case pursuant to Sections 365 and 1123(b)(2) of the Bankruptcy Code and the Confirmation Order, any and all costs or expenses that are required to be paid under Sections 365(b)(1)(A) and 365(b)(1)(B) of the Bankruptcy Code, as applicable, to cure any monetary defaults in connection with the assumption and assignment of the Executory Contracts (such costs and expenses required to be paid by Purchaser, the "**Cure Costs**"), provided, however, Sellers shall be responsible for paying any incremental and remaining Cure Costs in the event the Purchaser has already paid Cure Costs in an aggregate amount not to exceed \$250,000. If an Executory Contract is subject to a cure dispute or other dispute as to the assumption or assignment of such Executory Contract that has not been resolved to the reasonable satisfaction of Purchaser and Sellers prior to the Designation Deadline, then the Designation Deadline shall be extended (but only with respect to such Executory Contract) to no later than the earliest of (A) the date on which such dispute has been resolved to the reasonable satisfaction of Purchaser and Sellers, (B) the date on which such Executory Contract is deemed rejected by operation of Sections 365(d)(4) or 1123(b)(2) of the Bankruptcy Code, as applicable, or (C) the date required by the Bankruptcy Court and set forth in the Confirmation Order.

(e) In the event any Purchased Contract requires a third party's consent to the assignment thereof, Sellers will continue to use commercially reasonable efforts to obtain such consent; provided, that if such consent is made unnecessary by operation of the Confirmation Order or applicable bankruptcy Law, such Purchased Contract will be assigned to Purchaser at the Closing. In addition, no Seller will enter into, or negotiate to enter into, any amendment, extension, termination, modification, cancellation, assignment, transfer or renewal of any such Purchased Contract, or grant any waiver thereunder, or compromise or settle any amount receivable or payable arising thereunder after the Closing, without the prior written consent of Purchaser, which consent shall not be unreasonably withheld, conditioned or delayed. If after the Closing Date such consent is obtained, Purchaser will assume such Purchased Contract as of the date of such consent. For the avoidance of doubt, notwithstanding anything to the contrary in this **Section 2.05(e)**, in no event shall any Seller have any obligation to renew or extend any such Purchased Contract. The Parties shall treat Purchaser or its applicable Affiliate(s) as the owner of such Purchased Contracts for applicable Tax purposes from and after the Closing Date to the maximum extent permitted by Law. For the avoidance of doubt, in no event will the failure to obtain the consent of any third party to the assignment of any Purchased Contract, without more, be a breach of this Agreement.

(f) Notwithstanding anything to the contrary in this Agreement, Purchaser acknowledges that the assumption and assignment of the Purchased Contracts is subject to Bankruptcy Court approval and an Executory Contract shall not be a Purchased Contract until entry of an Order by the Bankruptcy Court approving the assumption and assignment by the Seller to Purchaser such Executory Contract. For the avoidance of doubt, to the extent that an Order is entered by the Bankruptcy Court determining that Sellers may not assume a Purchased Contract or a Purchased Contract is not assignable to Purchaser, then such Purchased Contract will be excluded from the Acquired Assets and be deemed an Excluded Contract.

#### **Section 2.06 Further Assurances; Misallocated Transfers; Wrong Pockets.**

(a) Subject to the terms and conditions of this Agreement, from time to time from the date hereof until the Closing, each Party shall use its commercially reasonable efforts to execute, acknowledge and deliver such other documents and instruments, provide such materials and information, and shall cooperate and shall take such other actions as may reasonably be necessary, proper or advisable, to the extent permitted by Law, to fulfill its obligations under this Agreement and to provide for the reasonable transition of the ownership and operation of the Acquired Assets. Subject to the terms and conditions of this Agreement, at any time or from time to time following the Closing, each Party shall, upon the reasonable request of any other Party, execute and deliver any further instruments or documents and exercise commercially reasonable efforts to take such further actions as may reasonably be required to fulfill and implement the terms of this Agreement.

(b) If, following the Closing, Purchaser or any of its Affiliates hold any Excluded Asset (unless subsequently purchased or leased by Purchaser or any of its Affiliates via a separate transaction), Purchaser shall transfer, or shall cause its applicable Affiliate to transfer, at no cost to the applicable Seller, such Excluded Asset as soon as practicable to the applicable Seller. If, following the Closing, any Seller or any of their respective Affiliates hold any Acquired Asset (unless subsequently purchased or leased by any Seller or any of their respective Affiliates

via a separate transaction), such Seller shall transfer, or shall cause its applicable Affiliates to transfer, such Acquired Asset as soon as practicable to Purchaser. For purposes of this **Section 2.06(b)**, any Net Insurance Proceeds received by Sellers after the Closing (and not taken into account in the calculation of the Purchase Price) shall be deemed to be an Acquired Asset; provided, that the Seller Representative shall forward such Net Insurance Proceeds, as promptly as practicable but in any event within ten (10) Business Days after such receipt, to Purchaser (or other entity nominated by Purchaser in writing to the Seller Representative).

(c) In the event that any Seller receives any payment from a third party (other than Purchaser or any of its Affiliates) after the Closing pursuant to any of the Purchased Contracts (or with respect to the operation by Purchaser of the Business or any Acquired Asset following the Closing) and to the extent such payment is not an Excluded Asset or made in connection with an Excluded Asset or an Excluded Liability, such Seller shall forward such payment, as promptly as practicable but in any event within ten (10) Business Days after such receipt, to Purchaser (or other entity nominated by Purchaser in writing to such Seller). Notwithstanding anything to the contrary in this Agreement, in the event that Purchaser or any of its Affiliates receives any payment from a third party after the Closing on account of, or in connection with, any Excluded Asset, Purchaser shall forward such payment, as promptly as practicable but in any event within ten (10) Business Days after such receipt, to the applicable Seller (or such other entity as such Seller may designate).

**Section 2.07 Withholding.** If any amount is required by Law to be deducted or withheld on account of any Tax with respect to payments made under or in connection with this Agreement to Sellers, then Purchaser shall be entitled to make such deduction or withholding from the amounts required to be paid under this Agreement. Purchaser shall use commercially reasonable efforts to notify Sellers at least five (5) days prior to the Closing Date of any intention to deduct or withhold any such Taxes. The Purchaser shall cooperate in good faith to take such actions reasonably requested by Seller as will minimize or reduce the amount of any such withholding Taxes. To the extent that amounts are so withheld and promptly remitted to the relevant Governmental Authority, such amounts deducted or withheld from payments pursuant to the preceding sentence shall be treated as having been actually paid to Sellers for purposes of this Agreement.

**Section 2.08 Economic Flip.**

(a) From the Flip Date until the earlier of the valid termination of this Agreement and the Closing Date (the “**Post-Flip Period**”), all Operating Expenses shall be funded from the Deposit and Purchaser hereby expressly acknowledges and agrees that Sellers may use the Deposit to fund the Operating Expenses; provided that, notwithstanding anything to the contrary contained herein, Sellers shall not be entitled to use the Deposit to fund more than \$250,000 in Bankruptcy Costs. If at any time during the Post-Flip Period the balance of the Deposit falls below, or in the Seller Representative’s good faith determination based on the then-current projected Operating Expenses is expected to fall below, \$800,000, then, within three (3) Business Days of receipt of notice from the Seller Representative, Purchaser shall pay, or cause to be paid, to the Deposit Account, an amount in cash sufficient to increase the balance of the Deposit to equal or exceed the Signing Deposit (taking into account any then-projected Operating Expenses).

(b) During the Post-Flip Period, (i) unless otherwise agreed by the Parties, Sellers shall, or shall cause, the Project to be operated in accordance with Good Industry Practice and in substantially the same manner as, and with the same level of care, quality, skill and diligence with which, such the Project were operated during the twelve (12)-month period immediately prior to the Flip Date and (ii) Sellers shall provide Purchaser with reasonably requested information related to the operation of the Acquired Assets (including the Project) and the conduct of the Business.

(c) In the event this Agreement is terminated during the Post-Flip Period, Sellers shall within 120 days of the date of such termination, pay to Purchaser any Operating Profit.

(d) Without limiting anything set forth in this **Section 2.08**, nothing contained in this Agreement shall give Purchaser, directly or indirectly, any right to control or direct the Business or the operations of the Project prior to the Closing.

### **ARTICLE III REPRESENTATIONS AND WARRANTIES OF SELLER**

Except as set forth in the disclosure schedule delivered by Sellers to Purchaser concurrently with the execution and delivery of this Agreement (the “**Seller Disclosure Schedule**”), each Seller, as to itself only, hereby represents and warrants to Purchaser as follows:

**Section 3.01 Legal Existence.** Each Seller is a limited liability company duly formed, validly existing and in good standing under the Laws of Delaware. Each Seller is qualified to do business and is in good standing in the states in which the conduct of the Business or locations of its Assets makes such qualification necessary, except where failure to be so qualified or to be in good standing would not, individually or in the aggregate, reasonably be expected to result in a Seller Material Adverse Effect. Each Seller has all requisite organizational power and authority to execute, deliver and perform its obligations under this Agreement and the other agreements and instruments executed and delivered by it in connection with this Agreement (collectively, the “**Seller Transaction Documents**”) and to consummate the transactions contemplated hereby and thereby, and no Seller has any subsidiary that is not otherwise defined as a “Seller” under Annex A to this Agreement (as the case may be).

**Section 3.02 Authority.** Subject to the entry of the Confirmation Order and any other Order from the Bankruptcy Court necessary to consummate the transactions contemplated by this Agreement, (a) the execution and delivery by Sellers of, and the performance by Sellers of their obligations under, this Agreement and the Seller Transaction Documents, and the consummation of the transactions contemplated hereby and thereby, have been duly and validly authorized by all necessary limited liability company actions and (b) this Agreement and, to the extent such Seller is a party thereto, each Seller Transaction Document has been duly and validly executed and delivered by such Seller, and constitutes a legal, valid and binding obligation of such Seller enforceable against such Seller in accordance with its terms, except as the same may be limited by Enforceability Limitations.

**Section 3.03 No Conflicts.** Except for (w) the entry of the Confirmation Order, (x) as described on **Section 3.03 of the Seller Disclosure Schedule**, and (y) as may result from any facts

or circumstances relating solely to the identity or the legal or regulatory status of Purchaser or any of its Affiliates, and assuming all filings, notices, consents, approvals, authorizations, and other actions described on **Section 3.04 of the Seller Disclosure Schedule** have been obtained, the execution and delivery by Sellers of, and the performance of their respective obligations under, this Agreement, the Seller Transaction Documents and the consummation of the transactions contemplated hereby and thereby do not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of the Governance Documents of such Seller;

(b) conflict with or result in a violation or breach of any term or provision of any Law or Order applicable to such Seller or any of its Assets in any material respect;

(c) except as would not be material to the Acquired Assets, taken as a whole, (i) conflict with or result in a violation or breach of, (ii) constitute (with or without notice, lapse of time or both) a default (or give rise to any right of termination, cancellation or acceleration) under, or (iii) require any Seller to obtain any consent, approval or action of, make any filing with or give any notice to any Person as a result or under the terms of, or result in or give to any Person (other than such Seller) any right of termination, consent, cancellation, acceleration or modification in or with respect to, any Contract, Permit or Governmental Approval to which any Seller is a party or by which any Seller's Assets are bound; or

(d) result in the creation or imposition of any Lien on the Acquired Assets (other than (i) Liens imposed under the Governance Documents of any Seller, (ii) restrictions on transfer that may be imposed by applicable federal or state securities Laws, (iii) encumbrances that arise solely out of any actions taken by Purchaser or its Affiliates, or taken on Purchaser's behalf by Purchaser's Representatives or financing sources or by any other Person at the request of Purchaser or its Affiliates, and (iv) such other Liens as will be discharged in full prior to or at the Closing and set forth on **Section 3.03(d) of the Seller Disclosure Schedule**).

**Section 3.04 Governmental; Filings.** Except (a) the entry of the Confirmation Order, (b) prior authorization from FERC under Section 203 of the FPA, (c) for informational filings and request for waiver filings as required pursuant to Schedule 2 of the PJM Open Access Transmission Tariff regarding compensation for reactive supply and voltage control service from the Project, and (d) as set forth on **Section 3.04 of the Seller Disclosure Schedule**, no Governmental Approval on the part of Sellers is required in connection with the execution and delivery by Sellers of this Agreement, the Seller Transaction Documents to which any Seller is a party or the consummation of the transactions contemplated hereby and thereby except (i) where the failure to obtain any such Governmental Approval would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole, and (ii) those as would be required solely as a result of the identity or the legal or regulatory status of Purchaser or any of its Affiliates.

**Section 3.05 Ownership of Assets.** Except as set forth on **Section 3.05 of the Seller Disclosure Schedule**, Sellers have good and valid title (and as to Owned Real Property, good and marketable title) to, or, in the case of any leased, subleased or licensed property, valid and subsisting leasehold interests in or a legal, valid and enforceable license to use, all of the Acquired Assets, free and clear of all Liens other than Permitted Liens.

**Section 3.06 Legal Proceedings.** Except as set forth on **Section 3.06 of the Seller Disclosure Schedule**, there are no Actions pending or threatened in writing or, to the Knowledge of Sellers, orally against any Seller or affecting any of the Acquired Assets, and there are no Orders outstanding against any Seller or affecting the Acquired Assets, in either case, that would (a) individually or in the aggregate, would reasonably be expected to be material to the Acquired Assets, taken as a whole, or (b) reasonably be expected to result in the issuance of an Order restraining, enjoining or otherwise prohibiting, delaying or making illegal the sale of the Acquired Assets by Sellers under this Agreement or the performance by Sellers of their obligations under this Agreement or the Seller Transaction Documents.

**Section 3.07 Financial Statements and Condition.** Prior to the execution of this Agreement, true and complete copies of the following financial statements (collectively, the “**Financial Statements**”) have been made available to Purchaser: (a) the audited consolidated balance sheets and statements of comprehensive income, member’s equity and cash flows of Lincoln Power, L.L.C. and its subsidiaries as of and the years ended December 31, 2021 and December 31, 2020; and (b) the unaudited consolidated balance sheet and statement of operations of Lincoln Power, L.L.C. and its subsidiaries as of and for the year ended December 31, 2022 and the three (3) months ended on March 31, 2023 (the “**Balance Sheet Date**”). Except as set forth on **Section 3.07 of the Seller Disclosure Schedule**, the Financial Statements have been prepared from the books and records of Lincoln Power, L.L.C. and its subsidiaries and present fairly, in all material respect, the consolidated financial position and results of operations of Lincoln Power, L.L.C. and its subsidiaries, as of the dates and for the periods indicated in such Financial Statements in conformity with GAAP (except, in the case of the Financial Statements referred to in clause (b) above, for the absence of footnotes and other presentation items and for normal year end adjustments).

**Section 3.08 No Undisclosed Liabilities.** There are no Liabilities relating to the Acquired Assets that would be required by GAAP to be reflected or reserved against on the balance sheet, including the notes thereto, except (a) Liabilities that are reflected on, reserved against or otherwise described in the Financial Statements that would be extinguished upon Closing, (b) Liabilities set forth on **Section 3.08 of the Seller Disclosure Schedule**, (c) Liabilities arising pursuant to or in connection with this Agreement or the transactions contemplated hereby, (d) Liabilities incurred in the ordinary course of business consistent with past practice since the Balance Sheet Date, or (e) Excluded Liabilities.

**Section 3.09 Absence of Changes.** Except (a) for activities undertaken in connection with the transactions contemplated by this Agreement or the preparation of the Bankruptcy Cases and actions related thereto or (b) as set forth on **Section 3.09 of the Seller Disclosure Schedule**, since the Balance Sheet Date, (i) Sellers have conducted the Business only in the ordinary course of business consistent with past practice, and (ii) Sellers have not taken any action (or failed to take any action) that would be prohibited by **Section 5.03** if such action were taken (or failed to be taken) after the date of this Agreement and prior to the Closing.

**Section 3.10 Compliance with Laws.** Except as set forth on **Section 3.10 of the Seller Disclosure Schedule**, since January 1, 2021 (a) Sellers are, and have been, in compliance in all material respects with all Laws and material Orders, in each case, applicable to the Acquired Assets and (b) as of the date hereof, Sellers have not received any written notice from any Governmental

Authority of a violation in any material respect of any Laws or material Orders, in each case, applicable to the Acquired Assets. Since January 1, 2021, and except where the failure to be, or to have been, in compliance with such Orders or Laws would not be material to the Acquired Assets, taken as a whole, (i) there has been no action taken by any Seller or by any officer, director or employee of any Seller, or to the Knowledge of Seller, any agent, other Representative or intermediary of any Seller, in each case, acting on behalf of such Seller, in violation of any applicable Anti-Corruption Law, (ii) no Seller has been convicted of violating any Anti-Corruption Laws or subjected to any investigation by a Governmental Authority for violation of any applicable Anti-Corruption Laws, (iii) no Seller has conducted or initiated any internal investigation or made a voluntary, directed, or involuntary disclosure to any Governmental Authority regarding any alleged act or omission arising under or relating to any noncompliance with any Anti-Corruption Law and (iv) no Seller has received any written notice, request or citation for any actual or potential noncompliance with any of the foregoing.

### **Section 3.11 Real Property.**

(a) **Section 3.11(a)(i) of the Seller Disclosure Schedule** sets forth a complete and accurate legal description of each parcel of real property owned in fee by a Seller and pertaining to the Project (the “**Owned Real Property**”). Except as set forth on **Section 3.11(a)(ii) of the Seller Disclosure Schedule**, a Seller has good and marketable title to the Owned Real Property free and clear of all Liens other than Permitted Liens.

(b) The Owned Real Property constitutes all of the real property used in or held for us in respect of the Project, and no Seller leases, subleases or licenses any real property in respect of the Project.

(c) **Section 3.11(c)(i) of the Seller Disclosure Schedule** sets forth a complete and accurate description of any Contract pursuant to which any Seller has an easement, right-of-way, license or similar interest in real property in respect of the Project (each, an “**Easement**”; such real property being referred to as the “**Easement Real Property**” and, the Easement Real Property, taken together with the Owned Real Property, the “**Real Property**”). Except as set forth on **Section 3.11(c)(ii) of the Seller Disclosure Schedule**, a Seller has a good and valid easement or license interest in the Easement Real Property, as applicable, free and clear of all Liens other than Permitted Liens.

(d) **Section 3.11(d)(i) of the Seller Disclosure Schedule** sets forth a complete and accurate list of any Contract pursuant to which any Seller has leased, subleased or otherwise granted any Person the right to cross, use or occupy (or similar right) any Real Property or any portion thereof (the “**Real Property Rights**”). Except as set forth on **Section 3.11(d)(ii) of the Seller Disclosure Schedule**, none of the Owned Real Property and no interest of any Seller in the Easement Real Property, is subject to or encumbered by any purchase options, rights of first refusals, rights of first offer or other rights to sell, assign or dispose any interest in such Real Property.

(e) None of the Real Property is subject to any written notice of any pending proceeding to condemn or take by power of eminent domain all or any part of the Real Property, and, to the Knowledge of Seller, no such proceeding has been threatened.

(f) Except as set forth in **Section 3.11(f) of the Seller Disclosure Schedule**, Sellers have not received written notice of any default under any covenants, restrictions or other encumbrances affecting the Real Property, except for such defaults as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole.

(g) All of the land used by Sellers in the conduct of its business pertaining to the operation of the Project as presently conducted is included in the Real Property. All of the buildings, structures and other improvements used by Sellers in the conduct of its business pertaining to the operation of the Project are located on the Real Property.

### **Section 3.12 Intellectual Property.**

(a) **Section 3.12 of the Seller Disclosure Schedule**, lists (i) all registered Intellectual Property and any applications therefor owned by Sellers and used in connection with the Business (other than any Sellers' Marks) and (ii) all Contracts granting rights under the Intellectual Property of any third party included in the Acquired Assets (excluding any "click-wrap" or "shrink-wrap" software licenses, other non-exclusive licenses pertaining to commercially available software or Contracts granting licenses which are incidental to the primary commercial objective of the Contract).

(b) No Seller has received any written notice that the operation of the Business as currently conducted is infringing any Intellectual Property of any other Person. To the Knowledge of Seller, (i) the operation of the Business has not, and does not, infringe in any respect on the Intellectual Property of any Person and (ii) no Person is infringing upon any Intellectual Property that is an Acquired Asset.

### **Section 3.13 Seller Contracts.**

(a) As of the date hereof, **Section 3.13(a) of the Seller Disclosure Schedule** sets forth a true, correct and complete list of the following Contracts related to the Acquired Assets or the Business and to which any Seller is a party or by which any Seller is bound (collectively, the "**Seller Contracts**"):

- (i) Contracts with any Affiliate or officer or director of Seller;
- (ii) Contracts for the sale, lease, license or other disposition of any of the assets of Seller for consideration in excess of one hundred thousand dollars (\$100,000) individually;
- (iii) Contracts relating to the acquisition by Seller of any operating business or the capital stock of any other Person;
- (iv) Contracts that, by their specific terms, require that transferees of the Project or the Acquired Assets be made a party thereto;
- (v) Contracts that restrain, restrict, limit or impede the ability of Purchaser to compete with or conduct any business or line of business in any geographic area;



(vi) Contracts that are a settlement, conciliation or similar agreement with any Governmental Authority or pursuant to any Seller is obligated to make payments or offer credits, offsets or rebates or provide similar concessions after the date hereof involving a value or amount, individually or in the aggregate, in excess of two hundred fifty thousand dollars (\$250,000);

(vii) Contracts pursuant to which (A) Seller is granted any license to any Intellectual Property that is an Acquired Asset, (B) Seller grants to any Person any license to any Owned Intellectual Property, or (C) Seller is restricted in Seller's ability to use, disclose, license or enforce, or grant an exclusive right to use, any Intellectual Property (including royalty, joint development, concurrent use, settlement, indemnification, tolling and consent to use agreements or contracts), in each case other than licenses for commercially available, unmodified, "off-the-shelf" software used by the Business solely for internal use, for an aggregate fee, royalty or other consideration for any such software or group of related software licenses of no more than one hundred thousand dollars (\$100,000);

(viii) Contracts (excluding Hedging Arrangements) involving annual aggregate consideration or payment obligations in excess of \$250,000 for the purchase, exchange, sale, transportation, storage, parking, loaning, distribution, wheeling, facility or meter construction, unloading, delivery or balancing of natural gas, coal, oil or other fuel;

(ix) Contracts involving annual aggregate consideration or payment obligations for the future purchase, exchange or sale of electric power, capacity or ancillary services;

(x) Contracts for the transmission, purchase, exchange, sale or delivery of electric power in any form (other than any Contracts for transmission services provided under a tariff of general applicability), including energy, capacity or any ancillary services;

(xi) electric, oil or natural gas interconnection Contracts;

(xii) Contracts under which any Seller or any Acquired Asset has created, incurred, assumed or guaranteed any outstanding Indebtedness;

(xiii) Contracts relating in any way to outstanding Hedging Arrangements with terms that are longer than thirty (30) days;

(xiv) Contracts that contain covenants of any Seller or any Acquired Asset (A) not to compete in any line of business, with any Person or in any geographical area; (B) not to offer or sell any product or service to any Person or class of Persons, (C) to offer, sell or purchase any product or service to or from any Person or class of Persons on an exclusive basis or to purchase "full requirements" from any Person or (D) granting "most favored nation" or similar rights to any Person;

(xv) Contracts that establish any partnership, joint venture or similar arrangement involving the sharing of profits or losses with a third party;

(xvi) Contracts with a Governmental Authority, except for normal and customary agreements for the provision of utilities, water or sewer that are provided on the basis of a tariff or similar generally applicable rates, terms and conditions;

(xvii) except as described above, all Contracts that require that any Support Obligation be maintained by or on behalf of any Seller or any Acquired Asset;

(xviii) except as described above, all other Contracts (A) for the future sale or acquisition of any Acquired Asset or (B) that grant a right or option to purchase any Acquired Asset, other than, in each case, sales or exchanges of electric power, capacity or ancillary services in the ordinary course of business; and

(xix) except as described above, all other Contracts requiring payments by or to any Seller in excess of \$250,000 for each individual Contract or \$500,000 in the aggregate for a series of related Contracts, except sales or exchanges of electric power, capacity or ancillary services in the ordinary course of business.

(b) Notwithstanding the foregoing, the Parties agree that the purchase orders, sales orders and similar Contracts and all other Contracts set forth in **Section 1.01(c) of the Seller Disclosure Schedules** shall constitute Seller Contracts, unless they are or become Excluded Assets. As of the date hereof, all of the material Contracts of each Seller is listed in either **Section 1.01(c) of the Seller Disclosure Schedules** or **Section 1.01(d) of the Seller Disclosure Schedules**. Except as set forth on **Section 3.13(b) of the Seller Disclosure Schedule** or as may be limited by the Enforceability Limitations, each Seller Contract is in full force and effect and constitutes a legal, valid and binding obligation, enforceable in accordance with its terms, of the applicable Seller, except as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole. No Seller is in breach of, or default under, any Seller Contract and, to the Knowledge of Sellers, no counterparty to any Seller Contract is in breach of or default under, any Seller Contract, except, in each case, for such defaults as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole. True and complete copies of each Seller Contract, in each case as amended, and in effect as of the date of this Agreement, have been made available to Purchaser.

**Section 3.14 Taxes.** Except as set forth in **Section 3.14 of the Seller Disclosure Schedule** and except with respect to any Taxes the nonpayment of which is permitted or required under the Bankruptcy Code, (a) all material Tax Returns of Sellers required to be filed have been or will be filed when due in accordance with all applicable Laws; (b) all Taxes of Sellers that are due and payable have been paid in full within the time required by Law; (c) there is no Action or audit claim now pending with respect to any material Tax of Sellers; (d) there are no outstanding agreements extending the statutory period of limitation applicable to any claim for, or the period for the collection or assessment of, material Taxes of Sellers; (e) there are no Liens on any of the Acquired Assets for Taxes (other than Permitted Liens); (f) no claim has ever been made by any Taxing Authority in a jurisdiction where Sellers do not file Tax Returns with respect to the ownership of the Acquired Assets or the Business that such entity may be subject to Tax by that jurisdiction with respect to the Acquired Assets or the Business; and (g) none of the Acquired Assets are treated as equity interests in any Person for Tax purposes.

**Section 3.15 Employees.** No Seller has, and since July 5, 2017 has not had, any employees. Sellers and the Business are, and since January 1, 2021 have been, in compliance in all material respects with all Laws relating to labor and employment matters, including provisions thereof relating to wages, hours, equal opportunity, fair labor standards, nondiscrimination, workers compensation, collective bargaining, workplace safety, immigration, employee and worker classification, and the payment and withholding of social security and other payroll Taxes and contributions. No Seller sponsors, maintains, participates in, contributes to or has any obligation to contribute to, and since January 1, 2021, has sponsored, maintained, participated in, contributed to or had an obligation to contribute to any Employee Plan.

**Section 3.16 Insurance.** **Section 3.16 of the Seller Disclosure Schedule** sets forth a true, correct and complete list, as of the date hereof, of all insurance policies maintained by Sellers or their respective Affiliates that insure the Acquired Assets or the Business or the ownership or operation thereof (collectively, the “**Insurance Policies**”).

**Section 3.17 Environmental Matters.**

(a) Sellers and the Acquired Assets are, and since January 1, 2021 have been, in compliance in all material respects with all Environmental Laws applicable to the Acquired Assets. Except as set forth on **Section 3.17 of the Seller Disclosure Schedule**:

(i) there are no material Environmental Claims pending or, to the Knowledge of Seller, threatened against Sellers or the Acquired Assets including those which would reasonably be expected to result in the imposition of any material Liability to the Project pursuant to any Environmental Law following the Closing;

(ii) there is no site to which Hazardous Substances stored or generated by Sellers or the Acquired Assets have been transported that is the subject of any environmental action or that would be reasonably expected to result in a material Environmental Claim;

(iii) since January 1, 2021, there has been no material Release or threatened Release on, at, from or under any Real Property;

(iv) since January 1, 2021, neither Seller nor any other Person managing the Project or employed by Seller or such manager, in the course of such employment, has disposed of, transported or arranged for the transportation or disposal of any Hazardous Materials generated by the Project to any off-site location, or exposed any Person to any Hazardous Materials, which would give rise to material Liabilities under applicable Environmental Laws;

(v) no Seller is currently operating the Business under any outstanding compliance or consent Order or decree issued or entered into under any Environmental Law; and

(b) Other than Permitted Liens, no Liens exist pursuant to Environmental Law related to Sellers, the Business, the Project, the Owned Real Property or the Acquired Assets.

(c) Sellers have made available to Purchaser with copies of all material environmental site assessments, environmental compliance audits, and other material reports or analyses of pending or reasonably foreseeable requirements or costs to maintain or achieve compliance with Environmental Laws or Environmental Permits relating to the Business that are in Seller's possession or control, including all material reports or analyses concerning air emissions allowances, in each case, that are in its possession or under its control and have been prepared since January 1, 2021.

**Section 3.18 Permits and Regulatory Matters.** **Section 3.18 of the Seller Disclosure Schedule** sets forth a true, correct and complete list of all material Permits owned or held by any Seller as of the date of this Agreement that are required for the ownership, maintenance, occupancy, management and operation of the Acquired Assets (collectively, the “**Material Permits**”). True and complete copies of all Material Permits have been made available to Purchaser. Except as set forth on **Section 3.18 of the Seller Disclosure Schedule**, (a) each Material Permit is in full force and effect and is not subject to appeal, rescission or cancellation and (b) the applicable Seller is in material compliance with all Material Permits held by it.

**Section 3.19 Affiliate Transactions.** Except as set forth on **Section 3.19 of the Seller Disclosure Schedule**, (a) no obligations, Contracts or other Liabilities exist between any Seller, on the one hand, and one or more of such Seller's Affiliates or any other Seller, on the other hand, that is related to any of the Acquired Assets and will continue in effect subsequent to the Closing, and (b) other than any other Seller, none of the Sellers' respective Affiliates owns or has any interest in any property (whether real, personal or mixed and whether tangible or intangible) which is used or held for use in the operation of the Acquired Assets.

**Section 3.20 Condition of Assets.** Subject to planned or unplanned outages or disclosed legal or regulatory restrictions on the Acquired Assets in existence as of the date of this Agreement or on the Closing Date and except as set forth on **Section 3.20 of the Seller Disclosure Schedule** or as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole, the Acquired Assets (a) are in good working order and condition, ordinary wear and tear excepted and (b) have been maintained in accordance with Good Industry Practice. No casualty or condemnation event has occurred with respect to the Project other than casualty events that have been fully repaired or are being repaired under a program approved by Purchaser.

**Section 3.21 Brokers.** Except for Guggenheim Securities, LLC, the fees and expenses of which will be paid by Sellers, no broker, finder or agent acting on behalf of Sellers or their respective Affiliates is entitled to any fee or commission with respect to the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby.

**Section 3.22 Support Obligations.** All of the Support Obligations that have been provided by, or on behalf of, any Seller or its Affiliates, including Support Obligations provided by any issuer of any letters of credit, any lender, or any other third-party provider of a Support Obligation, in each case, in respect of the Business or the Acquired Assets that are outstanding as of the Closing Date are as described on **Section 3.22 of the Disclosure Schedule** (the “**Specified Support Obligations**”). True and complete copies of such Support Obligations have been made available to Purchaser.

**Section 3.23 Bankruptcy Notice.** The Sellers have given notice of the sale to all known Persons entitled to such notice, including all known Persons that have asserted Liens on the Acquired Assets and all non-debtor parties to the Purchased Contracts, and other notice as provided in the Bid Procedures Order. Sellers shall give such additional notice as the Bankruptcy Court shall direct or as Purchaser may reasonably request relating to this Agreement or the transactions contemplated hereunder.

#### **ARTICLE IV REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Except as set forth in the disclosure schedule delivered by Purchaser to Sellers concurrently with the execution and delivery of this Agreement (the “**Purchaser Disclosure Schedule**”), Purchaser hereby represents and warrants to Sellers as follows:

**Section 4.01 Legal Existence.** Purchaser is a limited liability company duly formed, validly existing and in good standing under the Laws of the State of Delaware. Purchaser is qualified to do business and is in good standing in the states that the conduct of its business or locations of its Assets makes such qualification necessary, except where failure to be so qualified or to be in good standing would not, individually or in the aggregate, reasonably be expected to have a Purchaser Material Adverse Effect. Purchaser has all requisite organizational power and authority to execute, deliver and perform its obligations under this Agreement and the Purchaser Transaction Documents.

**Section 4.02 Authority.** Subject to the entry of the Confirmation Order and any other Order from the Bankruptcy Court necessary to consummate the transactions contemplated by this Agreement, (a) the execution and delivery by Purchaser of, and the performance by Purchaser of its obligations under, this Agreement and the Purchaser Transaction Documents, and the consummation by Purchaser of the transactions contemplated hereby and thereby, have been duly and validly authorized by all required action on the part of Purchaser and (b) this Agreement and each of the Purchaser Transaction Documents has been duly and validly executed and delivered by Purchaser and constitutes a legal, valid and binding obligation of Purchaser enforceable against Purchaser in accordance with its terms, except as the same may be limited by the Enforceability Limitations.

**Section 4.03 No Conflicts.** Except as described on **Section 4.03 of the Purchaser Disclosure Schedule** and, in the case of clauses (b) and (c) below, except as would not, individually or in the aggregate, reasonably be expected to impair or materially delay Purchaser’s ability to perform its obligations hereunder or under the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby, and assuming all filings, notices, consents, approvals, authorizations, and other actions described on **Section 4.04 of the Purchaser Disclosure Schedule** have been obtained, the execution and delivery by Purchaser of, and the performance of its obligations under, this Agreement, the Purchaser Transaction Documents and the consummation of the transactions contemplated hereby and thereby do not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of any Governance Document of Purchaser;

(b) conflict with or result in a violation or breach of any term or provision of any Law or Order applicable to Purchaser or any of its Assets in any material respect; or

(c) (i) conflict with or result in a material violation or material breach of, (ii) constitute (with or without notice, lapse of time or both) a material default (or give rise to any right of termination, cancellation or acceleration) under, or (iii) require Purchaser to obtain any consent, approval or action of, make any filing with or give any notice to any Person as a result or under the terms of, any material Contract, Permit or Governmental Approval to which Purchaser is a party or by which any of its Assets is bound.

**Section 4.04 Governmental Approvals.** Except (a) the entry of the Confirmation Order, (b) prior authorization from FERC under Section 203 of the FPA, (c) for informational filings and request for waiver filings as required pursuant to Schedule 2 of the PJM Open Access Transmission Tariff regarding compensation for reactive supply and voltage control service from the Project, (d) for the issuance of an order by FERC (i) either accepting succession to, or the replacement of, the Project's FERC tariff regarding reactive power and voltage control service and (ii) the grant of MBR Authority by FERC with respect to the Project, (e) the EWG status with respect to the Project becoming effective; (f) PJM's acceptance of the Affiliate of Purchaser for the Project as a market participant in PJM, and (g) except as set forth in **Section 4.04 of the Purchaser Disclosure Schedule** or as would not, individually or in the aggregate, reasonably be expected to impair or materially delay Purchaser's ability to perform its obligations hereunder or under the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby, no Governmental Approval on the part of Purchaser is required in connection with the execution and delivery by Purchaser of this Agreement, the Purchaser Transaction Documents or the consummation of the transactions contemplated hereby and thereby.

**Section 4.05 Legal Proceedings.** There are no Actions pending or threatened in writing or, to the Knowledge of Purchaser, orally, against Purchaser or any of its Assets that would, individually or in the aggregate, reasonably be expected to impair or materially delay Purchaser's ability to perform its obligations hereunder or under the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby. There are no Orders restraining, enjoining or otherwise prohibiting, delaying or making illegal the purchase by Purchaser of the Acquired Assets or the assumption of the Assumed Liabilities under this Agreement or the performance by Purchaser of its obligations under this Agreement or the Purchaser Transaction Documents.

**Section 4.06 Investment Representations.** Purchaser is a knowledgeable and sophisticated investor experienced (or owned or managed by Persons experienced) in evaluating investments and, in particular (either on its own or with advisors), power generation facilities and has the knowledge, experience and resources to enable it to evaluate and to bear the risks of the investment contemplated hereunder.

**Section 4.07 Financial Ability; Solvency.** Concurrently with the execution and delivery of this Agreement, Purchaser Parent has delivered to the Seller Representative a duly executed equity commitment letter (the "**Equity Commitment Letter**"), pursuant to which, Purchaser Parent has agreed to provide equity financing to Purchaser in connection with the transactions contemplated by this Agreement in an amount sufficient to pay the Purchase Price and any other

costs, fees and expenses which may be required to be paid by or on behalf of Purchaser at Closing under this Agreement and the other Purchaser Transaction Documents. The Equity Commitment Letter is in full force and effect, has not been withdrawn, rescinded, terminated or otherwise modified in any respect and no such amendment, rescission, termination or modification is contemplated. There are no side letters, understandings or other agreements or arrangements relating to the Equity Commitment Letter which could impose any new or additional or more restrictive conditions precedent to the funding of amounts under the Equity Commitment Letter, resulting in any delay in the funding of such amounts or result in the reduction to the aggregate amount available under the Equity Commitment Letter on the Closing Date. Purchaser acknowledges that receipt or availability of funds or financing by Purchaser or any of its Affiliates shall not be a condition to Purchaser's obligations hereunder. No funds to be paid to any Seller have derived from or will have been derived from, or constitute, either directly or indirectly, the proceeds of any criminal activity under the anti-money laundering Laws of the United States. Upon consummation of the transactions contemplated by this Agreement, (a) Purchaser will not be insolvent as defined in Section 101 of the Bankruptcy Code, (b) Purchaser will not be left with unreasonably small capital, (c) Purchaser will not have incurred debts beyond its ability to pay such debts as they mature and (d) the capital of Purchaser will not be impaired.

**Section 4.08 Brokers.** No broker, finder or agent acting on behalf of Purchaser or its Affiliates is entitled to any fee or commission with respect to the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby that would be payable by any Seller or any of their Affiliates.

## ARTICLE V COVENANTS RELATING TO SELLERS

**Section 5.01 Investigation by Purchaser.** From the date of this Agreement until the earlier of the Closing and the date that this Agreement is terminated in accordance with its terms (the "**Interim Period**"), Sellers shall provide Purchaser and its Representatives with reasonable access, upon reasonable prior notice and during normal business hours, to the officers of Sellers and the Plant General Manager of the Project and all other reasonable information related to the Acquired Assets and the Assumed Liabilities in the possession or control of Sellers, but only to the extent that such access does not unreasonably interfere with the business and operations of Sellers or the Project. Notwithstanding the foregoing, Sellers shall not be required to furnish any such information or access where the furnishing of such information or access would (a) violate any Law, Order, Permit or Governmental Approval applicable to Sellers or any of their respective Affiliates or Assets, including the Project, (b) result in the waiver or loss of attorney-client privilege with respect to any information, (c) result in a breach of a Contract to which Sellers or any of their respective Affiliates are a party; provided that Sellers shall use commercially reasonable efforts to obtain waivers of confidentiality provisions in Contracts to allow access by Purchaser, or (d) result in the disclosure of any trade secret, proprietary or confidential information of third parties (including any bids received from others in connection with the transactions contemplated by this Agreement and the information and analysis (including financial analysis) relating to such bids). Sellers shall collectively have the right to have a Representative present at all times during any such inspection, interview or examination by Purchaser or its Representatives and to impose reasonable restrictions and requirements for liability and safety purposes. Nothing in this **Section 5.01** shall entitle Purchaser, during the Interim Period, to conduct any sampling,

monitoring or other surface, subsurface or invasive investigation, assessment or analysis of soil, groundwater, building materials, ambient air, or other environmental media or emissions on any Real Property owned or leased by Sellers without the Seller Representative's prior written consent, which consent may be withheld in the Seller Representative's sole discretion. Except as expressly set forth in this Agreement, none of Purchaser, its Affiliates or their respective Representatives shall, prior to the Closing, contact any of the employees, customers, suppliers, distributors, contractors, lenders or agents (or Representatives of any of the foregoing) of any Seller in connection with the transactions contemplated by this Agreement without the prior written consent of the Seller Representative; provided, that nothing in this Agreement shall prohibit Representatives of or advisors to Purchaser from contacting the advisors to Sellers that are Sellers' retained professionals in the Bankruptcy Cases.

**Section 5.02 Conduct of Business.** During the Interim Period, Sellers shall use commercially reasonable efforts to conduct the Business and operate the Acquired Assets in the ordinary course of business consistent with past practice and Good Industry Practice, including compliance with Laws or Orders (including the Bankruptcy Code and any Orders entered by the Bankruptcy Court in the Bankruptcy Cases); provided that the foregoing shall not prohibit Sellers from taking, or failing to take, any actions as may be required by applicable Law or Order (including the Bankruptcy Code and any Orders entered by the Bankruptcy Court in the Bankruptcy Cases). Without limiting the foregoing, Sellers shall maintain and renew if applicable (a) the Material Permits and (b) the Insurance Policies set forth on **Section 3.16 of the Seller Disclosure Schedule**, including property insurance, to provide coverage with respect to the Acquired Assets through the Closing.

**Section 5.03 Certain Restrictions.** During the Interim Period, Sellers shall refrain from taking any of the following actions in respect of the Acquired Assets and Assumed Liabilities, except (u) with respect to those matters set forth on **Section 5.03 of the Seller Disclosure Schedule**, (v) as expressly permitted or required by this Agreement or the PJM Settlement, (w) with Purchaser's prior written consent, (x) as required by the terms of any Transferred Permit, or (y) as required by applicable Law or Orders (including the Bankruptcy Code and any Orders entered by the Bankruptcy Court in the Bankruptcy Cases):

(a) selling, transferring, conveying, releasing, liquidating, retiring, surrendering or otherwise disposing of, or leasing, mortgaging, encumbering or assigning, any Acquired Assets other than (x) dispositions of obsolete Assets or (y) sales, transfers or exchanges of electric power, capacity, emissions allowances or ancillary services, in the case of each of (x) and (y), in the ordinary course of business consistent with past practice;

(b) merging or consolidating with any other Person, entering into a joint venture with any other Person or acquiring (whether by merger, purchase of equity securities in, or purchase of Assets of, or by any other manner) any other Person or any business, division or other material Assets of any other Person that would constitute Acquired Assets or give rise to an Assumed Liability;

(c) allowing the Project to engage in any material new line of business, or make any material change in the conduct of the Business;



(d) (i) enter into any employment, deferred compensation, severance, consulting or similar agreement or arrangement (or amend any such agreement or arrangement) with any individual or (ii) create any Employee Plan;

(e) recognize any labor organization as a collective bargaining representative of any Persons whose place of employment is the Project, or enter into a collective bargaining agreement with any labor organization effecting any such Persons;

(f) cancel or compromise any material debt or claim or waive or release any material right of Seller relating to any Acquired Asset;

(g) amend its Governance Documents or take any other action which would reasonably be expected to have a material and adverse effect on the ability of Seller to consummate the Transactions or would otherwise materially and adversely affect the Business or the value, utility or transferability of any of the Acquired Assets;

(h) incurring any material Liens or permitting any material Liens to be imposed on any Acquired Assets (other than Permitted Liens);

(i) entering into, amending, modifying or terminating (partially or completely and other than pursuant to the expiration of the term thereof) any Seller Contract (or any Contract that, if in existence on the date of this Agreement would have been required to be disclosed on **Section 3.13(a) of the Seller Disclosure Schedule**), other than, in each case, the expiration of any Seller Contract in accordance with its terms or the entry into, amendment, modification or termination (whether partial or complete) of any Hedging Arrangements in the ordinary course of business consistent with past practice;

(j) entering into any Contract with any Affiliate or amending or modifying any Contract with an Affiliate, in each case, to the extent related to the Acquired Assets or Assumed Liabilities;

(k) paying or making any non-cash dividend or other non-cash distribution from the Acquired Assets;

(l) except as may be required to meet the requirements of applicable Law or GAAP, changing any accounting method or practice in a manner that is inconsistent with past practices in a way that would materially and adversely affect the Acquired Assets;

(m) granting any exclusive right or license in any material Intellectual Property included in the Acquired Assets or (without consulting with Purchaser in advance) failing to renew or exercise any rights of renewal with respect to any right in or license to any Intellectual Property included in the Acquired Assets and necessary for the conduct of the Business;

(n) amending any Material Permit or Transferred Permit (whether or not a Material Permit), or agreeing to a stipulation or settlement with a Governmental Authority relating to any Material Permit or Transferred Permit, other than routine renewals that do not impose additional material limitations on the Business or the Acquired Assets;

(o) entering into, amending or modifying any Support Obligation in a manner that would result in the aggregate outstanding amount of Support Obligations maintained by or on behalf of Sellers as of the Closing being increased as compared to the aggregate outstanding amount of Support Obligations maintained by or on behalf of Sellers as of the date of this Agreement;

(p) purchasing any equity securities of any Person that would become Acquired Assets;

(q) failing to maintain any Records in the ordinary course of business;

(r) cancelling, compromising, settling, releasing or discharging any Actions or any other material claim of the Sellers;

(s) entering into any agreement or commitment that would subject the Business to any non-competition, non-solicitation or any other material restrictions on the operation of the Business following the Closing, or that limits or restricts the use of the Intellectual Property included in the Acquired Assets following the Closing;

(t) transferring any tangible Acquired Assets to any other location if, at the Closing, such transfer would cause such Acquired Assets to not be at a location that is otherwise part of the Acquired Assets;

(u) entering into any Alternative Transaction, other than an Alternative Transaction with the Successful Bidder;

(v) waiving or sharing any attorney-client privilege or attorney work product protection that Sellers have agreed to share with Purchaser pursuant to the terms of this Agreement;

(w) other than in the ordinary course of business consistent with past practice, liquidating, retiring, selling, transferring, conveying or otherwise disposing of any emissions allowances used in the operation of the Business; or

(x) agreeing or committing to do or engage in any of the foregoing.

Notwithstanding anything else contained in this **Section 5.03**, (x) Sellers may take any actions consistent with Good Industry Practice with respect to emergency situations or to comply with the express terms of any Seller Contract so long as Sellers shall, upon receipt of notice of any such actions, promptly inform Purchaser of any such actions taken outside the ordinary course of business consistent with past practices and (y) Sellers shall have no obligation to enter into any Contract, including any Hedging Arrangements.

#### **Section 5.04 Governmental Approvals; Third Party Consents.**

(a) During the Interim Period, Sellers shall use commercially reasonable efforts to obtain and maintain in full force and effect all consents, approvals or actions of, make all filings with and give all notices to Governmental Authorities and any other Person necessary to permit

Sellers to perform their obligations under this Agreement and to consummate the transactions contemplated hereby, including maintaining all Permits.

(b) During the Interim Period, the Seller Representative shall promptly notify counsel to Purchaser of any oral or written communication they receive from any Governmental Authority relating to the matters that are the subject of this Agreement, including with respect to any Transferred Permits or otherwise with respect to the Business or any Acquired Assets, and, to the extent permitted by Law, (i) permit counsel to Purchaser to review in advance any communication proposed to be made by any Seller or any of their respective Affiliates to any Governmental Authority and (ii) provide counsel to Purchaser with copies of all material correspondence, filings or other communications between them or any of their Affiliates or Representatives, on the one hand, and any Governmental Authority or members of its staff, on the other hand, in each case of clauses (i) and (ii), relating to the matters that are the subject of this Agreement, including with respect to any Transferred Permits or otherwise with respect to the Business or any Acquired Assets.

#### **Section 5.05 Governmental Filings.**

(a) Within fifteen (15) Business Days following the date of this Agreement (subject to extension by mutual agreement of the Parties, which agreement to extend shall not be unreasonably withheld, conditioned or delayed by either Party), Sellers shall take all actions reasonably necessary to cooperate with Purchaser in the preparation of and submission to FERC, jointly with Purchaser, an application under Section 203 of the FPA for prior approval of the transactions contemplated herein. Sellers shall reasonably cooperate with Purchaser in connection with the preparation and filing of such application and also any rate approvals required under Section 205 of the FPA. Sellers shall promptly comply with, or cause to be complied with, any requests by FERC for additional information concerning such applications.

(b) CFIUS.

(i) Sellers shall, and shall cause their respective Affiliates to, use commercially reasonable efforts to cooperate with Purchaser to (A) submit to CFIUS a CFIUS Declaration or a CFIUS Notice as promptly as possible after the date hereof, (B) in the event the Parties submit a CFIUS Declaration and CFIUS requests that the Parties file a written notice pursuant to 31 C.F.R. § 800.407(a)(1): (x) submit to CFIUS a draft CFIUS Notice as promptly as possible and (y) submit a formal CFIUS Notice pursuant to the DPA as soon as practicable or, if applicable, after receipt of any comments to the draft CFIUS Notice, and (C) provide any supplemental information and other related information requested by CFIUS pursuant to the DPA as soon as practicable (and, in any case, within the time periods required by CFIUS); provided, however, that Sellers, after consultation with Purchaser, may request in good faith an extension of time pursuant to the DPA to respond to CFIUS requests for information.

(ii) Sellers shall, and shall cause their respective Affiliates to, use commercially reasonable efforts to obtain CFIUS Clearance. Sellers shall, in connection with the efforts to obtain CFIUS Clearance, (A) cooperate in all respects and consult with Purchaser in connection with the CFIUS Declaration or CFIUS Notice, as applicable,

including by allowing Purchaser to have a reasonable opportunity to review in advance and comment on drafts of filings and submissions, (B) to the extent not prohibited by CFIUS, promptly inform Purchaser of any communication received by Sellers from, or given by Sellers to, CFIUS, including by promptly providing copies to Purchaser of any such written communications, (C) permit Purchaser to review in advance any substantive communication that it gives to, and consult with each other in advance of any conference, meeting, or substantive telephone call with CFIUS, and to the extent not prohibited by CFIUS, provide Purchaser the opportunity to attend and participate in any conference, meeting, or substantive telephone call with CFIUS and (D) avoid and, if necessary, eliminate impediments to obtaining CFIUS Clearance.

(iii) Sellers shall not, and shall cause their respective Affiliates not to, take or agree to take any action, condition or restriction required by CFIUS in connection with obtaining CFIUS Clearance except with the advance written consent of Purchaser. In addition, commercially reasonable efforts shall not be construed to require Sellers to enter into litigation to overturn or challenge any governmental determination or action with respect to the DPA.

(c) Sellers shall consult and cooperate with Purchaser in the timely preparation and submission of any notifications or registrations required to comply with the PJM Open Access Transmission Tariff and other applicable PJM rules or requirements.

(d) With respect to the filings and submissions contemplated by this **Section 5.05(a) and (c)** and other filings and submissions to Governmental Authorities that may be necessary to effect the transactions contemplated by this Agreement, including the transfer and reissuance of any Transferred Permits, Sellers shall, and shall cause their respective Affiliates to, (i) cooperate and coordinate with Purchaser in the making of such filings and submissions, (ii) supply Purchaser with any information that may be required in order to make such filings and submissions, (iii) supply any additional information that may be required or requested by any applicable Governmental Authority, and (iv) use their respective commercially reasonable efforts to take all actions reasonably necessary to obtain the Governmental Approvals and any other required regulatory approvals or consents promptly and in any event prior to the End Date (without limiting any post-Closing obligation). Sellers shall (and shall cause their respective Affiliates to, if applicable) promptly inform counsel to Purchaser of any substantive communication from any Governmental Authority regarding the transactions contemplated by this Agreement in connection with such filings. If Sellers or any of their respective Affiliates receives any comments or a request for additional information or documentary material with respect to the transactions contemplated by this Agreement, including with respect to the transfer and reissuance of any Transferred Permit, from any Governmental Authority, the Seller Representative shall make (or, cause to be made), as promptly as reasonably practicable and after consultation with the Purchaser, an appropriate response to such request.

(e) Before or after Closing, Sellers shall (i) respond promptly (and, in any event, within ten (10) Business Days) to any request for additional information, documents or other materials made by any Governmental Authority with respect to any filings and submissions or any of the transactions contemplated by this Agreement, including with respect to any Transferred Permit or otherwise with respect to the Business or Acquired Assets, (ii) promptly notify counsel

to Purchaser of, any communications from or with any Governmental Authority in connection with any of the transactions contemplated by this Agreement, including with respect to any Transferred Permit or otherwise with respect to the Business or the Acquired Assets, and, to the extent reasonably practicable, enable counsel to Purchaser to participate in any such communications, (iii) not participate in any prescheduled telephonic or in-person meeting with any Governmental Authority in connection with any of the transactions contemplated by this Agreement, including with respect to any Transferred Permit or otherwise with respect to the Business or Acquired Assets, unless Sellers consult with counsel to Purchaser in advance and, to the extent permitted by such Governmental Authority, gives counsel to Purchaser a reasonable opportunity to attend, participate and speak thereat and (iv) furnish such information and assistance as may be reasonably requested in connection with the preparation of necessary filings or submission of information to the applicable Governmental Authority and provide counsel to Purchaser the opportunity to review in advance any document, opinion or proposal to be made or submitted to any Governmental Authority, including with respect to any Transferred Permit or otherwise with respect to the Business or Acquired Assets.

**Section 5.06 Replacement of Security.** Purchaser shall use all commercially reasonable efforts to replace or provide for the replacement of, on, or as promptly as practicable after the Closing Date, but in no event later than forty five (45) days thereafter, all of the Specified Support Obligations that pertain to Purchased Contracts with new letters of credit, guarantees or other security (each new letter of credit, guarantee or other security, a “**Replacement Support Obligation**” and collectively, the “**Replacement Support Obligations**”), in each case, such that (a) all contractual requirements under the Purchased Contracts corresponding to such Specified Support Obligations are satisfied in full and (b) each applicable Seller (or its applicable Affiliates) and each applicable issuer, lender or other provider of any Specified Support Obligation is fully and unconditionally released from its obligations to the beneficiaries of the applicable Specified Support Obligations (or, in the case of letters of credit, such beneficiary will return such letters of credit to such Seller (or its applicable Affiliates) or Seller Representative). With respect to any such Specified Support Obligation that is not replaced at Closing with a Replacement Support Obligation, for the period beginning on the Closing Date and continuing until the earlier of (x) forty-five (45) days thereafter or (y) Purchaser has provided for a Replacement Support Obligation in respect of such Specified Support Obligation, (A) each applicable Seller (or its applicable Affiliates) shall maintain in effect and will not amend or terminate any such Specified Support Obligations, (B) Purchaser agrees to and shall reimburse such applicable Seller (or its applicable Affiliates) for all amounts paid and expenses incurred by such Seller or its applicable Affiliate from and after the Closing Date under or in connection with any demand upon any of such Specified Support Obligations relating to post-Closing Date transactions and shall reimburse such Seller (or its applicable Affiliates) upon demand for such Seller’s (or such applicable Affiliate’s) out-of-pocket costs for providing such corresponding Specified Support Obligations and (C) Purchaser shall have the right to contact and have discussions with each beneficiary of a Specified Support Obligation and each issuer, lender or other provider of a Specified Support Obligation in order to satisfy its obligations under this section; provided that the Seller Representative shall be entitled to participate in any such contacts or discussions.

**Section 5.07 Transition Cooperation.** Sellers shall, at Purchaser’s reasonable out-of-pocket cost and expense, reasonably cooperate with Purchaser and shall take such other actions as may reasonably be necessary, proper or advisable, to the extent permitted by Law, to fulfill its

obligations under this Agreement and to provide for the reasonable transition of the ownership and operation of the Acquired Assets to the Purchaser.

**Section 5.08 Insurance Proceeds.** If during the Interim Period, any Acquired Asset is damaged or destroyed by any casualty loss, Sellers shall, and shall cause its Affiliates to, use commercially reasonable efforts to obtain any available insurance proceeds (any such insurance proceeds actually received by any Seller or reasonably expected to be received by any Seller prior to the Closing Date, the “**Insurance Proceeds**”). In the Seller Representative’s reasonable discretion and in discussion with Purchaser, the Sellers may apply all or any portion of the Insurance Proceeds actually received during the Interim Period to repair or restore such Acquired Asset to its prior condition.

## **ARTICLE VI COVENANTS RELATING TO PURCHASER**

### **Section 6.01 Governmental Approvals; Third Party Consents.**

(a) During the Interim Period, Purchaser shall use commercially reasonable efforts to obtain and maintain in full force and effect all consents, approvals or actions of, make all filings with and give all notices to Governmental Authorities and any other Person necessary to permit Purchaser to perform its obligations under this Agreement and to consummate the transactions contemplated hereby.

(b) During the Interim Period, Purchaser shall promptly notify the Seller Representative of any oral or written communication it receives from any Governmental Authority relating to the matters that are the subject of this Agreement and, to the extent permitted by Law, (i) permit the Seller Representative to review in advance any communication proposed to be made by Purchaser or any of its Affiliates to any Governmental Authority and (ii) provide the Seller Representative with copies of all material correspondence, filings or other communications related between Purchaser or any of its Affiliates or Representatives, on the one hand, and any Governmental Authority or members of its staff, on the other hand, in each case of clauses (i) and (ii), relating to matters that are the subject of this Agreement.

### **Section 6.02 Governmental Filings.**

(a) Within fifteen (15) Business Days following the date of this Agreement (subject to extension by mutual agreement of the Parties, which agreement to extend shall not be unreasonably withheld, conditioned or delayed by either Party), Purchaser shall take all actions reasonably necessary to prepare, in consultation with Sellers, and submit to FERC jointly with Sellers, an application under Section 203 of the FPA for prior approval of the transactions contemplated herein. Purchaser shall reasonably cooperate with Sellers in connection with the preparation and filing of such application. Purchaser shall promptly comply with, or cause to be complied with, any requests by FERC for additional information concerning such application. Within fifteen (15) Business Days following the date of this Agreement, Purchaser shall take all actions reasonably necessary to file with FERC (i) to either succeed to, or to replace, the Project’s FERC tariff regarding reactive power and voltage control service and (ii) to obtain MBR Authority with respect to the Project. Sellers shall reasonably cooperate with Purchaser in connection with

the preparation and filing of such applications. Sellers shall reasonably cooperate with Purchaser to comply with, or cause to be complied with, any requests by FERC for additional information concerning such applications.

(b) CFIUS.

(i) Purchaser shall, and shall cause its Affiliates to, use commercially reasonable efforts to (A) submit to CFIUS a CFIUS Declaration or a CFIUS Notice as promptly as possible after the date hereof, (B) in the event the Parties submit a CFIUS Declaration and CFIUS requests that the Parties file a written notice pursuant to 31 C.F.R. § 800.407(a)(1): (x) submit to CFIUS a draft CFIUS Notice as promptly as possible and (y) submit a formal CFIUS Notice pursuant to the DPA as soon as practicable or, if applicable, after receipt of any comments to the draft CFIUS Notice and (C) provide any supplemental information and other related information requested by CFIUS pursuant to the DPA as soon as practicable (and, in any case, within the time periods required by CFIUS); provided, however, that Purchaser, after consultation with Sellers, may request in good faith an extension of time pursuant to the DPA to respond to CFIUS requests for information.

(ii) Purchaser shall, and shall cause its Affiliates to, use commercially reasonable efforts to obtain CFIUS Clearance. Purchaser shall, in connection with the efforts to obtain CFIUS Clearance, (A) cooperate in all respects and consult with Sellers in connection with the CFIUS Declaration or CFIUS Notice, as applicable, including by allowing Sellers to have a reasonable opportunity to review in advance and comment on drafts of filings and submissions, (B) to the extent not prohibited by CFIUS, promptly inform Sellers of any communication received by Purchaser from, or given by Purchaser to, CFIUS, including by promptly providing copies to Sellers of any such written communications, (C) permit Sellers to review in advance any substantive communication that it gives to, and consult with each other in advance of any conference, meeting, or substantive telephone call with CFIUS, and to the extent not prohibited by CFIUS, provide Sellers the opportunity to attend and participate in any conference, meeting, or substantive telephone call with CFIUS and (D) enter into such commercially reasonable assurances or agreements requested or required by CFIUS or the President of the United States to obtain CFIUS Clearance; provided, however that Purchaser shall not be required to (w) take any action that would violate any Law applicable to Purchaser or any of its Affiliates, (x) sell, divest, or dispose of any assets or businesses that it or any of its Affiliates hold, (y) provide Sellers with copies of or permit Sellers to review or receive the “personal identifier information” required under 31 C.F.R. § 800.502(c)(5)(vi)(B), or (z) otherwise adopt conditions or restrictions that would reasonably be expected to have, individually or in the aggregate, a Purchaser Material Adverse Effect (disregarding for this purpose, clause (a) of the definition of Purchaser Material Adverse Effect).

(iii) Purchaser shall not, and shall cause their respective Affiliates not to, take or agree to take any action, condition or restriction required by CFIUS in connection with obtaining CFIUS Clearance except with the advance written consent of the Seller Representative. In addition, commercially reasonable efforts shall not be construed to

require Purchaser to enter into litigation to overturn or challenge any governmental determination or action with respect to the DPA.

(c) Purchaser shall consult and cooperate with Sellers in the timely preparation and submission of any notifications or registrations required to comply with the PJM Open Access Transmission Tariff and other applicable PJM rules or requirements.

(d) Within five (5) Business Days following the entry of the Confirmation Order (or such later time as may be agreed by Purchaser and the Seller Representative in writing), Purchaser shall, and shall cause its Affiliates to, make all appropriate applications, notices, reports, disclosures, submissions, or other filings with the applicable Governmental Authorities, including any required filings or submissions as may be required for the transfers of control of the Acquired Assets and to assume all rights and obligations required by the PJM Settlement.

(e) With respect to the filings and submissions contemplated by this **Section 6.02** and any other filings and submissions to Governmental Authorities that may be necessary to effect the transactions contemplated by this Agreement, including the transfer and reissuance of any Transferred Permits, Purchaser shall, and shall cause its Affiliates to, (i) cooperate and coordinate with Sellers in the making of such filings and submissions; (ii) supply Sellers with any information that may be required in order to make such filings and submissions; (iii) supply any additional information that may be required or requested by any applicable Governmental Authority; and (iv) use their respective commercially reasonable efforts to take all action reasonably necessary to obtain the Governmental Approvals and any other required regulatory approvals or consents promptly and in any event prior to the End Date. Purchaser shall (and shall cause its Affiliates to, if applicable) promptly inform the Seller Representative of any substantive communication from any Governmental Authority regarding the transactions contemplated by this Agreement in connection with such filings. If Purchaser or any of its Affiliates receives any comments or a request for additional information or documentary material with respect to the transactions contemplated by this Agreement from any Governmental Authority Purchaser shall make (or, cause to be made), as promptly as reasonably practicable and after consultation with the Seller Representative, an appropriate response to such request.

(f) Purchaser shall (i) respond promptly (and, in any event, within ten (10) days) to any request for additional information, documents or other materials made by any Governmental Authority with respect to any filings or any of the transactions contemplated by this Agreement, (ii) promptly notify counsel to Sellers of, any communications from or with any Governmental Authority in connection with any of the transactions contemplated by this Agreement and, to the extent reasonably practicable, enable counsel to Sellers to participate in any such communications, (iii) not participate in any prescheduled telephonic or in-person meeting with any Governmental Authority in connection with any of the transactions contemplated by this Agreement unless Purchaser consults with counsel to Sellers in advance and, to the extent permitted by such Governmental Authority, gives the Seller Representative a reasonable opportunity to attend, participate and speak thereat, and (iv) furnish such information and assistance as may be reasonably requested in connection with the preparation of necessary filings or submissions to the applicable Governmental Authority and provide counsel to Sellers the opportunity to review in advance any document, opinion or proposal to be made or submitted to



any Governmental Authority. All filing fees relating to this **Section 6.02** shall be borne and paid fully by Purchaser.

**Section 6.03 Insurance.** No Seller shall be responsible from and after the Closing for providing any insurance with respect to the Acquired Assets for events or occurrences occurring after the Closing. Purchaser acknowledges that all insurance arrangements maintained by Sellers or otherwise for the benefit of the Acquired Assets shall be terminated as of the Closing and no further business interruption, property or liability shall be covered under any such insurance arrangements.

**Section 6.04 Investigation by Purchaser; No Other Representations; Non-Reliance of Purchaser.** Purchaser has substantial familiarity with the Business and understands the risks inherent therewith. Furthermore, Purchaser (for itself and on behalf of its Affiliates, Representatives and financing sources), has conducted an independent investigation, verification, review and analysis of the business, operations, Assets, Liabilities, results of operations, financial condition, technology and prospects of the Business, and Purchaser, its Affiliates and their advisors and Representatives have had access to the personnel, properties, premises and records of Sellers and the Business for such purpose. In entering into this Agreement, except for the specific representations and warranties expressly made by Sellers in **Article III** (in each case, as modified by the Seller Disclosure Schedules), Purchaser (for itself and on behalf of its Affiliates, Representatives and financing sources) acknowledges that (a) none of Sellers or any other Person is making or has made any representation or warranty, expressed or implied, at law or in equity, in respect of Sellers or the Acquired Assets, the Assumed Liabilities, the Business or any Assets, Liabilities, operations, prospects or condition (financial or otherwise) thereof, including with respect to merchantability or fitness for any particular purpose of any Assets, the nature or extent of any Liabilities, the prospects of the Business, the effectiveness or the success of any operations, or the veracity, accuracy or completeness of any confidential information memoranda, documents, projections, material or other information (financial or otherwise) regarding the Business furnished to Purchaser or its Affiliates or their advisors or Representatives or made available to Purchaser, its Affiliates or their advisors or Representatives in any data rooms, management presentations or in any other form in expectation of, or in connection with, the transactions contemplated hereby; (b) it is specifically disclaiming any such other representations or warranties that may have been made by any Person other than those expressly made by Sellers in **Article III**, and acknowledges that Sellers and their respective Affiliates hereby specifically disclaim any such other representation or warranty made by any Person; and (c) it is specifically disclaiming any obligation or duty by Sellers or any of their respective Affiliates or any other Person to make any disclosures of fact not required to be disclosed pursuant to the specific representations and warranties set forth in **Article III**, except to the extent disclosure is required pursuant to this Agreement. In entering into this Agreement, except for the specific representations and warranties expressly made by Purchaser in **Article IV** (in each case, as modified by the Purchaser Disclosure Schedules), Sellers (for themselves and on behalf of their respective Affiliates, Representatives and financing sources) acknowledge that none of Purchaser or any other Person is making or has made any others representation or warranty, expressed or implied, at law or in equity.

## ARTICLE VII ADDITIONAL COVENANTS

### Section 7.01 Certain Tax Matters.

(a) **Straddle Period.** When it is necessary under this Agreement to allocate Taxes, other than Transaction Transfer Taxes, between the Pre-Closing Tax Period and the Post-Closing Tax Period, Property Taxes shall be allocated based on a prorated daily basis, Taxes imposed on transactions shall be allocated to the date of the transaction giving rise to the Tax, and all other Taxes shall be allocated based on an interim closing of the books as of the Closing.

(b) **Transfer Taxes.** All transfer, documentary, sales, use, stamp, recording, registration, controlling interest transfer and other similar Taxes and fees (including any penalties and interest, but, for the avoidance of doubt, excluding any Taxes of Sellers that are imposed on income or gain (which Taxes are Excluded Liabilities)) (the “**Transfer Taxes**”) incurred in connection with this Agreement and the transactions contemplated hereby, if any, and any costs associated therewith (collectively, the “**Transaction Transfer Taxes**”), shall be borne by Purchaser. The Party responsible under applicable Law for filing any Tax Return with respect to an applicable Transaction Transfer Tax shall prepare such Tax Return and provide a copy to the other Party for its review and approval within a reasonable period of time prior to filing such Tax Return. The Parties shall cooperate in good faith to take such commercially reasonable actions as will minimize or reduce the amount of such Transaction Transfer Taxes.

(c) **Purchase Price Allocation.** The Parties agree that the aggregate consideration (including any Assumed Liabilities and any other items treated as consideration for U.S. federal income tax purposes and all other tax purposes) paid in exchange for the Acquired Assets will be allocated among the Acquired Assets in a manner consistent with applicable tax Law (the “**Allocation**”). Within thirty (30) days of the Closing Date pursuant to **Section 2.05**, Purchaser shall deliver to the Seller Representative a draft of the Allocation. The Seller Representative shall be deemed to agree with the draft Allocation unless the Seller Representative delivers a written dispute notice to Purchaser within fifteen (15) days from the receipt thereof setting forth in reasonable detail the reason for any objections and any proposed adjustments to the draft Allocation. Purchaser and the Seller Representative shall negotiate in good faith to resolve any disputed items. If the Parties fail to resolve any disputed items within fifteen (15) Business Days of the delivery of Purchaser’s dispute notice, the Parties shall submit the dispute to the Independent Accountant for resolution, and the Independent Accountant shall resolve any such dispute promptly (but in any event within ten (10) Business Days after the submission of the dispute to the Independent Accountant). Sellers and Purchaser each shall be liable for and pay one-half of the fees and other costs charged by the Independent Accountant. The Seller Representative and Purchaser shall use commercially reasonable efforts to update and adjust the Allocation, in a manner consistent with applicable tax Law, following any adjustment to the aggregate consideration paid in exchange for the Acquired Assets pursuant to this Agreement. Except to the extent otherwise required by any applicable tax Law, Purchaser and Sellers shall prepare all Tax Returns, in a manner consistent with the Allocation (as agreed upon by the Parties or as determined by the Independent Accountant and as may be adjusted pursuant to this Agreement); provided, however, that nothing contained herein shall prevent Purchaser or Sellers from settling any proposed deficiency or adjustment by any Taxing Authority based upon or arising out of the Allocation, and neither Purchaser nor Seller shall be required to litigate before any court any proposed deficiency or adjustment by any Taxing Authority challenging such

Allocation. Each of Purchaser and Sellers shall promptly notify the other in writing upon receipt of notice of any pending or threatened Tax audit or assessment challenging the Allocation.

(d) **Property Taxes.** All Property Taxes shall be apportioned between the Sellers, on the one hand, and Purchaser, on the other hand, under the principles set forth in Section 7.01(a) and based solely on the amounts of such Property Taxes reflected on the most recent bills received with respect to such Property Taxes. At least five (5) Business Days prior to the Closing Date, the Seller Representative shall deliver to Purchaser Sellers' good faith calculation of any such Property Taxes that are known or reasonably capable of estimation on or before such date and that are allocable to Sellers (the dollar amount of such Property Taxes, after application of this paragraph, being the "**Seller Property Tax Amount**"); provided, for the avoidance of doubt, that the Seller Property Tax Amount (i) shall take into account all refunds, overpayments and prepayments of, and credits in respect of, the applicable Property Taxes and (ii) may be a positive or a negative number. Such calculation shall be final absent manifest error, and the Seller Representative shall, upon Purchaser's reasonable request, provide Purchaser with access to the Records used in calculating the Seller Property Tax Amount. Purchaser shall pay or cause to be paid to the Taxing Authorities all Property Taxes relating to the taxable period in which the Closing occurs without thereby becoming entitled to any additional payment from any Seller, and no Party shall be liable to make any additional payment to any other Party in the event the Seller Property Tax Amount varies from the actual amount of Property Taxes allocable to Sellers for the Straddle Period.

#### **Section 7.02 Bankruptcy Court Matters.**

(a) Sellers shall diligently pursue the Bankruptcy Court's entry of the Confirmation Order and any other Order reasonably necessary in connection with the transactions contemplated by this Agreement as promptly as reasonably practicable. Purchaser agrees that it will promptly take such actions as are reasonably requested by the Sellers to assist in obtaining entry of the Confirmation Order and a finding of adequate assurance of future performance by Purchaser, including, if necessary, furnishing affidavits, non-confidential financial information, or other documents or information for filing with the Bankruptcy Court and making such representatives of Purchaser and its respective Affiliates available to testify before the Bankruptcy Court for the purposes of, among other things, providing adequate assurances of future performance by Purchaser as required under Section 365 of the Bankruptcy Code, and demonstrating that Purchaser is a "good faith" purchaser under Section 363(m) of the Bankruptcy Code and that the Purchase Price was not controlled by an agreement in violation of Section 363(n) of the Bankruptcy Code. In the event the entry of the Confirmation Order or any other Order in connection with the transactions contemplated by this Agreement shall be appealed, Sellers and Purchaser shall use their respective commercially reasonable efforts to defend such appeal. The Confirmation Order and any other sale-related Order must each be in form and substance reasonably acceptable to Purchaser and the Seller Representative.

(b) Sellers, on the one hand, and Purchaser, on the other hand, shall appear formally or informally in the Bankruptcy Court if reasonably requested by the other or required by the Bankruptcy Court in connection with the transactions contemplated by this Agreement and keep the other Parties reasonably apprised of the status of material matters related to this Agreement, including, upon reasonable request promptly furnishing the other Parties with copies

of notices or other communications received by such Party from the Bankruptcy Court or any third party or any Governmental Authority with respect to the transactions contemplated by this Agreement.

(c) The Confirmation Order shall, among other things, (i) approve, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, (A) the execution, delivery and performance by Sellers of this Agreement, (B) the sale of the Acquired Assets to Purchaser on the terms set forth herein and free and clear of all Liabilities and Liens (other than Liabilities and Liens included in the Assumed Liabilities and Permitted Liens) and (C) the performance by Sellers of their obligations under this Agreement, (ii) approve Sellers' assumption and assignment to Purchaser of the Purchased Contracts, (iii) find that Purchaser is a "good faith" buyer within the meaning of Section 363(m) of the Bankruptcy Code, (iv) find that Purchaser is not a successor to Sellers and grant Purchaser the protections of Section 363(m) of the Bankruptcy Code, (v) find that Purchaser shall have no Liability or responsibility for any Liability or other obligation of Sellers arising under or related to the Acquired Assets other than as expressly set forth in this Agreement, (vi) find that Purchaser has provided adequate assurance (as that term is used in Section 365 of the Bankruptcy Code) of future performance in connection with the assumption of the Purchased Contracts, (vii) find that Purchaser shall have no Liability for any Excluded Liability and (viii) find that the consideration provided by Purchaser for the Acquired Assets under this Agreement constitutes fair consideration and reasonably equivalent value for purposes of all laws of the United States, any state, territory, possession or the District of Columbia, and the transactions under this Agreement may not be avoided under Section 363(n) of the Bankruptcy Code. Nothing in this Agreement shall require Purchaser, Sellers or their respective Affiliates to give testimony to or submit any pleading, affidavit or information to the Bankruptcy Court or any Person that is untruthful or to violate any duty of candor or other fiduciary duty to the Bankruptcy Court or their respective stakeholders.

(d) Notwithstanding anything to the contrary herein, Purchaser agrees and acknowledges that Sellers and their respective Affiliates, including through their representatives, are and may continue until the entry of the Confirmation Order soliciting or responding to inquiries, proposal or offers from third parties with respect to the Acquired Assets or any reorganization, merger, transaction, consolidation, business combination, joint venture, partnership, financing, or restructuring or similar transaction, and may facilitate, including furnishing any information (subject to entering into a customary confidentiality agreement) with respect to, any effort or attempt by any Person to seek to do any of the foregoing in connection with the same.

(e) Sellers and Purchaser agree that, in the event that Sellers do not choose Purchaser as the Successful Bidder at the Auction undertaken pursuant to the Bid Procedures, if and only if (i) Purchaser is selected as the Back-Up Bidder at the Auction, and (ii) Sellers give written notice to Purchaser on or before the Back-Up Termination Date, stating that Sellers (A) failed to consummate the sale of the Acquired Assets with the winning bidder, and (B) terminated the purchase agreement with the winning bidder, Purchaser shall be deemed the Successful Bidder and shall promptly consummate the transactions contemplated hereby upon the terms and conditions as set forth herein (provided that the End Date shall be deemed to be 180 days following the date on which Sellers deliver such notice to Purchaser), including the payment of the Purchase Price, as may be increased by Purchaser at the Auction.

(f) Nothing in this Agreement, including this **Section 7.02**, shall require any director or officer of any Seller to violate the fiduciary duties they owe to such Seller. No action or inaction on the part of any director or officer of any Seller that such director or officer reasonably believes is required by the fiduciary duties they owe to such Seller shall be limited or precluded by this Agreement; provided, however, that no such action or inaction shall be deemed to prevent Purchaser from exercising any termination rights it may have hereunder as a result of such action or inaction.

(g) Sellers shall provide Purchaser (through counsel) a draft of each document proposed to be filed in the Bankruptcy Court or any other tribunal or regulatory body affecting the Purchaser, the Confirmation Order, this Agreement, or the transactions contemplated thereunder or hereunder at least three (3) Business Days prior to filing such document or as soon as reasonably practicable prior to filing such document.

**Section 7.03 Record Retention and Access.** Purchaser, for a period of seven (7) years following Closing, will retain the Records that are Acquired Assets and are in existence as of the Closing Date and will provide the Seller Representative and its Representatives with access to such records on reasonable advance notice and during normal business hours for review and copying at Sellers' cost; provided that Purchaser may destroy Records from time to time and prior to the end of such period in accordance with its normal document retention policy so long as Purchaser notifies the Seller Representative at least ten (10) Business Days in advance and provides Sellers an opportunity to remove or copy such Records during such advance period at Sellers' cost.

**Section 7.04 Employee Matters.**

(a) Sellers shall cause Lincoln Operating Services, LLC (“**LOS**”) to terminate the employment of all Project Personnel on the Closing Date, prior to the Closing. No later than five (5) Business Days prior to the Closing Date, Purchaser or an Affiliate of Purchaser shall make an offer of employment, effective as of the Closing Date, to those certain employees of LOS listed on **Section 7.04(a) of the Seller Disclosure Schedule**. Such employees of LOS who affirmatively accept Purchaser's or its Affiliate's offer of employment shall commence working for Purchaser or its Affiliate immediately following the Closing and are hereinafter referred to as the “**Transferred Employees**.” Such offers of employment shall be for the same job or position and at the same work location as in effect immediately prior to the Closing Date: (i) at a base salary or wage rate that is no less than the base salary or wage rate provided immediately prior to the Closing Date; (ii) with bonus and incentive opportunities (including a target bonus) with value that is no less than the value of the bonus and incentive opportunities (and target bonus), if any, provided immediately prior to the Closing Date; (iii) employee benefits substantially similar in the aggregate to the benefits provided to the employee prior to the Closing Date; and (iv) entitlement to severance benefits in accordance with the terms previously provided to Purchaser (the “**Offer Terms**”). Purchaser shall be obligated to and shall provide severance benefits in accordance with the terms previously made available to Purchaser with respect to any such Project Personnel who is either not given an offer of employment with Offer Terms consistent with this **Section 7.04(a)** or who is given an offer of employment but with terms of employment inconsistent with the Offer Terms set forth in this **Section 7.04(a)**.

(b) Purchaser shall, or shall cause an Affiliate of Purchaser to, provide each Transferred Employee with employment consistent with the Offer Terms for the twelve (12) month period following the Closing Date (the “**Continuation Period**”). Should Purchaser terminate any Transferred Employee’s employment (other than for cause) during the Continuation Period, Purchaser will pay the terminated Transferred Employee severance benefits in accordance with the terms previously made available to Purchaser. Within a reasonable time following the end of the calendar year in which the Continuation Period occurs (and in any event on or prior to March 15 of the immediately succeeding calendar year), Purchaser may, in its sole discretion, determine and pay or cause an Affiliate to pay to each Transferred Employee such Transferred Employee’s annual bonus earned for such calendar year, if any.

(c) Purchaser shall cause the Transferred Employees to receive service credit for all service with LOS and its Affiliates prior to the Closing Date, and credit for all service with any predecessor to LOS and its Affiliates, to the extent recognized under any equivalent Employee Plan of LOS or any of its Affiliates (“**LOS Plan**”), for all purposes under the Purchaser Employee Plans, including eligibility to participate, vesting credit, eligibility to commence benefits and benefit accrual, and including, without limitation, for purposes of determining the rate of accrual of paid time off and entitlement to severance benefits.

(d) On the Closing Date, each Transferred Employee shall immediately be eligible to commence participation in the Employee Plan of Purchaser or its Affiliates (“**Purchaser Employee Plan**”) that are made available to such Transferred Employees. Purchaser or its Affiliates shall (i) cause to be waived (for each Transferred Employee and his or her eligible spouse and dependents) all pre-existing condition exclusions and actively at work requirements and similar limitations, eligibility waiting periods and evidence of insurability requirements under any Purchaser Employee Plan to the same extent waived or satisfied by a Transferred Employee under a LOS Plan immediately prior to the Closing Date, and (ii) cause any deductible, co-insurance and covered out-of-pocket expenses paid under a LOS Plan in the plan year which includes the final date of the Term to be taken into account for purposes of satisfying the corresponding deductible, coinsurance and maximum out of pocket provisions under any applicable Purchaser Employee Plan.

(e) Each Transferred Employee who is a participant in the 401(k) plan of LOS or its Affiliates (the “**LOS 401(k) Plan**”) shall cease to be an active participant under such plan effective as of the Closing Date. Purchaser agrees to cause a 401(k) plan of Purchaser or its Affiliates to accept a “direct rollover” to such 401(k) plan of the account balances (including an in-kind rollover of promissory notes evidencing all outstanding loans) of all Transferred Employees under the LOS 401(k) Plan if such rollover is elected in accordance with applicable Law by such employees.

(f) To the fullest extent permitted under applicable Law, for purposes of determining the number of vacation or paid time off days to which each Transferred Employee shall be entitled following the Closing Date, Purchaser shall assume and honor all vacation or paid time off days accrued by such Transferred Employee during his or her employment with LOS but unused as of the Closing Date and Purchaser shall hold harmless Seller, LOS and their respective Affiliates in respect of any liabilities with respect to such accrued vacation or paid time off days.

(g) Notwithstanding anything in this Agreement to the contrary, nothing contained herein, whether express or implied, shall constitute or be deemed to be (i) an establishment of, amendment to, or other modification of any LOS Plan or any Purchaser Employee Plan, or (ii) a contract for employment. This **Section 7.04** is solely for the benefit of Purchaser and Sellers (and their respective Affiliates, successors and permitted assigns), and nothing in this Agreement, either express or implied, is intended to confer any third-party beneficiary or other Person any rights, benefits, remedies, obligations or liabilities of any nature whatsoever under this **Section 7.04** to any other Person, including any current or former employee of Sellers, Purchaser, LOS, or their respective Affiliates. Nothing in this **Section 7.04**, express or implied, shall provide any Person (including any Transferred Employee) with any right to continued employment with Purchaser, or any of their Affiliates, or any other Person or to any particular term or condition of employment.

## ARTICLE VIII CONDITIONS TO OBLIGATIONS OF PURCHASER

The obligation of Purchaser to consummate the transactions described in **Section 2.01**, **Section 2.03** and **Section 2.04** are subject to the fulfillment, at or before the Closing, of each of the following conditions (all or any of which may, to the extent permitted by Law, be waived in whole or in part by Purchaser in its sole discretion):

**Section 8.01 Representations and Warranties.** The representations and warranties of Sellers contained in this Agreement shall be true and correct as of the first to occur of the Flip Date and the Closing Date as though such representations and warranties were made on and as of the Flip Date or the Closing Date, as applicable (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date), except where the failure of such representations and warranties to be so true and correct (in each case, disregarding all qualifications and exceptions contained therein to materiality or Seller Material Adverse Effect), would not, individually or in the aggregate, reasonably be expected to result in a Seller Material Adverse Effect, other than (i) any representation in **Section 3.01**, **Section 3.02**, **Section 3.05** and **Section 3.21**, which shall be true and correct in all respects (with the exception of de minimis inaccuracies) as of the first to occur of the Flip Date and the Closing Date as though such representations and warranties were made on and as of the Flip Date or the Closing Date, as applicable (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date) and (ii) the representation in **Section 3.08**, which shall be true and correct in all respects as of the first to occur of the Flip Date and the Closing Date, except as would not result in a Liability to the Project or the Acquired Assets equal to or in excess of the Base Purchase Price.

**Section 8.02 Seller Material Adverse Effect.** No Seller Material Adverse Effect shall have occurred since the date of this Agreement through the first to occur of the Flip Date and the Closing Date.

**Section 8.03 Performance.** Sellers shall have performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be so performed or complied with by Sellers at or before the Closing.

**Section 8.04 Officers' Certificate.** Sellers shall have delivered to Purchaser an officer's certificate, dated the Closing Date and executed on behalf of Sellers, certifying that all of the conditions set forth in **Section 8.01**, **Section 8.02** and **Section 8.03** have been satisfied.

**Section 8.05 Orders and Laws.** There shall not be in effect on the Closing Date any Order or Law restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

**Section 8.06 Governmental Approvals.** All Governmental Approvals set forth on **Section 8.06 of the Seller Disclosure Schedule** shall have been obtained, made or given, and all terminations or expirations of applicable waiting periods imposed by any Governmental Authority with respect to the transactions contemplated hereby shall have occurred.

**Section 8.07 Sellers' Closing Deliverables.** Sellers shall have delivered, or caused to be delivered, to Purchaser the following:

- (a) an IRS Form W-9 from each Seller;
- (b) with respect to the Project, a recordable special warranty deed substantially in the form attached hereto as **Exhibit B** duly executed and acknowledged by the applicable Seller (the "**Deed**"), conveying good and marketable fee title to the Owned Real Property free and clear of all Liens other than Permitted Liens, together with any transfer tax declarations or other forms required in order to enter the Deed in the real property records of the applicable jurisdiction where the real property to be conveyed by the Deed is located; and
- (c) a bill of sale or bills of sale, as requested by Purchaser, duly executed by Sellers conveying all items of Tangible Personal Property, substantially in the form attached hereto as **Exhibit C** (collectively, the "**Bill of Sale**").

**Section 8.08 Bankruptcy Court Requirements.** The Bankruptcy Court shall have entered (i) the Bid Procedures Order, (ii) the Confirmation Order and (iii) any other Order reasonably necessary to consummate the transactions contemplated by this Agreement, and the Confirmation Order and any sale-related Order shall be a Final Order.

**Section 8.09 CFIUS Clearance.** CFIUS Clearance shall have been obtained and shall remain in full force and effect.

**Section 8.10 Successful Bidder.** Purchaser shall have been deemed the Successful Bidder, including pursuant to **Section 7.02(e)**.

Purchaser may not rely on the failure of any condition set forth in **Sections 8.01** through **8.09** as a basis for not fulfilling its obligation to effect the Closing if Purchaser has breached in any material respect its obligations under this Agreement in any manner that shall have materially caused such failure.

## ARTICLE IX CONDITIONS TO OBLIGATIONS OF SELLER



The obligation of Sellers to consummate the transactions described in **Section 2.01**, **Section 2.03** and **Section 2.04** are subject to the fulfillment, at or before the Closing, of each of the following conditions (all or any of which may, to the extent permitted by Law, be waived in whole or in part by the Seller Representative in its sole discretion):

**Section 9.01 Representations and Warranties.** The representations and warranties of Purchaser contained in this Agreement shall be true and correct as of the Closing Date as though such representations and warranties were made on and as of the Closing Date (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date), except where the failure of such representations and warranties to be true and correct (in each case disregarding all qualifications and exceptions contained therein relating to materiality, material adverse effect or word of similar import) would not, individually or in the aggregate, reasonably be expected to have a Purchaser Material Adverse Effect, other than any representation in **Section 4.01**, **Section 4.02**, and **Section 4.08**, which shall be true and correct in all respects (with the exception of de minimis inaccuracies) as of the Closing Date as though such representations and warranties were made on and as of the Closing Date (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date).

**Section 9.02 Performance.** Purchaser shall have performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be performed or complied with by Purchaser at or before the Closing.

**Section 9.03 Officer's Certificates.** Purchaser shall have delivered to the Seller Representative an officer's certificate, dated the Closing Date and executed on behalf of Purchaser, certifying that all of the conditions set forth in **Section 9.01** and **Section 9.02** have been satisfied.

**Section 9.04 Orders and Laws.** There shall not be in effect on the Closing Date any Order or Law restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

**Section 9.05 Governmental Approvals.** All Governmental Approvals set forth on **Section 9.05 of the Purchaser Disclosure Schedule** shall have been obtained, made or given, and all terminations or expirations of applicable waiting periods imposed by any Governmental Authority with respect to the transactions contemplated hereby shall have occurred.

**Section 9.06 Purchaser's Closing Deliverables.** Purchaser shall have delivered, or caused to be delivered, to the Seller Representative the Bill of Sale, duly executed by Purchaser or applicable Affiliates of Purchaser.

**Section 9.07 Bankruptcy Court Requirements.** The Bankruptcy Court shall have entered the Confirmation Order and the Confirmation Order shall be a Final Order.

**Section 9.08 CFIUS Clearance.** CFIUS Clearance shall have been obtained and shall remain in full force and effect.

Seller may not rely on the failure of any condition set forth in **Sections 9.01** through **9.07** as a basis for not fulfilling its obligation to effect the Closing if Seller has breached in any material respect its obligations under this Agreement in any manner that shall have materially caused such failure.

**ARTICLE X  
TERMINATION**

**Section 10.01 Termination.** This Agreement may be terminated, and the transactions contemplated hereby may be abandoned, at any time prior to the Closing:

- (a) by mutual written consent of Purchaser and the Seller Representative;
- (b) by either Purchaser or Seller:

- (i) if the Closing has not occurred on or before the date is 180 days following the date of this Agreement (the “**End Date**”) (which date may be extended by Purchaser or the Seller Representative, by written notice to the other, for one additional sixty (60) day period if (A) one or more applicable Governmental Approvals set forth on **Section 8.06 of the Seller Disclosure Schedules** has not been duly obtained, made or given (or any terminations or expirations of applicable waiting periods imposed by any Governmental Authority with respect to the transactions contemplated hereby shall have not occurred), and such Party reasonably believes that the relevant Governmental Approvals will be obtained during such extension period, and (B) all of the other conditions to Closing set forth in **Article VIII and Article IX** (other than (x) those conditions that by their nature are to be satisfied at the Closing, which at such time are capable of being satisfied, and (y) the conditions set forth in **Section 8.05, Section 8.06, Section 9.04 or Section 9.05**) are satisfied) (such date, as may be extended pursuant to the foregoing sentence, the “**Termination Date**”); provided that the right to terminate this Agreement pursuant to this **Section 10.01(b)(i)** shall not be available (1) to Purchaser, if Purchaser is then in default or breach of this Agreement such that the conditions specified in **Section 9.01 or Section 9.02** would not be satisfied and (2) to the Seller Representative, if Sellers are then in default or breach of this Agreement such that the conditions specified in **Section 8.01 or Section 8.03** would not be satisfied;

- (ii) if any Governmental Authority shall have issued a Final Order or enacted any Law or taken any other final action restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated by this Agreement and such Order or Law or other Action is or shall have become final and nonappealable;

- (iii) if at the end of the Auction (if any), Purchaser is not determined by Sellers to be either the Successful Bidder or the Back-up Bidder; or

- (iv) if an Order of the Bankruptcy Court is entered denying approval of the Confirmation Order and such Order denying approval shall have become a non appealable Final Order.

- (c) by Purchaser, (i) if there has been a breach by any Seller or the Seller Representative, as applicable, of any covenant, agreement or obligation of such Seller or the Seller Representative contained in this Agreement or (ii) if any representation or warranty of any Seller is or shall have become untrue, in either case such that the conditions set forth in **Section 8.01 or Section 8.03** would not be satisfied, and such breach or inaccuracy is not curable, or, if curable, is not cured within the earlier of (A) thirty (30) days after written notice of such breach is given to

the Seller Representative by Purchaser and (B) the Termination Date; provided that the right to terminate this Agreement pursuant to this **Section 10.01(c)** shall not be available to Purchaser if Purchaser is in default or breach of this Agreement such that the conditions specified in **Article IX** would not be satisfied;

(d) by Purchaser, if Sellers have failed to consummate the transactions contemplated hereby on the date that the Closing would have occurred, pursuant to and subject to the provisions of **Section 2.04**, if Sellers had not failed to consummate the transactions contemplated hereby, and all of the conditions set forth in **Article IX** would have been satisfied if the Closing were to have occurred on such date, and the Purchaser has notified the Seller Representative in writing that Purchaser is ready, willing and able to consummate the transactions contemplated by this Agreement and Sellers do not consummate the Closing within three (3) Business Days of such written notice;

(e) by the Seller Representative, (i) if there has been a breach by Purchaser of any covenant, agreement or obligation of Purchaser contained in this Agreement or (ii) if any representation or warranty of Purchaser is or shall have become untrue, in either case such that the conditions set forth in **Section 9.01** or **Section 9.02** would not be satisfied, and such breach or inaccuracy is not curable, or, if curable, is not cured within the earlier of (A) thirty (30) days after written notice of such breach is given to Purchaser by Seller and (B) fifteen (15) days prior to the End Date; provided, however, that no cure period shall apply to Purchaser's obligation to pay the Purchase Price. The right to terminate this Agreement pursuant to this **Section 10.01(e)** shall not be available to the Seller Representative if any Seller or the Seller Representative is in default or breach of this Agreement such that the conditions specified in **Article VIII** would not be satisfied;

(f) by the Seller Representative, if Purchaser has failed to consummate the transactions contemplated hereby on the date that the Closing would have occurred, pursuant to and subject to the provisions of **Section 2.04**, if Purchaser had not failed to consummate the transactions contemplated hereby, and all of the conditions set forth in **Article VIII** would have been satisfied if the Closing were to have occurred on such date, and the Seller Representative has notified Purchaser in writing that Sellers are ready, willing and able to consummate the transactions contemplated by this Agreement;

(g) automatically and without further action by any Person upon the consummation of any Alternative Transaction;

(h) by Purchaser, upon written notice to the Seller Representative, at any time following the Partial Satisfaction Date and on or prior to the Flip Date;

(i) by mutual written consent of Purchaser and the Seller Representative no more than sixty (60) days prior to the End Date, if Purchaser and the Seller Representative reasonably determine that CFIUS Clearance will not be obtained prior to the End Date;

(j) by either Purchaser or the Seller Representative, upon written notice to the other, in the event of a CFIUS Denial; or

(k) by the Seller Representative, if the Partial Satisfaction Date has occurred, by delivering written notice to Purchaser on the date that is no earlier than twenty (20) days prior to the End Date (the “**Secondary End Date**”).

**Section 10.02 Effect of Termination.**

(a) Except as provided in this **Section 10.02**, if this Agreement is validly terminated pursuant to **Section 10.01**, then this Agreement will forthwith become null and void and there will be no liability or obligation on the part of any Party or any other Person in respect of this Agreement other than for willful and intentional breaches of this Agreement prior to such termination; provided that the agreements of the Parties in **Article I, Section 6.04** this **Section 10.02** and **Article XI** will continue to apply following any termination hereof.

(b) Notwithstanding this **Section 10.02** or anything else in this Agreement to the contrary, Purchaser affirms that it is not a condition to the Closing or to any of its obligations under this Agreement that Purchaser obtain financing for or related to any of the transactions contemplated by this Agreement.

(c) If this Agreement is terminated in accordance with **Section 10.01**, the Deposit shall be released in accordance with and subject to the following provisions:

(i) If the Seller Representative terminates this Agreement pursuant to **Section 10.01(e)** or **Section 10.01(f)** or this Agreement is otherwise terminated by Purchaser or the Seller Representative at a time when the Seller Representative was entitled to terminate this Agreement pursuant to **Section 10.01(e)** or **Section 10.01(f)**, the Deposit shall be retained by the Seller Representative for further distribution to Sellers. The Parties acknowledge and agree that (A) the Parties have expressly negotiated the provisions of this **Section 10.02(c)(i)**, (B) in light of the circumstances existing at the time of the execution of this Agreement (including the inability of the Parties to quantify the damages that may be suffered by Sellers and its Affiliates) the provisions of this **Section 10.02(c)(i)** are reasonable, (C) the Deposit represents a good faith, fair estimate of the damages that Sellers and their respective Affiliates would suffer, and (D) the Deposit shall be payable as liquidated damages (and not as a penalty) without requiring Sellers or any other Person to prove actual damages. Subject to Sellers’ rights set forth in **Section 12.08**, Sellers’ receipt of the Deposit pursuant to this **Section 10.02(c)(i)** shall be the sole and exclusive remedy of Sellers and their respective Affiliates against Purchaser and its Affiliates, financing sources and Representatives for any Losses suffered as a result of the failure of the transactions contemplated hereby to be consummated or for a breach or failure to perform hereunder; provided, however, that nothing set forth (x) herein shall affect the obligations of Purchaser, or its applicable Affiliate, pursuant to the Confidentiality Agreement and (y) in this **Section 10.02(c)(i)** shall be deemed to limit or release any Liability of the Purchaser for Fraud or an intentional and willful breach of its obligations under this Agreement.

(ii) If this Agreement is terminated pursuant to **Section 10.01(h)**, **Section 10.01(i)**, so long as at the time of such termination all of the conditions specified in **Article VIII** have been satisfied or waived (other than (x) the condition set forth in

**Section 8.09**, (y) the condition set forth in **Section 8.05** (solely as it relates to CFIUS) and (z) those conditions that by their nature are to be satisfied at the Closing, **Section 10.01(j)** or, so long as a breach of, or default under, this Agreement by any Seller or the Seller Representative is not the primary cause of the conditions specified in **Article VIII** not having occurred by the Secondary End Date, **Section 10.01(k)**, or otherwise terminated by Purchaser or the Seller Representative for any reason (other than in the circumstances described in **Section 10.02(c)(i)**) when this Agreement could have been terminated pursuant to (A) **Section 10.01(h)**, (B) **Section 10.01(i)**, (C) so long as at the time of such termination all of the conditions specified in **Article VIII** have been satisfied or waived (other than (x) the condition set forth in **Section 8.09**, (y) the condition set forth in **Section 8.05** (solely as it relates to CFIUS) and (z) those conditions that by their nature are to be satisfied at the Closing, **Section 10.01(j)** or (D) so long as a breach of, or default under, this Agreement by any Seller or the Seller Representative is not the primary cause of the conditions specified in **Article VIII** not having occurred by the Secondary End Date, **Section 10.01(k)**, (1) \$250,000 of the Deposit (less any Operating Expenses if such termination occurs following the Flip Date) shall be retained by the Seller Representative for further distribution to the Sellers and (2) the remainder of the Deposit shall promptly following such termination be refunded to Purchaser, to the account(s) designated by Purchaser.

(iii) If this Agreement terminates for any reason other than in the circumstances described in **Section 10.02(c)(i)** or **Section 10.02(c)(ii)**, the then-current balance of the Deposit (less any Operating Expenses if such termination occurs following the Flip Date) shall promptly following such termination be refunded to Purchaser, to the account(s) designated by Purchaser.

## **ARTICLE XI NON-SURVIVAL; SELLER REPRESENTATIVE**

**Section 11.01 Non-Survival of Representations; Warranties and Covenants.** The Parties, intending to modify any applicable statute of limitations, agree that (a)(i) the representations and warranties in this Agreement and in any certificate delivered pursuant hereto and (ii) the covenants in this Agreement only requiring performance at or prior to the Closing shall, in each case, terminate and be of no further force and effect effective as of the Closing and shall not survive the Closing for any purpose, and thereafter there shall be no liability on the part of, nor shall any claim be made by or on behalf of, any Party or any Party's Affiliates in respect thereof and (b) the covenants in this Agreement that contemplate performance after the Closing or expressly by their terms survive the Closing shall survive the Closing in accordance with their respective terms (the "**Surviving Covenants**") until the earlier of (i) full performance of such covenant in accordance with its terms and (ii) three (3) years following the Closing Date; provided that, notwithstanding the foregoing, the covenant in **Section 7.03** shall survive until fully performed in accordance with its terms. Except with respect to the Surviving Covenants or Fraud, no other remedy shall be asserted or sought by any Party, and each Party shall cause its Affiliates not to assert or seek any other remedy, against any other Party or any of its Affiliates under any contract, misrepresentation, tort, strict liability, or statutory or regulatory Law or theory or otherwise, all such remedies being hereby knowingly and expressly waived and relinquished to the fullest extent permitted under applicable Law. Each Party acknowledges and agrees, on its own

behalf and on behalf of its Affiliates that the agreements contained in this **Section 11.01** are an integral part of the transactions contemplated hereby and that, without the agreements set forth in this **Section 11.01**, none of the Parties would enter into this Agreement. Notwithstanding anything to the contrary contained in this Agreement, nothing shall limit any claims for Fraud.

### **Section 11.02 Seller Representative.**

(a) The Parties have agreed that it is desirable to designate a representative to act on behalf of Sellers for certain limited purposes as specified herein (the “**Seller Representative**”). Lincoln Power, L.L.C. shall be the agent and attorney-in-fact for each Seller to act as the Seller Representative under this Agreement in accordance with the terms of this **Section 11.02**. In the event of the resignation of the Seller Representative, a successor Seller Representative shall be appointed by the resigning Seller Representative.

(b) The Seller Representative is hereby authorized and empowered to act for, and on behalf of, any or all of Sellers (with full power of substitution in the premises) in connection with such matters as are reasonably necessary for the consummation of the transactions contemplated by this Agreement, including (i) to receive or direct the receipt or distribution of all payments owing to Sellers under this Agreement, (ii) to withhold any amounts received on behalf of Sellers in order to satisfy any actual or potential liabilities of Sellers under this Agreement, (iii) to make any payments on behalf of Sellers and collect from Sellers any amounts paid in settlement of any claims under this Agreement, (iv) to terminate, amend, waive any provision of or abandon this Agreement or any of the Seller Transaction Documents, (v) to act as the representative of Sellers to review and authorize all claims and disputes or question the accuracy thereof, (vi) to negotiate and compromise on Sellers’ behalf with Purchaser any claims asserted hereunder and to authorize payments to be made with respect thereto, (vii) to distribute or direct the distribution of any payments to Sellers as contemplated by this Agreement, (viii) to take such further actions as are authorized in this Agreement or the Seller Transaction Documents and (ix) in general, do all things and perform all acts, including executing and delivering all agreements (including the Seller Transaction Documents), certificates, receipts, consents, elections, instructions and other documents contemplated by or deemed by the Seller Representative to be necessary or desirable in connection with this Agreement, the Seller Transaction Documents and the transactions contemplated by this Agreement. Purchaser shall be entitled to rely on such appointment and to treat the Seller Representative as the duly appointed attorney-in-fact of each Seller. Notices given to the Seller Representative in accordance with the provisions of this Agreement shall constitute notice to Sellers for all purposes under this Agreement. The Seller Representative shall not have any duties or responsibilities except those expressly set forth in this Agreement, and no implied covenants, agreements, functions, duties, responsibilities, obligations or liabilities shall be read into this Agreement or shall otherwise exist against the Seller Representative.

(c) The appointment of the Seller Representative is an agency coupled with an interest and is irrevocable and any action taken by the Seller Representative pursuant to the authority granted in this **Section 11.02** shall be effective and absolutely binding on each Seller notwithstanding any contrary action of or direction from such Seller, and the dissolution or other termination of existence, of any Seller shall not terminate the authority and agency of the Seller Representative. Purchaser and any other party to any Seller Transaction Document in dealing with

the Seller Representative may conclusively rely, without inquiry, upon any act of the Seller Representative as the act of Sellers.

(d) The Seller Representative shall not be liable to any Seller, with respect to any action taken or omitted to be taken by the Seller Representative in its role as the Seller Representative under or in connection with this Agreement or any Seller Transaction Document. Acquiror and Merger Sub acknowledge and agree that the Holder Representative is party to this Agreement solely for purposes of serving as the “Seller Representative”.

(e) The Seller Representative shall receive no compensation for service as such but shall receive reimbursement from, and be indemnified by, Sellers for any and all expenses, charges and liabilities, including reasonable attorneys’ fees incurred by the Seller Representative in the performance or discharge of its duties set forth in this **Section 11.02**.

## **ARTICLE XII MISCELLANEOUS**

**Section 12.01 Entire Agreement.** This Agreement and the agreements and documents referred to herein contain the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersede all prior agreements and understandings, whether written or oral, relating to such subject matter in any way. The Parties have voluntarily agreed to define their rights, liabilities and obligations with respect to the transactions contemplated hereby exclusively in contract pursuant to the express terms and provisions of this Agreement, and, except in the case of Fraud, the Parties expressly disclaim that they are owed any duties or are entitled to any remedies not expressly set forth in this Agreement. Furthermore, this Agreement embodies the justifiable expectations of sophisticated parties derived from arm’s-length negotiations and shall not be deemed to create a partnership between Sellers or any of their respective Affiliates, on the one hand, and Purchaser or any of its Affiliates, on the other hand, and no Person has any other special relationship with another Person that would justify any expectation beyond that of an ordinary buyer and an ordinary seller in an arm’s-length transaction.

### **Section 12.02 Expenses; Payments.**

(a) Except as otherwise specified in this Agreement, whether or not the transactions contemplated hereby are consummated, each Party shall pay its own costs and expenses; provided, however, that Purchaser shall pay all filing fees with respect to any CFIUS Notice and the obtainment of all Governmental Approvals required to be made pursuant to **Section 8.06**.

(b) Each Party agrees that, where not otherwise specified, all amounts required to be paid hereunder shall be paid in United States currency and, except as otherwise expressly set forth in this Agreement, without discount, rebate or reduction and subject to no counterclaim or offset, on the dates specified herein.

### **Section 12.03 Confidentiality.**

(a) From and after the Closing, each Party will, and will cause its Affiliates and Representatives to, hold in strict confidence all documents and information concerning another

Party or any of its Affiliates furnished to it by another Party or such other Party's Affiliates or Representatives in connection with this Agreement or the transactions contemplated hereby (the "**Confidential Information**"), and treat all such Confidential Information as proprietary, secret and confidential; provided, however, from and after the Closing, (x) such confidentiality obligations of Purchaser and its Affiliates and Representatives shall terminate with respect to all Confidential Information other than with respect to any Confidential Information that relates exclusively to Sellers or Sellers' Affiliates or the Excluded Assets or Excluded Liabilities and (y) without limiting **Section 12.19**, all Confidential Information relating to the Acquired Assets or their respective businesses or operations shall be deemed to be the Confidential Information of Purchaser. Except with respect to Purchaser to the extent Purchaser's confidentiality obligations are terminated from and after the Closing pursuant to the previous sentence, in no event shall either Party distribute to third parties any Confidential Information; provided, however, that nothing in this **Section 12.03** shall limit the disclosure by any Party of any Confidential Information:

(i) to the extent requested or required by Law or Order (provided that the disclosing Party agrees to give the non-disclosing Party prompt and reasonably sufficient written notice thereof so as to enable the non-disclosing Party to seek a protective order, oppose any action by the disclosing Party, or pursue any other appropriate remedy, if so desired by the non-disclosing Party). If such a protective order or other remedy is not obtained, or if the non-disclosing Party, in its sole discretion, waives in writing compliance with this Agreement, the disclosing Party (or such other Person required to disclose the Confidential Information) may disclose only that portion of the Confidential Information that it is legally required to disclose to avoid contempt or other penalty in the reasonable opinion of counsel to the disclosing Party (or such other Person required to disclose the Confidential Information), and shall exercise commercially reasonable efforts to obtain reliable assurance that confidential treatment will be accorded such Confidential Information so disclosed; provided that notwithstanding the foregoing clause (i) either Party may disclose information in response to routine examinations by Governmental Authorities not targeted at the Acquired Assets, the transactions contemplated by this Agreement or the Confidential Information without first complying with the provisions of this clause (i);

(ii) in an Action brought by a Party in pursuit of its rights or in the exercise of its remedies under this Agreement or the transactions contemplated hereby;

(iii) to the extent that such Confidential Information can be shown to have come within the public domain through no action or omission of the disclosing Party or its Affiliates or Representatives; and

(iv) later acquired by the receiving Party from another source if the receiving Party is not aware that such source is under an obligation to another Party hereto to keep such Confidential Information confidential.

(b) To the extent that any Confidential Information may include materials subject to the attorney-client privilege, no Seller is waiving, and no Seller will be deemed to have waived or diminished, its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any Confidential Information (including



Confidential Information related to pending or threatened litigation) to Purchaser, its Affiliates or their respective Representatives, regardless of whether any Seller has asserted or is or may be entitled to assert such privileges and protections. In furtherance of the foregoing, neither Purchaser nor its Affiliates shall claim or contend, in any Action involving either Party, that any Seller waived its attorney work-product protections, attorney-client privileges or similar protections and privileges with respect to any information, documents or other material (whether or not disclosed to Purchaser or its Affiliates) solely due to such Seller's disclosure of Confidential Information (including Confidential Information related to pending or threatened litigation) to Purchaser, its Affiliates or their respective Representatives.

(c) For the avoidance of doubt, the terms of the Confidentiality Agreement shall continue in full force and effect in accordance with its terms until the consummation of the Closing.

**Section 12.04 Announcements.** From the date of this Agreement until, or in connection with, the Closing, none of Sellers, Purchaser or any of their respective Affiliates shall issue or make any reports, statements or releases to the public or generally to the employees, customers, suppliers or other Persons to whom Sellers or the Business sell goods or provide services or with whom Sellers or the Business otherwise have significant business relationships with respect to this Agreement or the transactions contemplated hereby without the consent of, in the case of Sellers, Purchaser, or in the case of Purchaser, the Seller Representative, which consent shall not be unreasonably withheld, conditioned or delayed; provided that for purposes of clarity, the foregoing shall not restrict reports, statements or releases (a) that are necessary for the procurement of any required consents, approvals, payoff letters and similar documentation or (b) that a Party determines in good faith, after consultation with legal counsel, is required by Law. Sellers and Purchaser shall also obtain the other Parties' prior approval of any press release to be issued announcing the consummation of the transactions contemplated by this Agreement. For the avoidance of doubt, nothing in **Section 12.03** or this **Section 12.04** shall limit Sellers ability to disclose information or make announcements that Sellers determine, in good faith, are reasonably necessary in the conduct of the Bankruptcy Cases. Purchaser shall promptly, and in any event within thirty (30) days after the Closing Date, discontinue the use of or any reference to any and all of the Sellers' Marks or any stationary, signage or other materials displaying or otherwise using any Sellers' Mark.

**Section 12.05 No Waiver.** Any term or condition of this Agreement may be waived at any time by the Party that is entitled to the benefit thereof, but no such waiver shall be effective unless set forth in a written instrument duly executed by or on behalf of the Party waiving such term or condition. No waiver by any Party of any term or condition of this Agreement, in any one or more instances, shall be deemed to be or construed as a waiver of the same or any other term or condition of this Agreement on any prior or future occasion.

**Section 12.06 Amendments.** Any provision of this Agreement may be modified, supplemented or waived only by an instrument in writing duly executed by Purchaser and the Seller Representative. Any such modification, supplement or waiver shall be for such period and subject to such conditions as shall be specified in the instrument effecting the same and shall be binding upon each of Purchaser and Sellers, and any such waiver shall be effective only in the specific instance and for the purposes for which given. No course of dealing between or among any Persons having any interest in this Agreement shall be deemed effective to modify, amend or

discharge any part of this Agreement or any rights or obligations of any Person under or by reason of this Agreement.

**Section 12.07 Addresses for Notices.** All notices and other communications required or permitted to be given or made under this Agreement shall be given or made in writing, by physical (including by mail or courier) or electronic mail delivery to the address specified below or such other address as shall be designated in a notice in writing. Notices will be effective and deemed to have been given (a) when personally delivered, sent by email (so long as the sender of such email does not receive an automatic reply from the recipient's email server indicating that the recipient did not receive such email) or sent by reputable overnight express courier (charges prepaid), or (b) three (3) days following mailing by certified or registered mail, postage prepaid and return receipt requested.

If to Sellers or the Seller Representative:

Lincoln Power, L.L.C.  
c/o Cogentrix Energy Power Management, LLC  
13860 Ballantyne Corporate Place – Suite 300  
Charlotte, NC 28277  
Attn: General Counsel  
Email: georgeknapp@cogentrix.com

with copies (which shall not constitute notice) to:

Latham & Watkins LLP  
1271 Avenue of the Americas  
New York, NY 10020  
Attn: David Allinson; Caroline Reckler  
Email: david.allinson@lw.com; caroline.reckler@lw.com

If to Purchaser:

Middle River Power VI LLC  
11 West 42<sup>nd</sup> Street, 9<sup>th</sup> Floor  
New York, New York 10036  
Attn: Kiran Ramineni  
Email: kramineni@avenuecapital.com

with a copy (which shall not constitute notice) to:

Baker Botts L.L.P.  
700 K Street, N.W.  
Washington, D.C. 20001-5692  
Attn: Elaine M. Walsh; Scott R. Bowling  
Email: elaine.walsh@bakerbotts.com; scott.bowling@bakerbotts.com

**Section 12.08 Specific Performance.**

(a) Purchaser acknowledges that the rights of Sellers to consummate the transactions contemplated hereby are unique and recognize and affirm that in the event any of the provisions of this Agreement are not performed in accordance with their specific terms or otherwise are breached, money damages would be inadequate (and therefore Sellers would have no adequate remedy at law) and Sellers would be irreparably damaged. Accordingly, Purchaser agrees that, subject to **Section 10.02** and the next sentence of this **Section 12.08**, (i) Sellers shall be entitled to specific performance, an injunction or other equitable relief (without posting of bond or other security or needing to prove irreparable harm or damages) to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and the terms and provisions hereof, in addition to any other remedy to which Sellers may be entitled, at law or in equity, and (ii) the right of specific performance and other equitable relief is an integral part of the transactions contemplated by this Agreement and without that right as provided in this **Section 12.08**, Sellers would not have entered into this Agreement.

(b) If, on or prior to the Termination Date, any Seller brings any Action, in each case, in accordance with the terms hereof, to enforce specifically the performance of the terms and provisions hereof by Purchaser, the Termination Date shall automatically be extended (i) for the period during which such Action is pending, plus ten (10) Business Days or (ii) by such other time period established by the court presiding over such Action, as the case may be.

(c) Notwithstanding anything to the contrary contained herein, while Sellers may pursue both a grant of specific performance to the extent permitted by this **Section 12.08** and the forfeiture of the Deposit by Purchaser, under no circumstances shall Sellers be permitted or entitled to receive both (A) a grant of specific performance to require Purchaser to consummate the Closing and (B) the forfeiture of the Deposit by Purchaser.

**Section 12.09 Captions.** The captions and section headings appearing in this Agreement are included solely for convenience of reference and are not intended to affect the interpretation of any provision of this Agreement.

**Section 12.10 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable Law, but if any provision of this Agreement or the application of any such provision to any Person or circumstance shall be held to be prohibited by or invalid, illegal or unenforceable under applicable law in any respect by a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, illegality or unenforceability, without invalidating the remainder of such provision or the remaining provisions of this Agreement, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. Furthermore, in lieu of such illegal, invalid or unenforceable provision, there shall be added automatically as a part of this Agreement a legal, valid and enforceable provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible.

**Section 12.11 Assignment.** This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided that neither this Agreement nor any of the rights, interests or obligations hereunder may

be assigned or delegated by any Party (including by operation of law) without the prior written consent of the other Parties; provided, however, that Purchaser may assign its rights, interests and obligations hereunder to any Affiliate or Affiliates of Purchaser, or to Purchaser's lenders for collateral security purposes, but such assignment shall not release Purchaser from its obligations hereunder.

**Section 12.12 No Third-Party Beneficiary.** The terms and provisions of this Agreement are intended solely for the benefit of each Party hereto and their respective successors or permitted assigns, and it is not the intention of the Parties to confer third-party beneficiary rights upon any other Person other than with respect to the Non-Party Affiliates identified in **Section 12.13(b)**, Latham under **Section 12.19**, each of which provisions is intended to be for the benefit of the Persons covered thereby or to be paid thereunder and may be enforced by such Person.

**Section 12.13 Disclaimer; Non-Recourse.**

(a) EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, (I) THE ACQUIRED ASSETS AND ASSUMED LIABILITIES ARE BEING TRANSFERRED "AS IS, WHERE IS, WITH ALL FAULTS," AND, (II) WITHOUT LIMITING THE GENERALITY OF **Section 6.04**, SELLERS EXPRESSLY DISCLAIM ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, AS TO THE CONDITION, VALUE OR QUALITY OF THE ACQUIRED ASSETS AND ASSUMED LIABILITIES OR THE PROSPECTS (FINANCIAL OR OTHERWISE), RISKS AND OTHER INCIDENTS OF THE BUSINESS, OR THE PROJECT.

(b) All claims or causes of action (whether in contract or in tort or otherwise) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement), may be made only against the Persons that are expressly identified as Parties. No Person who is not a named party to this Agreement, including any past, present or future direct or indirect director, officer, employee, incorporator, member, manager, partner, equityholder, Affiliate, agent, attorney or other Representative of any named party to this Agreement (such Persons, collectively, "**Non-Party Affiliates**"), shall have any liability (whether in contract or in tort or otherwise, or based upon any theory that seeks to impose liability of an entity party against its owners or Affiliates) for any obligations or liabilities arising under, in connection with or related to this Agreement or for any claim based on, in respect of, or by reason of this Agreement or its negotiation or execution, and each Party waives and releases all such Liabilities, claims and obligations against any such Non-Party Affiliates. Non-Party Affiliates are expressly intended as third-party beneficiaries of this **Section 12.13(b)**.

(c) Notwithstanding anything to the contrary contained herein or provided for under any applicable Law or Order, nothing shall limit the obligations of, or preclude or derogate from any claim or cause of action against Purchaser Parent pursuant to the Confidentiality Agreement in accordance with the terms of such Contract.

**Section 12.14 Counterparts.** This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument and any of

the Parties to this Agreement may execute this Agreement by signing any such counterpart. In the event that any signature is delivered by e-mail delivery of a “.pdf” format data file, such signature shall create a valid and binding obligation of the Party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or “.pdf” signature page were an original thereof.

**Section 12.15 Governing Law.** This Agreement shall be interpreted and construed in accordance with the laws of the State of Delaware and any and all Actions related to or arising out of or relating to this Agreement, whether sounding in contract, tort or statute, shall be governed by the laws of the State of Delaware, including its statutes of limitations, without giving effect to any conflict of law or other rule that would result in the application of the laws of a different jurisdiction.

**Section 12.16 Consent to Jurisdiction.** The Parties irrevocably agree that, during the period from the date hereof until the date on which the Bankruptcy Cases are closed or dismissed, any Action seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby shall be brought exclusively in the Bankruptcy Court. The Parties further irrevocably agree that, after the Bankruptcy Cases are closed or dismissed, any Action with respect to this Agreement or the transactions contemplated hereby shall be brought against any of the Parties exclusively in either the United States District Court for the District of Delaware or any state court of the State of Delaware located in such district, and each of the Parties hereby irrevocably consents to the jurisdiction of such court and the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such Action and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such Action in such courts or that any such Action which is brought in such courts has been brought in an inconvenient forum. Process in any Action may be served on any party anywhere in the world, whether within or without the jurisdiction of the Bankruptcy Court, the United States District Court for the District of Delaware or any state court of the State of Delaware. Without limiting the foregoing, each Party agrees that service of process on such Party in the manner as provided in **Section 12.07** for notices shall be deemed effective service of process on such Party.

**Section 12.17 Waiver of Jury Trial.** TO THE FULLEST EXTENT PERMITTED BY LAW, EACH PARTY HEREBY WAIVES ALL RIGHTS TO A TRIAL BY JURY IN ANY LEGAL ACTION, SUIT, OR PROCEEDING (WHETHER ARISING IN CONTRACT, TORT OR OTHERWISE) TO ENFORCE OR INTERPRET THE PROVISIONS OF THIS AGREEMENT OR THAT OTHERWISE RELATES TO THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED HEREBY OR THE RELATIONSHIPS ESTABLISHED AMONG THE PARTIES HEREUNDER.

**Section 12.18 Disclosure.** Any fact or item disclosed in any section of the Seller Disclosure Schedule shall be deemed disclosed in each other section of the Seller Disclosure Schedule to which such fact or item may apply so long as (a) such other section is specifically referenced by applicable cross-reference or (b) it is reasonably apparent on the face of such disclosure that such disclosure is applicable to such other section. The headings contained in the Seller Disclosure Schedule are for convenience of reference only and shall not be deemed to modify or influence the interpretation of the information contained in the Seller Disclosure

Schedule or this Agreement. The Seller Disclosure Schedule is not intended to constitute, and shall not be construed as, an admission or indication that any such fact or item is required to be disclosed. Any fact or item disclosed in the Seller Disclosure Schedule shall not by reason only of such inclusion be deemed to be material, to establish any standard of materiality or to define further the meaning of such terms for purposes of this Agreement and matters reflected in the Seller Disclosure Schedule are not necessarily limited to matters required by this Agreement to be reflected herein and may be included solely for information purposes. No disclosure in the Seller Disclosure Schedule relating to any possible breach or violation of any Contract, Law or Order shall be construed as an admission or indication that any such breach or violation exists or has actually occurred. The information contained in the Seller Disclosure Schedule shall be kept strictly confidential by the Parties pursuant to the terms of **Section 12.03** and no third party may rely on any information disclosed or set forth therein.

**Section 12.19 Legal Representation.** Purchaser agrees, on their own behalf and on behalf of their directors, managers, members, partners, officers, employees and Affiliates and each of their successors and assigns (all such parties, the “**Waiving Parties**”), that Latham & Watkins LLP (“**Latham**”) (or any successor thereto) may represent Sellers or any direct or indirect director, manager, member, partner, officer, employee, equityholder, Affiliate or other Representative of any Seller, in connection with any dispute, Action or obligation arising out of or relating to this Agreement, any agreement entered into in connection herewith or the transactions contemplated hereby (any such representation, the “**Post-Closing Representation**”) notwithstanding its representation (or any continued representation) of Sellers, and Purchaser consents thereto on behalf of itself and the Waiving Parties, and Purchaser irrevocably waives (and will not assert) any conflict of interest or any objection arising therefrom or relating thereto. Purchaser acknowledges that the foregoing provision applies whether or not Latham provides legal services to the Business or the Project after the Closing Date. Purchaser irrevocably acknowledges and agrees, for itself and the Waiving Parties, that all communications among Latham, Sellers or any director, officer, manager, member, employee or other Representative of any of the foregoing made in connection with the negotiation, preparation, execution, delivery and performance under, or any dispute or proceeding arising out of or relating to, this Agreement, any agreement entered into in connection herewith, the transactions contemplated hereby or any matter relating to any of the foregoing, are Excluded Assets and privileged communications and the attorney-client privilege and the expectation of client confidence belongs to solely to Sellers and may be controlled by Sellers and shall not pass to or be claimed by Purchaser and from and after the Closing none of Purchaser or any Person purporting to act on behalf of or through Purchaser or any of the Waiving Parties will seek to obtain the same by any process. From and after the Closing, Purchaser, on behalf of itself and the Waiving Parties, waives and will not assert any attorney-client privilege with respect to any communication among Latham, Sellers or any director, officer, manager, member, employee or other Representative of any of the foregoing occurring prior to the Closing in connection with any Post-Closing Representation. Notwithstanding the foregoing, in the event that a dispute arises between Purchaser, on the one hand, and a third party, on the other hand, Purchaser may assert the attorney-client privilege to prevent disclosure of confidential communications to such third party.

**Section 12.20 Release.**

(a) Effective as of the Closing, each Seller Released Party shall release and forever discharge each Purchaser Released Party from any and all Liabilities, claims and causes of

action, whether known or unknown, including any derivative claims, asserted by or on behalf of the Seller Released Parties, based on or relating to, or in any manner arising from, in whole or in part, (i) the Released Claims and (ii) any events, circumstances or actions occurring, existing or taken prior to or as of the Closing Date in connection with or relating to the Released Claims, in each case except (A) in the case of Fraud and (B) for rights and obligations arising from or in connection with this Agreement, the Seller Transaction Documents or the Purchaser Transaction Documents.

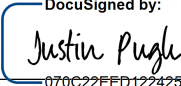
(b) Effective as of the Closing, each Purchaser Released Party shall release and forever discharge each Seller Released Party from any and all Liabilities, claims and causes of action, whether known or unknown, including any derivative claims, asserted by or on behalf of the Purchaser Released Parties, based on or relating to, or in any manner arising from, in whole or in part, (i) the Released Claims and (ii) any events, circumstances or actions occurring, existing or taken prior to or as of the Closing Date in connection with or relating to the Released Claims, in each case except (A) in the case of Fraud and (B) for rights and obligations arising from or in connection with this Agreement, the Seller Transaction Documents (other than the Deed executed and acknowledged pursuant to **Section 8.07(b)**) or the Purchaser Transaction Documents.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, this Agreement has been duly executed and delivered by the duly authorized representative of each party hereto as of the date first above written.

**SELLERS:**

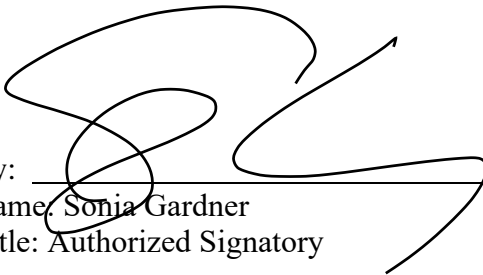
**Cogentrix Lincoln Holdings II, LLC**  
**Lincoln Power, L.L.C.**  
**Elgin Energy Center Holdings, LLC**  
**Elgin Energy Center, LLC**  
**Valley Road Holdings, LLC**  
**Valley Road Funding, LLC**  
**Rocky Road Power, LLC**

DocuSigned by:  
  
By: \_\_\_\_\_  
Name: Justin Pugh  
Title: Chief Restructuring Officer



**PURCHASER:**

**Middle River Power VI LLC**

By:   
Name: Sonia Gardner  
Title: Authorized Signatory

**EXHIBIT A**

**[Reserved.]**

**EXHIBIT B**  
**FORM OF DEED**

[See attached.]

**SPECIAL WARRANTY DEED**

ILLINOIS

*Above Space for Recorder's Use Only*

THE GRANTOR, **ELGIN ENERGY CENTER, LLC**, an Illinois limited liability company, having a mailing address at \_\_\_\_\_

\_\_\_\_\_, and authorized to transact business in the State of Illinois, for and in consideration of TEN and 00/100 DOLLARS, and other good and valuable considerations in hand paid, does GRANT, BARGAIN, SELL AND CONVEY to (*Name and Address of Grantee(s):*) \_\_\_\_\_, a(n)

\_\_\_\_\_, having a mailing address at \_\_\_\_\_

\_\_\_\_\_, and authorized to transact business in the State of Illinois, the following described real estate, situated in the County of COOK in the State of Illinois to wit: (**See Exhibit A for legal description attached here to and made part hereof.**), hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any way appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever, of the party of the first part, either in law or equity, of, in and to the above described premises, with the hereditaments and appurtenances: TO HAVE AND TO HOLD the said premises as above described, with the appurtenances, unto the party of the second part, its successors and assigns forever.

And the party of the first part, for itself, and its successors, does covenant, promise and agree, to and with the party of the second part, its successors and assigns, that it has not done or suffered to be done, anything whereby the said premises hereby granted are, or may be, in any manner encumbered or charged, except as herein recited, and that IT WILL WARRANT AND DEFEND the said premises against all persons lawfully claiming, or to claim the same, by, through or

under it, SUBJECT TO: general taxes for 2024 and subsequent years; covenants, conditions and restrictions of record, if any;

Permanent Real Estate Index Number: 06-31-201-018-0000 Vol. 061

Address of Real Estate:  
1559 Gifford Road  
Elgin, Illinois

The date of this deed of conveyance is \_\_\_\_\_, 2023.

*[Signature page of Grantor follows on the next page.]*

**Grantor:**

**ELGIN ENERGY CENTER, LLC**, an Illinois limited liability company

By: \_\_\_\_\_  
Name  
Title:

State of \_\_\_\_\_, County of \_\_\_\_\_

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that \_\_\_\_\_ personally known to me to be the same person(s) whose name(s) is(are) subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he/she(they) signed, sealed and delivered the said instrument as his/her(their) free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

*(Impress Seal Here)*

Given under my hand and official seal .

*(My Commission Expires:*  
\_\_\_\_\_ )

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

**LEGAL DESCRIPTION**

For the Premises commonly known as:  
Elgin Energy Center

Legal Description:

PARCEL 1:

THAT PART OF THE EAST 1/2 OF THE NORTHEAST 1/4 OF SECTION 31, AND THE WEST 1/2 OF THE NORTHWEST 1/4 OF SECTION 32, TOWNSHIP 41 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, DESCRIBED AS FOLLOWS:

COMMENCING AT AN EXISTING IRON STAKE AT THE CENTER LINE OF GIFFORD AND SPAULDING ROAD; THENCE NORTH 89 DEGREES 58 MINUTES 09 SECONDS EAST, ALONG THE CENTER LINE OF SAID SPAULDING ROAD AS MONUMENTED, A DISTANCE OF 33.00 FEET TO THE EASTERLY RIGHT OF WAY LINE OF SAID GIFFORD ROAD, SAID RIGHT OF WAY LINE BEING 33.00 FEET EASTERLY, AS MEASURED PERPENDICULAR AND PARALLEL TO SAID CENTER LINE OF GIFFORD ROAD; THENCE SOUTH 00 DEGREES 13 MINUTES 56 SECONDS WEST ALONG SAID EASTERLY RIGHT OF WAY LINE, A DISTANCE OF 710.00 FEET FOR THE POINT OF BEGINNING; THENCE NORTH 89 DEGREES 58 MINUTES 09 SECONDS EAST, PARALLEL WITH SAID CENTER LINE OF SPAULDING ROAD, A DISTANCE OF 1262.38 FEET TO THE EASTERLY LINE OF SAID EAST HALF OF THE NORTHEAST 1/4 OF SECTION 31; THENCE CONTINUING NORTH 89 DEGREES 58 MINUTES 09 SECONDS EAST, ALONG SAID LINE PARALLEL WITH THE CENTER LINE OF SPAULDING ROAD, A DISTANCE OF 365.73 FEET; THENCE SOUTH 00 DEGREES 17 MINUTES 07 SECONDS WEST, A DISTANCE OF 893.59 FEET TO THE NORTH LINE OF ELGIN-VICTOR INDUSTRIAL PARK, BEING A SUBDIVISION OF PART OF SAID SECTIONS 31 AND 32; THENCE NORTH 89 DEGREES 41 MINUTES 49 SECONDS WEST, ALONG SAID NORTH LINE, A DISTANCE OF 1627.93 FEET TO THE AFORESAID EASTERLY RIGHT OF WAY LINE OF GIFFORD ROAD; THENCE NORTH 00 DEGREES 22 MINUTES, 49 SECONDS EAST, ALONG SAID EASTERLY RIGHT OF WAY LINE, A DISTANCE OF 256.75 FEET TO AN ANGLE POINT IN SAID EASTERLY RIGHT OF WAY LINE; THENCE NORTH 00 DEGREES 13 MINUTES 56 SECONDS EAST, ALONG SAID EASTERLY RIGHT OF WAY LINE, A DISTANCE OF 627.36 FEET TO A POINT OF BEGINNING,

EXCEPTING THEREFROM THE EASTERN 277 FEET OF SUCH PROPERTY,

AND ALSO EXCEPTING THEREFROM THE LAND DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE NORTH LINE OF ELGIN-VICTOR INDUSTRIAL PARK UNIT NO. 1 AS AFORESAID WITH THE EAST LINE OF GIFFORD ROAD THENCE NORTHERLY ALONG SAID EAST LINE A DISTANCE OF 256.75 FEET TO AN ANGLE IN SAID EAST LINE; THENCE NORTHERLY ALONG SAID EAST LINE WHICH FORMS AN ANGLE OF 00 DEGREES 01 MINUTES TO THE LEFT WITH THE PROLONGATION OF THE LAST DESCRIBED COURSE A DISTANCE OF 154.46 FEET FOR THE PLACE OF BEGINNING; THENCE EASTERLY AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE A DISTANCE OF 80.0 FEET; THENCE NORTHERLY PARALLEL WITH THE EAST LINE OF GIFFORD ROAD, A DISTANCE OF 80.00 FEET; THENCE WESTERLY AT RIGHT ANGLES TO THE LAST DESCRIBED COURSE A DISTANCE OF 80.0 FEET TO THE EAST LINE OF GIFFORD ROAD; THENCE SOUTHERLY ALONG SAID EAST LINE A DISTANCE OF 80.0 FEET TO THE PLACE OF BEGINNING, IN COOK COUNTY, ILLINOIS.

PARCEL 2:

A NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CREATED BY GRANT BY REALEN HOMES, L.P., A PENNSYLVANIA LIMITED PARTNERSHIP, TO AMEREN ENERGY DEVELOPMENT COMPANY, AN ILLINOIS CORPORATION, DATED MARCH 03, 2004 AND RECORDED MARCH 08, 2004 AS DOCUMENT 0406839118 FOR THE PURPOSE TRANSMITTING FROM THE GRANTEE'S LAND DESCRIBED BELOW, SOUND WAVES, NOISE, LIGHT, AND VIBRATIONS, PURSUANT TO THE OPERATION OF GRANTEE'S FACILITIES AT FULL CAPACITY, INCLUDING, SPECIFICALLY, AND WITHOUT LIMITATION, THE TRANSMISSION OF SOUND WAVES NOT EXCEEDING THE LEVELS SHOW ON EXHIBIT E TO SAID GRANT BEING PART OF THE NORTH 1/2 OF SECTION 31 AND OF THE SOUTH 1500 FEET OF SECTION 30, TOWNSHIP 41 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, LYING EASTERLY OF THAT PARCEL DESCRIBED IN THE WARRANTY DEED RECORDED AS DOCUMENT 0020026246.

PARCEL 3:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CONTAINED IN A STORMWATER DISCHARGE EASEMENT RECORDED FEBRUARY 1, 2002 AS DOCUMENT NO. 0020137360.

PARCEL 4:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CONTAINED IN A GRANT OF STORMWATER DISPOSITION EASEMENT RECORDED JUNE 5, 2002 AS DOCUMENT NO. 0020631179 AND FIRST AMENDMENT TO GRANT OF STORM WATER DISPOSITION EASEMENT RECORDED MARCH 8, 2004 AS DOCUMENT NO. 0406839117 AND SECOND AMENDMENT TO GRANT OF STORM WATER DISPOSITION EASEMENT RECORDED MAY 20, 2005 AS DOCUMENT NO. 0514033127.

PARCEL 5:



PERPETUAL EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CONTAINED IN A GRANT OF EASEMENT TO AMEREN ENERGY DEVELOPMENT COMPANY RECORDED AUGUST 16, 2001 AS DOCUMENT NO. 0010756051.

PARCEL 6:

PERPETUAL EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CONTAINED IN A GRANT OF EASEMENT TO AMEREN ENERGY DEVELOPMENT COMPANY RECORDED NOVEMBER 21, 2001 AS DOCUMENT NO. 0011098216.

PARCEL 7:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CONTAINED IN A GRANT OF INTERCONNECTION EASEMENT RECORDED FEBRUARY 1, 2002 AS DOCUMENT NO. 0020137359.

PARCEL 8:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 AS CONTAINED IN A GAS PIPELINE EASEMENT RECORDED AUGUST 19, 2002 AS DOCUMENT NO. 0020909369.

This instrument was prepared by: Mark Leskiw Latham & Watkins LLP 1271 Avenue of the Americas New York, New York 10020	Send subsequent tax bills to:	Recorder – mail recorded document to:
--	----------------------------------	--

**EXHIBIT C**

**FORM OF BILL OF SALE**

[See attached.]

**BILL OF SALE AND ASSIGNMENT AND ASSUMPTION AGREEMENT**

This BILL OF SALE AND ASSIGNMENT AND ASSUMPTION AGREEMENT (this “Bill of Sale”) is made as of [x], 2023, by and among (a) Cogentrix Lincoln Holdings II, LLC, a Delaware limited liability company, Lincoln Power, L.L.C., a Delaware limited liability company, Elgin Energy Center Holdings, LLC, a Delaware limited liability company, Elgin Energy Center, LLC, a Delaware limited liability company, Valley Road Holdings, LLC, a Delaware limited liability company, Valley Road Funding, LLC, a Delaware limited liability company, and Rocky Road Power, LLC, a Delaware limited liability company (collectively, “Sellers”), and (b) Ricochet Power, LLC, a Delaware limited liability company (“Purchaser”).

**WHEREAS**, Sellers and Purchaser entered into that certain Asset Purchase Agreement, dated as of July 24, 2023 (as amended, the “Asset Purchase Agreement”);

**WHEREAS**, pursuant to the Asset Purchase Agreement, each Seller has agreed to sell, grant, convey, assign, transfer and deliver to Purchaser all of such Seller’s respective right, title and interest in, to and under the Acquired Assets, and Purchaser has agreed to acquire the Acquired Assets; and

**WHEREAS**, pursuant to the Asset Purchase Agreement, each Seller has agreed to assign the Assumed Liabilities to Purchaser, and Purchaser has agreed to assume, timely perform and discharge in accordance with their respective terms, the Assumed Liabilities.

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, it is hereby agreed that:

1. **Definitions**. Unless otherwise defined herein, all capitalized terms used in this Bill of Sale shall have the meanings set forth in the Asset Purchase Agreement.

2. **Transfer of Assets**. Effective as of the Closing, each Seller hereby sells, grants, conveys, assigns, transfers and delivers to Purchaser all of such Seller’s respective right, title and interest in, to and under the Acquired Assets, and Purchaser hereby accepts such sale, grant, conveyance, assignment, transfer and delivery of the Acquired Assets free and clear of all Liens except for Permitted Liens. Notwithstanding anything to the contrary in this Bill of Sale, none of the Excluded Assets nor any other assets, properties or rights of Sellers, other than the Acquired Assets), are being sold, granted, conveyed, assigned, transferred or delivered to Purchaser by this Bill of Sale.

3. **Assignment and Assumption of Assumed Liabilities**. Effective as of the Closing, each Seller hereby assigns, transfers, conveys and grants to Purchaser all of such Seller’s respective legal, beneficial, and other right, title, benefit, privileges, and interest in and to each of the Assumed Liabilities, all in accordance with the terms and conditions of the Asset Purchase Agreement. In consideration of said assignment, transfer, conveyance and granting, Purchaser hereby assumes and agrees to perform and discharge when due the Assumed Liabilities, all in accordance with the terms and conditions of the Asset Purchase Agreement. Notwithstanding the foregoing, Purchaser shall not assume and shall not be liable or responsible for the Excluded

Liabilities, all of which are retained by the Sellers in accordance with the terms of the Asset Purchase Agreement.

4. Subject to the Asset Purchase Agreement. This Bill of Sale is subject in all respects to the terms and conditions of the Asset Purchase Agreement, and all of the representations, warranties, covenants and agreements of Sellers and Purchaser contained therein. Nothing in this Bill of Sale shall supersede, amend, alter or modify (nor shall it be deemed or construed to supersede, amend, alter or modify) any of the terms or conditions of the Asset Purchase Agreement in any manner whatsoever. In the event of any conflict between the, provisions of this Bill of Sale and the provisions of the Asset Purchase Agreement, the provisions of the Asset Purchase Agreement shall control and prevail.

5. Representations and Warranties. Except as set forth in the Asset Purchase Agreement, Sellers do not make any representations or warranties, express or implied, with respect to the Acquired Assets or the Assumed Liabilities, and Sellers expressly disclaim any implied warranties.

6. Miscellaneous. Article XII of the Asset Purchase Agreement, to the extent applicable, shall apply to this Bill of Sale *mutatis mutandis*.

*[Signature pages follow]*

IN WITNESS WHEREOF, the undersigned have executed and delivered this Bill of Sale as of the date first written above.

**SELLERS:**

COGENTRIX LINCOLN HOLDINGS II, LLC  
LINCOLN POWER, L.L.C.  
ELGIN ENERGY CENTER HOLDINGS, LLC  
ELGIN ENERGY CENTER, LLC  
VALLEY ROAD HOLDINGS, LLC  
VALLEY ROAD FUNDING, LLC  
ROCKY ROAD POWER, LLC

By: \_\_\_\_\_  
Name:  
Title:

**PURCHASER:**

[∅]

By: \_\_\_\_\_  
Name:  
Title:

**ANNEX A**

**SELLERS**

Cogentrix Lincoln Holdings II, LLC

Lincoln Power, L.L.C.

Elgin Energy Center Holdings, LLC

Elgin Energy Center, LLC

Valley Road Holdings, LLC

Valley Road Funding, LLC

Rocky Road Power, LLC

**Exhibit C-2**

**Asset Purchase Agreement – Middle River Power VII LLC**



**ASSET PURCHASE AGREEMENT**

**by and among**

**Middle River Power VII LLC,**

**as Purchaser,**

**the Persons Identified on Annex A hereto,**

**as Sellers,**

**and**

**solely in its capacity as the initial Seller Representative,**

**Lincoln Power, L.L.C.**

**Dated as of July 24, 2023**

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**EXHIBITS**

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## ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT is made as of July 24, 2023 (this “**Agreement**”) by and among Middle River Power VII LLC, a Delaware limited liability company (“**Purchaser**”), the Persons (as defined below) identified on Annex A hereto (collectively, “**Sellers**” and each individually, a “**Seller**”), and Lincoln Power, L.L.C., a Delaware limited liability company, solely in its capacity as the initial Seller Representative (as defined below) hereunder. Each of Purchaser and Sellers are sometimes referred to herein collectively as the “**Parties**”, and each as a “**Party**”.

### WITNESSETH:

WHEREAS, Sellers and certain of their Affiliates (as defined below) filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the “**Bankruptcy Code**”), on March 31, 2023 in the United States Bankruptcy Court for the District of Delaware (the “**Bankruptcy Court**” and such cases commenced by the petitions, the “**Bankruptcy Cases**”);

WHEREAS, immediately prior to the execution of this Agreement, certain Sellers are the owners of a natural gas fired 333 MW combustion turbine power plant in East Dundee, Illinois known as the Rocky Road facility (the “**Project**”); and

WHEREAS, upon the terms and subject to the conditions set forth in this Agreement, Sellers desire to sell to Purchaser, and Purchaser desires to purchase from Sellers, for itself or for transfer into an Affiliate of Purchaser, the Acquired Assets (as defined below), and Sellers desire to assign to Purchaser or such Affiliate of Purchaser, and Purchaser through itself or such Affiliate desires to assume, the Assumed Liabilities (as defined below).

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

## ARTICLE I DEFINITIONS

**Section 1.01 Definitions.** As used in this Agreement, the following defined terms have the meanings indicated below:

“**Acquired Assets**” has the meaning ascribed thereto in **Section 2.01(a)**.

“**Actions**” means any action, litigation, suit, proceeding, arbitration or investigation, by or before any Governmental Authority.

“**Affiliate**” means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the Person specified. For purposes of this definition, “control” of a Person means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person whether through ownership of voting securities or ownership interests,

by Contract or otherwise, and specifically with respect to a corporation, partnership or limited liability company, means direct or indirect ownership of securities having the power to elect a majority of the board of directors or similar body governing the affairs of such Person; provided, however, that with respect to any Seller “Affiliate” shall not include (a) Carlyle Investment Management L.L.C. or any of its Affiliates or any investment fund or investment vehicle doing business as “The Carlyle Group”, (b) any investment fund or investment vehicle advised or managed by the Persons listed in clause (a) or the general partner or similar entity affiliated with any of the foregoing or (c) any Affiliate of any Person identified in clauses (a) or (b), in each case, excluding each Seller. Notwithstanding the foregoing, the proviso above shall not apply for purposes of any indemnitees, disclaimers, releases or waivers hereunder in favor of or for the benefit of Sellers or their Affiliates, and for purposes of **Section 3.19**, **Section 3.22**, **Section 12.03**, **Section 12.04** and **Section 12.20** the term “Affiliates” shall include the Persons specified in the above proviso.

“**Agreement**” has the meaning ascribed thereto in the preamble to this Agreement.

“**Allocation**” has the meaning ascribed thereto in **Section 7.01(c)**.

“**Alternative Transaction**” means, the sale, transfer or disposition of all or any material portion of the Acquired Assets (whether effected pursuant to a reorganization, merger, consolidation, business combination, joint venture, partnership, sale of assets, plan of reorganization or liquidation, or restructuring or similar transaction), other than (a) the transactions contemplated by and in accordance with this Agreement and (b) sales of Inventory in the ordinary course of business.

“**Anti-Corruption Laws**” means any applicable domestic or international Laws relating to anti-bribery, anti-money laundering or anti-corruption (governmental or commercial), including Laws that prohibit the corrupt payment, offer, promise, or authorization of the payment or transfer of anything of value (including gifts or entertainment), directly or indirectly, to any representative of a foreign Governmental Authority or commercial entity to obtain a business advantage, including the U.S. Foreign Corrupt Practices Act.

“**Asset Manager**” means, collectively, Cogentrix Energy Power Management, LLC and Lincoln Operating Services, LLC.

“**Assets**” means, with respect to a Person, all assets and properties of every kind, nature, character and description (whether real, personal or mixed, whether tangible or intangible and wherever situated), including the goodwill related thereto, operated, owned or leased by such Person.

“**Assumed Liabilities**” has the meaning ascribed thereto in **Section 2.01(c)**.

“**Auction**” means an auction or auctions, if any, for the sale of each Seller’s assets conducted pursuant to the terms and conditions of the Bid Procedures Order.

“**Back-up Bidder**” means the bidder for the Acquired Assets with the next-highest or otherwise second-best bid for the Acquired Assets following the conclusion of the Auction, as determined in accordance with the Bid Procedures.

“**Back-Up Termination Date**” means the earliest to occur of (a) if Purchaser is not the Successful Bidder, the date of consummation of the Transaction (as defined in the Bid Procedures) with the Successful Bidder at the Auction, (b) Purchaser’s receipt of notice from each Seller of the release of Purchaser’s obligations under **Section 7.02(a)** and (c) the End Date.

“**Balance Sheet Date**” has the meaning ascribed thereto in **Section 3.07**.

“**Bankruptcy Cases**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Bankruptcy Code**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Bankruptcy Costs**” means any fees and expenses of Sellers associated with the administration of the Bankruptcy Cases (including attorneys’ fees and other fees and expenses incurred by retained professionals for such purposes).

“**Bankruptcy Court**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Base Purchase Price**” has the meaning ascribed thereto in **Section 2.03**.

“**Bid Procedures**” means the bid procedures attached to the Bid Procedures Order as Exhibit 1 thereto.

“**Bid Procedures Motion**” means, the *Motion of Debtors for Entry of an Order (I) Approving Bid Procedures in Connection with the Sale of All or Substantially All of the Debtors’ Assets, (II) Scheduling Bid Deadlines and An Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (V) Granting Related Relief* [Docket No. 131], filed in the Bankruptcy Cases on May 1, 2023.

“**Bid Procedures Order**” means, the *Order (I) Approving Bid Procedures in Connection with the Sale of All or Substantially All of the Debtors’ Assets, (II) Scheduling Bid Deadlines and an Auction, (III) Approving the Form and Manner of Notice Thereof, (IV) Approving Procedures for the Assumption and Assignment of Contracts and Leases, and (V) Granting Related Relief* [Docket No. 205], entered by the Bankruptcy Court in the Bankruptcy Cases on May 26, 2023.

“**Business**” means the business and operations of the Project and the Acquired Assets as conducted on the date hereof.

“**Business Day**” means a day other than Saturday, Sunday or any day on which banks located in New York, New York are obligated to close.

“**Cash**” means all of any Seller’s cash, checking account balances, marketable securities, certificates of deposits, time deposits, bankers’ acceptances, commercial paper, security entitlements, securities accounts, commodity accounts, government securities and any other cash



equivalents, whether on hand, in transit, in banks or other financial institutions, or otherwise held by such Seller.

“**CFIUS**” means the Committee on Foreign Investment in the United States.

“**CFIUS Clearance**” means (a) Purchaser and Sellers have received written notice from CFIUS that (i) CFIUS has conducted an assessment, review, or investigation of the transactions contemplated by this Agreement and determined that there are no unresolved national security concerns, and has concluded all action under the DPA, (ii) pursuant to 31 C.F.R. § 800.407(a)(2), CFIUS has determined that it is not able to conclude action under the DPA with respect to the transactions contemplated by this Agreement based on a CFIUS Declaration but has not requested the filing of a CFIUS Notice or (iii) the transactions contemplated by this Agreement are not covered transactions, as defined in the DPA; or (b) CFIUS has sent a report to the President of the United States (the “**President**”) requesting the President’s decision on the transactions contemplated by this Agreement and either (i) the period under the DPA during which the President may announce his decision to take action to suspend or prohibit the transactions contemplated by this Agreement has expired without any such action being announced or taken or (ii) the President has announced a decision not to take any action to suspend or prohibit the transactions contemplated by this Agreement.

“**CFIUS Declaration**” means a declaration prepared jointly by Purchaser and Sellers with respect to the transactions contemplated by this Agreement and submitted to CFIUS pursuant to 31 C.F.R. Part 800 Subpart D.

“**CFIUS Denial**” means that CFIUS has notified Purchaser and any Seller that it (a) intends to recommend to the President that the transactions contemplated by this Agreement be prohibited and (b) has been unable to identify conditions mitigating the risk of the transactions contemplated by this Agreement sufficient to alter its recommendation.

“**CFIUS Notice**” means a joint voluntary notice prepared by Purchaser and Sellers with respect to the transactions contemplated by this Agreement and submitted to CFIUS pursuant to 31 C.F.R. Part 800 Subpart E.

“**Closing**” has the meaning ascribed thereto in **Section 2.04**.

“**Closing Date**” means (a) the fourteenth (14th) day or if such date is not a Business Day, the next Business Day thereafter or (b) such other date as Purchaser and the Seller Representative may mutually agree in writing, in each case following the date on which the last of the conditions set forth in **Article VIII** and **Article IX** are satisfied or waived by Purchaser or Sellers, as the case may be (except for such conditions that by their nature can only be satisfied at the Closing and subject to the satisfaction or waiver of such conditions as provided herein).

“**Code**” means the Internal Revenue Code of 1986, as may be amended, modified, supplemented or replaced from time to time, and the rules and regulations promulgated thereunder.

“**Confidential Information**” has the meaning ascribed thereto in **Section 12.03(a)**.

“**Confidentiality Agreement**” means that certain Confidentiality Agreement, dated as of May 4, 2023, by and between Lincoln Power, L.L.C. and Avenue Capital Management II, L.P.

“**Confirmation Hearing**” means a hearing before a Bankruptcy Court to (a) approve, among other things, this Agreement and the transactions contemplated hereby and (b) entry of the Confirmation Order.

“**Confirmation Order**” means an Order of the Bankruptcy Court, in form and substance reasonably acceptable to the Purchaser and the Seller Representative, among other things, granting the relief set forth in **Section 7.02(c)**.

“**Continuation Period**” has the meaning ascribed thereto in **Section 7.04(b)**.

“**Contract**” means any legally binding contract, agreement, lease, license, evidence of Indebtedness, mortgage, indenture, security agreement or other legally binding arrangement, whether written or oral, including any amendments and other modifications thereto.

“**Cure Costs**” has the meaning ascribed thereto in **Section 2.05(d)**.

“**Deposit**” has the meaning ascribed thereto in **Section 2.02**.

“**Deposit Account**” has the meaning ascribed thereto in **Section 2.02**.

“**Designation Deadline**” means the date that is fourteen (14) days prior to the Closing, or such other date as Purchaser and the Seller Representative mutually agree in writing and, if applicable, as the Bankruptcy Court may authorize.

“**DPA**” means Section 721 of the Defense Production Act of 1950, as amended, including all implementing regulations thereof.

“**Easement**” has the meaning ascribed thereto in **Section 3.11(c)**.

“**Easement Real Property**” has the meaning ascribed thereto in **Section 3.11(c)**.

“**Employee Plan**” means any “employee benefit plan,” as such term is defined in Section 3(3) of ERISA, whether or not subject to any provision of ERISA, including Title IV of ERISA, and each change in control, retention, severance, bonus, incentive, profit-sharing, retirement, equity or equity-based, deferred compensation, paid time off, health, welfare, material fringe benefits or other material benefit or compensation plan, program, policy, agreement or arrangement.

“**Enforceability Limitations**” means any Laws relating to bankruptcy, reorganization, insolvency, moratorium, fraudulent conveyance or preferential transfers, or similar Laws relating to or affecting creditors’ rights generally and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforceability is considered in any Action in equity or at Law).

“**Environmental Claim**” means any and all administrative, regulatory or judicial Actions, Orders or notices of noncompliance or violation by any third party (including any Governmental Authority) alleging liability (including liability for enforcement, investigatory costs, damages, Losses, contribution, indemnification, cost recovery, compensation, injunctive relief, cleanup costs, governmental resource costs, removal costs, remedial costs, natural resources damages, property damages, personal injuries or penalties) arising out of, based on or resulting from: (a) any violation or alleged violation of, or liability under, any Environmental Law or Environmental Permit; or (b) the presence, Release or threatened Release of, or exposure to, any Hazardous Substances at any location.

“**Environmental Laws**” means any and all Laws or binding agreements with any Governmental Authority relating to pollution or protection of the environment, natural resources, endangered, threatened or candidate species, biological or cultural resources, or occupational and public human health and safety (as it relates to exposure to Hazardous Substances), including those relating to the generation, manufacture, use, handling, treatment, storage, disposal, distribution, labeling, discharge, Release, threatened Release, control, cleanup, recycling, transportation or exposure to any Hazardous Substances.

“**Environmental Permit**” means any Permit required by or from a Governmental Authority under Environmental Law.

“**Equity Commitment Letter**” has the meaning ascribed thereto in **Section 4.07**.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as may be amended, modified, supplemented or replaced from time to time.

“**Excess Seller Costs**” means an amount equal to the amount by which any Seller Costs exceed \$1,312,500.00.

“**Excluded Assets**” has the meaning ascribed thereto in **Section 2.01(b)**.

“**Excluded Contracts**” means all Contracts to which any Seller is a party other than the Purchased Contracts, including the Contracts set forth in **Section 1.01(d) of the Seller Disclosure Schedule**.

“**Excluded Deposits**” has the meaning ascribed thereto in **Section 2.01(b)(xii)**.

“**Excluded Liabilities**” has the meaning ascribed thereto in **Section 2.01(d)**.

“**Executory Contract**” means any executory Contract (including any unexpired lease) related to the Acquired Assets and Assumed Liabilities to which any Seller or an Affiliate of any Seller is a party or a beneficiary or by which any Acquired Assets are bound.

“**EWG**” means “exempt wholesale generator” as that term is defined in PUHCA.

“**FERC**” means the Federal Energy Regulatory Commission, and any successor thereto.

“**Final Order**” means an Order of the Bankruptcy Court or other court of competent jurisdiction, which is in full force and effect, which has not been modified, amended, reversed, vacated or stayed and as to which the time to file an appeal, a motion for rehearing or reconsideration or a petition for writ of certiorari has expired and no such appeal, motion or petition is pending; provided that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Code, may be filed with respect to such order will not preclude such order from being a Final Order.

“**Financial Statements**” has the meaning ascribed thereto in **Section 3.07**.

“**Flip Date**” means the date that is fourteen (14) days after the Partial Satisfaction Date.

“**FPA**” means the Federal Power Act, 16 U.S.C. §§ 791a, et seq., as amended, and the implementing regulations of FERC thereunder.

“**Fraud**” means an actual (and not constructive or imputed) and intentional common law fraud under Delaware Law by a Party in the making of the representations and warranties by a Party in **Article III** or **Article IV**, as applicable, and not with respect to any other matters, with the intent to deceive the other Party; provided that such actual and intentional common law fraud of such Party specifically excludes any statement, representation or omission made negligently or recklessly.

“**GAAP**” means generally accepted accounting principles in the United States, consistently applied throughout the specified period.

“**Good Industry Practice**” means any of the practices, methods, standards, procedures and acts engaged in or approved by a significant portion of the electric generation industry and applicable to gas-fired power generation resources comparable to the Project during the relevant time period, or any of the practices, methods and acts that, in the exercise of reasonable judgment in light of the applicable manufacturer’s recommendations and the facts known at the time the decision is made, would reasonably have been expected to accomplish the desired result in a manner consistent with good business practices, Law, reliability and safety. “**Good Industry Practice**” is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather is intended to include practices, methods or acts that meet the foregoing qualifications.

“**Governance Document**” means, with respect to any Person, (a) the articles of incorporation or organization, certificates of formation and by-laws, the limited partnership agreement, the partnership agreement or the limited liability company agreement, or such other organizational documents of such Person, including those that are required to be registered or kept in the place of incorporation, organization or formation of such Person and that establish the legal personality of such Person and (b) any voting trust, shareholder agreement, voting agreement, pledge agreement, buy-sell agreement, right of first refusal, preemptive right or proxy or other agreement, right, instrument or understanding with respect to any purchase, sale, issuance, transfer, repurchase, redemption or voting of such equity interests, or any other similar governing document with respect to such Person.

**“Governmental Approval”** means any authorization, consent, approval, ruling, tariff, rate, certification, waiver, exemption, filing, variance or Order of, or any notice to or registration by or with, any Governmental Authority, including those required with respect to the transfer and reissuance of Transferred Permits.

**“Governmental Authority”** means any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any governmental authority, agency, department, board, commission, official, tribunal, court or arbitrator(s) of competent jurisdiction or other instrumentality of the United States or any state, county, city or other political subdivision or similar governing entity thereof, including FERC, the Federal Communications Commission, NERC, PJM, and any other governmental, quasi governmental or non-governmental body, administering, regulating or having general oversight over gas and power markets, including any regional transmission operator, independent system operator and any market monitor thereof, and compliance with Environmental Laws.

**“Hazardous Substance”** means any waste or other chemical, material or substance that is listed, defined, or regulated, as hazardous, radioactive, toxic, or a pollutant or a contaminant, or words of similar import, under or pursuant to any Environmental Law, including petroleum or petroleum by-products, asbestos or asbestos-containing materials, any radioactive materials, per- or polyfluoroalkyl substances or polychlorinated biphenyls.

**“Hedging Arrangements”** means any forward, futures, swap, collar, put, call, floor, cap, option or other Contract, that are intended to benefit from, or reduce or eliminate the risk of, fluctuations in the price of commodities, including electric power, natural gas or securities.

**“Improvements”** means all buildings, structures, improvements, facilities, fixtures, furnishings, furniture, offices, building systems and equipment, and all components thereof, in each case, owned or leased by Seller or any Affiliate thereof for use primarily at or in connection with the Project.

**“Indebtedness”** of any Person means, without duplication, all obligations of such Person (a) for borrowed money, (b) evidenced by notes, bonds, debentures or other debt security, (c) for the deferred purchase price of goods or services (other than trade payables or accruals incurred in the ordinary course of business), (d) as lessee under finance or capital leases, (e) any obligations, contingent or otherwise, under acceptance, letters of credit or similar facilities, obligations under any Hedging Arrangement, any other interest rate or other derivative securities, and any commitments by which a Person assures a creditor against loss (including contingent reimbursement obligations with respect to letters of credit), or (f) in the nature of guarantees of the obligations described in clauses (a) through (e) above of any other Person, in each case, including all unpaid interest, premiums, make-whole payments, yield maintenance fees, penalties and similar amounts relating to the obligations described in clauses (a) through (f) above.

**“Independent Accountant”** means a nationally recognized firm of independent certified public accounts reasonably acceptable to Purchaser and the Seller Representative.

**“Initial Contract Notice”** has the meaning ascribed thereto in **Section 2.05**.

**“Insurance Policies”** has the meaning ascribed thereto in **Section 3.16**.

“**Insurance Proceeds**” has the meaning ascribed thereto in **Section 5.08**.

“**Interim Period**” has the meaning ascribed thereto in **Section 5.01**.

“**Inventories**” means (a) any fuel inventories, materials, consumable supplies, chemical and gas inventories or similar raw materials located at the Project, in transit to the Project or stored offsite for use at the Project and (b) all inventories, parts, materials and supplies, including spare parts, that are for use at or in connection with the Project, in each case, in which Sellers have any right, title or interest.

“**Intellectual Property**” means all intellectual property and rights therein protected in any jurisdiction throughout the world, including all (a) patents, patent applications, invention disclosures and all related continuations, continuations-in-part, divisionals, reissues, re-examinations, substitutions and extensions thereof, (b) trademarks, service marks, corporate names, domain names, logos, slogans, trade dress, design rights, and other similar designations of source or origin, (c) copyrights and designs, (d) trade secrets and know-how, (e) to the extent not included in the foregoing, software (including source code) and related documentation and data and (f) all applications and registrations for any of the foregoing.

“**Knowledge of Purchaser**” means the actual knowledge, after reasonable inquiry by such Persons of their respective direct reports with overall responsibility for the specific subject matter, of those Persons listed in **Section 1.01(a) of the Purchaser Disclosure Schedule**.

“**Knowledge of Seller**” means the actual knowledge, after reasonable inquiry by such Persons of their respective direct reports with overall responsibility for the specific subject matter, of those Persons listed on **Section 1.01(b) of the Seller Disclosure Schedule**.

“**Latham**” has the meaning ascribed thereto in **Section 12.19**.

“**Laws**” means all laws, statutes, rules, regulations, ordinances, codes, Orders and constitutions of any Governmental Authority.

“**Liabilities**” means, with respect to any Person, all Indebtedness, obligations and other liabilities of such Person (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due).

“**Liens**” means any mortgage, deed of trust, pledge, assessment, security interest, lease, lien, adverse claim, levy, charge, easement, restrictive covenant, encroachment, protrusion, right-of-way, right-of-first offer or refusal, royalty, franchise, defect to title or other encumbrance, or any conditional sale contract, title retention contract or other contract to give any of the foregoing.

“**LOS**” has the meaning ascribed thereto in **Section 7.04(a)**.

“**LOS Plan**” has the meaning ascribed thereto in **Section 7.04(b)**.

“**LOS 401(k) Plan**” has the meaning ascribed thereto in **Section 7.04(d)**.

“**Loss**” means any and all damages, fines, penalties, deficiencies, liabilities, losses and expenses (including interest, court costs, fees of attorneys, accountants and other experts).

“**Material Permits**” has the meaning ascribed thereto in **Section 3.18**.

“**MBR Authority**” means authorization issued by FERC pursuant to Section 205 of the FPA to sell electric energy, capacity and certain ancillary services at market-based rates, acceptance by FERC of a tariff providing for such sales, and approval by FERC of such regulatory waivers and blanket authorizations as are customarily granted by FERC to “persons,” as defined in the FPA, authorized to sell electric power at market-based rates, including blanket authorization under Section 204 of the FPA and FERC’s regulations at 18 C.F.R. Part 34 to issue securities and assume liabilities.

“**NERC**” means the North American Electric Reliability Corporation, or any successor thereto, and any of its regional entities, including ReliabilityFirst Corporation.

“**Net Insurance Proceeds**” means, with respect to any Insurance Proceeds in respect of any Acquired Asset that is not repaired or restored to its prior condition prior to the Closing in accordance with **Section 5.08**, an amount equal to (a) such Insurance Proceeds, *minus* (b) the Seller Costs, *minus* (c) the amount of any such Insurance Proceeds applied to the restoration or repair of the applicable casualty.

“**Non-Party Affiliates**” has the meaning ascribed thereto in **Section 12.13(b)**.

“**Offer Terms**” has the meaning ascribed thereto in **Section 7.04(a)**.

“**Operating Expenses**” means all operating expenses of Sellers related to the Acquired Assets (including the Project) attributable to the conduct of the Business during the Post-Flip Period (including all real estate and personal property taxes, amounts owed under vendor or similar service provider contracts, fuel or utility expenses and any other expenses, including accrued expenses, arising in connection with any activities used to support or maintain the operations of the Acquired Assets (including the Project) and the Business), all calculated in accordance with GAAP.

“**Operating Profit**” means an amount equal to Operating Revenues received by Sellers from PJM Settlement, Inc. attributable to the operation of the Project during the Post-Flip Period, *minus* Operating Expenses, all calculated in accordance with GAAP.

“**Operating Revenues**” means (x) all revenue derived from the ownership and/or operation of the Acquired Assets (including the Project) from whatever source, including, accrued revenue, all consistent with the Financial Statements and as calculated in accordance with GAAP, *plus* (y) the amount of any Bankruptcy Costs funded from the Deposit in accordance with **Section 2.08(a)**.

“**Order**” means any writ, judgment, decree, injunction or award issued, or otherwise put into effect by or under the authority of any Governmental Authority (in each such case whether preliminary or final).

“**Owned Real Property**” has the meaning ascribed thereto in **Section 3.11(a)**.

“**Partial Satisfaction Date**” means date on which all of the conditions to Closing set forth in **Article VIII** are satisfied or waived by Purchaser, except for (a) the condition set forth in **Section 8.05** (solely as it relates to CFIUS) or **Section 8.09** and (b) any conditions that by their nature can only be satisfied at the Closing and subject to the satisfaction or waiver of such conditions as provided herein.

“**Party**” has the meaning ascribed thereto in the preamble to this Agreement.

“**Permits**” means all licenses, permits, certificates of authority, authorizations, approvals, registrations, franchises, variances, exemptions, waivers and similar consents of, or granted by, any Governmental Authority.

“**Permitted Liens**” means (a) any Lien for Taxes (i) not yet delinquent, (ii) being contested in good faith by appropriate proceedings and both (A) set forth on **Section 1.01-PL of the Seller Disclosure Schedule** and (B) for which adequate reserves have been established in accordance with GAAP or (iii) the nonpayment of which is permitted or required under the Bankruptcy Code (so long as such Liens will be released by operation of the Agreement), (b) any statutory Lien arising in the ordinary course of business by operation of Law with respect to a Liability that is not yet delinquent (including mechanics’, materialmen’s, warehousemen’s, repairmen’s, landlord’s and other similar liens to the extent arising by operation of Law) or that is being contested in good faith by appropriate proceedings, (c) in the case of Real Property, (i) any immaterial imperfection of title or other minor encumbrance, (ii) any Lien that is disclosed in a title report or survey of any Project that has been made available to Purchaser, (iii) restrictive covenants, building restrictions and zoning restrictions or other restrictions affecting title to, or possession of, any of the Real Property that exist generally with respect to properties of a similar character in the jurisdiction in which the Real Property is located and (iv) the rights of lessees and lessors of the Real Property pursuant to the terms and conditions of the applicable lease, that, in the case of each of clause (i) through (iv), (A) would not reasonably be expected to materially detract from the value of the affected property or the Acquired Assets or interfere with the Business or the ability to utilize the affected property for its intended purpose and (B) does not secure Indebtedness of any Seller and (d) Liens created by Purchaser, or its successors and assigns or otherwise expressly consented to by Purchaser in writing in accordance with the terms hereof.

“**Person**” means any individual, corporation, company, voluntary association, partnership, joint venture, trust, enterprise, unincorporated organization, limited liability company, other business or similar entity or Governmental Authority.

“**PJM**” means, collectively, PJM Interconnection, L.L.C. and PJM Settlement, Inc., and any successors thereto.

“**PJM Manuals**” means any of the manuals established by PJM, and posted on PJM’s website, for the operation, planning and accounting requirements of the PJM region and PJM energy markets, as amended from time to time.



“**PJM Open Access Transmission Tariff**” means, collectively, the PJM Open Access Transmission Tariff, including any schedules, appendices or exhibits attached thereto, on file with FERC and as amended from time to time thereafter, and the PJM Manuals.

“**PJM Settlement**” means the settlement by and among PJM and Sellers, the terms of which are set forth in that certain PJM Settlement Term Sheet, dated as of May 3, 2023, approved by the Bankruptcy Court pursuant to the *Order (I) Approving the Settlement with PJM Interconnection, L.L.C. and PJM Settlement, Inc. and (II) Granting Related Relief* [Docket No. 198].

“**Post-Closing Credits**” means any credit, refund, reimbursement, rebate or cash proceeds from any third party (whether in connection with an allowance, adjustment or otherwise), including any Governmental Authority, or any class action or other settlement payment or award granted by any third party, including any Governmental Authority, that becomes payable or is paid to Sellers post-Closing, if the Flip Date does not occur, or on or following the Flip Date, if the Flip Date does occur, and that is attributable to the ownership or operation of any Acquired Asset or the Project during any pre-Closing period, if the Flip Date does not occur, or any pre-Flip Date period, if the Flip Date does occur. For the avoidance of doubt, “Post-Closing Credits” expressly includes any capacity payments related to any pre-Closing period, if the Flip Date does not occur, or any pre-Flip Date period, if the Flip Date does occur.

“**Post-Closing Representation**” has the meaning ascribed thereto in **Section 12.19**.

“**Post-Closing Tax Period**” means any taxable period beginning after the Closing and the portion of any Straddle Period beginning after the Closing.

“**Post-Flip Period**” has the meaning ascribed to thereto in **Section 2.08(a)**.

“**Pre-Closing Tax Period**” means any taxable period ending at or before the Closing and the portion of any Straddle Period ending at the Closing.

“**President**” has the meaning ascribed thereto in the definition of CFIUS Clearance.

“**Project Personnel**” means the employees listed on **Section 1.01(e) of the Seller Disclosure Schedule** (to the extent such employee is not terminated for cause during the Interim Period) and any other employee employed by LOS during the Interim Period to replace any employee terminated for cause during the Interim Period.

“**Project**” has the meaning ascribed thereto in the recitals of this Agreement.

“**Property Taxes**” means all real property Taxes, personal property Taxes and similar ad valorem Taxes.

“**PUHCA**” means the Public Utility Holding Company Act of 2005, as amended and FERC’s implementing regulations thereunder at 18 C.F.R. § 366.1 et seq.

“**Purchase Price**” has the meaning ascribed thereto in **Section 2.03**.

“**Purchased Contracts**” means the Contracts set forth in **Section 1.01(c) of the Seller Disclosure Schedule** (except those that expire or are terminated prior to the Closing), as amended pursuant to **Section 2.05(c)**.

“**Purchaser**” has the meaning ascribed thereto in the preamble to this Agreement.

“**Purchaser Employee**” has the meaning ascribed thereto in **Section 7.04(c)**.

“**Purchaser Parent**” means Avenue MIC Power Opportunities Master Fund, L.P.

“**Purchaser Disclosure Schedule**” has the meaning ascribed thereto in the introduction to **Article IV**.

“**Purchaser Released Parties**” means, collectively, and in each case in its capacity as such: (a) Purchaser and (b) each of Purchaser’s predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, and each of their current and former (i) officers, (ii) directors, (iii) managers, (iv) principals, (v) shareholders, (vi) members, (vii) partners, (viii) employees, (ix) agents, (x) advisory board members, (xi) financial advisors, (xii) attorneys, (xiii) accountants, (xiv) investment bankers, (xv) consultants, (xvi) representatives, (xvii) management companies, (xviii) fund advisors and (xix) other professionals, and such entities’ respective heirs, executors, estate, servants and nominees.

“**Purchaser Material Adverse Effect**” means a (a) material impairment or delay of the ability of Purchaser to perform its material obligations under this Agreement or the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby or (b) a material and adverse effect on the ability of Purchaser to retain or operate the businesses, operations, or assets of the Project.

“**Purchaser Transaction Documents**” means, collectively, this Agreement and the other agreements and instruments to be executed and delivered by Purchaser in connection with this Agreement.

“**Real Property**” has the meaning ascribed thereto in **Section 3.11(c)**.

“**Real Property Rights**” has the meaning ascribed thereto in **Section 3.11(d)**.

“**Records**” has the meaning ascribed thereto in **Section 2.01(a)(xi)**.

“**Release**” means, any release, spill, emission, leaking, pumping, pouring, emptying, discharging, injecting, escaping, leaching, dumping, deposit, disposal, discharge, dispersal or migration of any Hazardous Substance into or through the indoor or outdoor environment.

“**Released Claims**” means all Liabilities, claims and causes of action related to, or in any manner arising from, in whole or in part, (a) the Bankruptcy Cases, and (b) the Acquired Assets or the Assumed Liabilities, including any Liabilities, claims and causes of action constituting Acquired Assets.

“**Replacement Support Obligation**” has the meaning ascribed thereto in **Section 5.06**.

“**Representatives**” means, as to any Person, its officers, directors, managers, employees, agents, partners, members, stockholders, counsel, accountants, financial advisors, engineers, consultants, and other advisors, and, with respect to Sellers, the Asset Manager.

“**Secondary End Date**” has the meaning ascribed thereto in **Section 10.01(k)**.

“**Seller Contracts**” has the meaning ascribed thereto in **Section 3.13(a)**.

“**Seller Costs**” means, in respect of any Insurance Proceeds, an amount equal to (a) any deductible or retention under the applicable insurance policy, *plus* (b) any costs and expenses of Sellers related to recovering such Insurance Proceeds, *plus* (c) any income, franchise or similar Taxes in respect of such Insurance Proceeds payable by any Seller, any Affiliate of any Seller or any of their respective direct or indirect equityholders.

“**Seller Disclosure Schedule**” has the meaning ascribed thereto in the introduction to **Article III**.

“**Sellers’ Marks**” means Cogentrix and any mark, word or expression incorporating such term, similar thereto or constituting an abbreviation or extension thereof.

“**Seller Material Adverse Effect**” means any circumstance, fact, development, change, event, effect or occurrence that has had or would reasonably be expected to (a) have, individually or in the aggregate, a material adverse effect on, the Project, the Acquired Assets or the Assumed Liabilities, taken as a whole, or (b) prevent or otherwise is materially adverse to, or has a material adverse effect on, Sellers’ ability to perform their respective obligations hereunder or to consummate the transactions contemplated hereunder; provided that a “Seller Material Adverse Effect” shall not include circumstances, facts, developments, changes, events, effects or occurrences (individually or taken together) resulting from or arising out of (i) any change generally affecting the national, local or regional (A) electric generating, transmission or distribution industry, (B) wholesale or retail markets for electric energy, capacity or ancillary services, or natural gas, (C) electrical or natural gas transmission and distribution systems or the operation thereof, and related rates and charges, (D) markets for commodities or supplies, including electric power, natural gas, emissions, fuel or water or (E) design or pricing of the wholesale or retail electric power and natural gas; (ii) [reserved]; (iii) [reserved]; (iv) any change in the financial, banking or securities markets or any change in the general international, national or regional economic conditions, including as a result of terrorist activity, acts of war or acts of public enemies; (v) the execution of this Agreement or announcement or pendency of the transactions contemplated hereby or any actions contemplated to be taken pursuant to or in accordance with this Agreement; (vi) the consequences of actions taken upon Purchaser’s written request; or with the Purchaser’s written consent; (vii) (reserved); (viii) the consequences of actions taken by Purchaser or any Affiliate of Purchaser; (ix) changes in any industry standards, Law, GAAP or regulatory accounting requirements, including NERC reliability standards, or changes in the official interpretation thereof; (x) earthquakes, hurricanes, floods, acts of God or other natural disasters; (xi) the Excluded Assets or Excluded Liabilities; (xii) the failure or inability of

Seller to meet any internal or public projections, forecasts or estimates of revenues or earnings (it being understood that this clause (xii) shall not exclude the facts or circumstances giving rise to such failure, inability or change in ability, in each case to the extent any such fact or circumstance is not otherwise excluded from this definition of Seller Material Adverse Effect); (xiii) the consequences of the filing or commencement of the Bankruptcy Cases, including Sellers' inability to pay certain obligations as a result of the filing of the Chapter 11 Cases or (xiv) [reserved]; provided, however, (A) that in the case of clauses (i) through (iv), (ix) and (x) such occurrence, development, circumstance effect, change or event does not have a materially disproportionate effect on the Project or on Acquired Assets, taken as a whole, relative to other Persons operating in the same industry and geographic region, and (B) the exception described in clause (v) shall not apply in connection with any representation or warranty of Sellers' in this Agreement addressing the execution, delivery, announcement or performance of this Agreement or the consummation of the transactions contemplated hereby, or any condition with respect thereto.

**"Seller Released Parties"** means, collectively, and in each case in its capacity as such: (a) each Seller, (b) the Seller Representative, (c) the Asset Manager and (d) with respect to each of the entities in clause (a) and (b), each such entities' predecessors, successors and assigns, subsidiaries, Affiliates, managed accounts or funds, and each of their current and former (i) officers, (ii) directors, (iii) managers, (iv) principals, (v) shareholders, (vi) members, (vii) partners, (viii) employees, (ix) agents, (x) advisory board members, (xi) financial advisors, (xii) attorneys, (xiii) accountants, (xiv) investment bankers, (xv) consultants, (xvi) representatives, (xvii) management companies, (xviii) fund advisors and (xix) other professionals, and such entities' respective heirs, executors, estate, servants, and nominees.

**"Seller Representative"** has the meaning ascribed thereto in **Section 11.02(a)**.

**"Seller Transaction Documents"** has the meaning ascribed thereto in **Section 3.01**.

**"Sellers"** has the meaning ascribed thereto in the preamble to this Agreement.

**"Seller Property Tax Amount"** has the meaning ascribed thereto in **Section 7.01(d)**.

**"Service Provider"** means each current or former individual that performs, or has performed, services for the Business.

**"Signing Deposit"** has the meaning ascribed thereto in **Section 2.02(a)**.

**"Specified Support Obligation"** has the meaning ascribed thereto in **Section 3.22**.

**"Straddle Period"** means a taxable period that begins before or at and ends after the Closing.

**"Successful Bidder"** means the bidder for the Acquired Assets with the highest or otherwise best bid for the Acquired Assets as determined in accordance with the Bid Procedures.

“**Support Obligation**” means any letter of credit, guarantee, surety, performance bond, escrow arrangement, cash collateral, security arrangement or other credit support.

“**Surviving Covenants**” has the meaning ascribed thereto in **Section 11.01**.

“**Tangible Personal Property**” means all machinery, mobile or otherwise, equipment, spare parts, vehicles, pumps, fittings, tools, furniture or furnishings, meter equipment and other tangible personal property owned or leased by Sellers or any of their respective Affiliates for use or consumption primarily at or in connection with the Project.

“**Tax**” means any and all federal, state, provincial, local, foreign and other taxes, levies, fees, imposts, duties, and similar governmental charges (including any interest, fines, assessments, penalties, deficiency assessments or additions to tax imposed in connection therewith or with respect thereto) including (a) taxes imposed on, or measured by, net income, gross income, franchise, profits or gross receipts, and (b) ad valorem, value added, capital gains, sales, goods and services, use, real or personal property (tangible and intangible), capital stock, license, branch, payroll, withholding, employment, social security (or similar), unemployment, disability, occupational, excise, compensation, utility, severance, production, excise, stamp, registration, occupation, premium, windfall profits, excess profits, fuel, gas import, environmental, transfer and gains, lease, service, service use, alternative or add on minimum, and estimated taxes and customs duties.

“**Tax Return**” means any return, report, information return, declaration, claim for refund, election, disclosure, estimate, or other document, together with all schedules, attachments, amendments and supplements thereto (including all related or supporting information), supplied to or required to be supplied to any Governmental Authority responsible for the administration of Taxes.

“**Taxing Authority**” shall mean any Governmental Authority having or purporting to exercise jurisdiction with respect to any Tax.

“**Termination Date**” has the meaning ascribed thereto in **Section 10.01(b)(i)**.

“**Transaction Transfer Taxes**” has the meaning ascribed thereto in **Section 7.01(b)**.

“**Transfer Taxes**” has the meaning ascribed thereto in **Section 7.01(b)**.

“**Transferred Employee**” has the meaning ascribed thereto in **Section 7.04(a)**.

“**Transferred Permits**” has the meaning ascribed thereto in **Section 2.01(a)(x)**.

“**U.S. Dollars**” means the lawful currency of the United States.

“**Waiving Parties**” has the meaning ascribed thereto in **Section 12.19**.

**Section 1.02 Certain Principles of Interpretation.** In this Agreement, unless otherwise indicated, all words defined in the singular have the corresponding meaning in the plural and vice

versa; words importing any gender include the other gender; references to statutes or regulations are to be construed as including all statutory or regulatory provisions consolidating, amending or replacing the statute or regulation referred to; references to “writing” include printing, typing, lithography and other means of reproducing words in a tangible visible form; the words “including”, “includes” and “include” shall be deemed to be followed in each instance by the words “without limitation”; the words “shall” and “will” have the same meaning; references to articles, sections (or subdivisions of sections), the words “hereof,” “herein,” “hereby,” “hereto,” “hereunder” and derivative or similar words refer to this entire Agreement; the word “or” shall be disjunctive but not exclusive; the phrase “to the extent” means “the degree by which” and not “if”; exhibits, annexes or schedules are to articles, sections (or subdivisions of sections), exhibits, annexes or schedules of or to this Agreement; references to agreements and other contractual instruments shall be deemed to include all amendments, extensions and other modifications to such instruments prior to the date of this Agreement and any such amendments, extensions and other modifications to such instruments that are expressly permitted hereunder; references to Persons include their respective successors and permitted assigns and, in the case of Governmental Authorities, Persons succeeding to their respective functions and capacities; the phrase “ordinary course of business” refers to the Business, unless otherwise indicated; all accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP; the terms “indemnification,” “indemnify” and derivative words shall be deemed to include reference to any related reimbursement obligations (whether or not related to a claim by a third party); and “made available” with reference to any document provided by Seller hereunder means made available to Purchaser or its Representatives in the “Lincoln Restructuring” electronic data room established on behalf of Sellers and hosted by firmex.com in connection with the transactions contemplated under this Agreement, as updated as of 5:00 P.M. (prevailing Eastern time) on the date that is one (1) day prior to the date of this Agreement. Any deadline or the date of performance of any right or obligation set forth herein shall be calculated exclusive of the first date from which such time period commences and inclusive of the date on which such time period ends. To the extent that any deadline or date of performance of any right or obligation set forth herein shall fall on a day other than a Business Day, then such deadline or date of performance shall automatically be extended to the next succeeding Business Day.

## ARTICLE II PURCHASE AND SALE OF ACQUIRED ASSETS; CLOSING

### Section 2.01 Purchase and Sale of Acquired Assets.

(a) At the Closing, upon the terms and subject to the conditions set forth in this Agreement, Purchaser agrees to purchase, acquire and accept from Sellers, and Sellers agree to sell, assign, transfer, convey and deliver to Purchaser, free and clear of all Liens (other than Permitted Liens) all of Sellers’ right, title and interest in, to and under the following Assets owned, used or held for use in the operation of, or comprising, the Project (collectively, the “**Acquired Assets**”):

(i) all deposits and expenses that have been prepaid by any Seller (or a predecessor owner), including as set forth or disclosed in **Section 2.01(a)(i) of the Seller Disclosure Schedule** and all other security deposits with third-party suppliers or vendors,

prepaid lease and rental payments and prepaid Property Taxes, postage, utility deposits, and expenses, in each case, solely to the extent attributable to the ownership and operation of the Acquired Assets or the Assumed Liabilities, but excluding, for the avoidance of doubt, the Excluded Deposits;

(ii) all accounts receivable, notes, negotiable instruments and chattel paper owned or held by any Seller, together with any unpaid interest or fees accrued thereon or other amounts due with respect thereto related to the Acquired Assets, but excluding for the avoidance of doubt, the Post-Closing Credits;

(iii) any operating claims, refunds or adjustments related principally to the Acquired Assets or the Business, but excluding, for the avoidance of doubt, the Post-Closing Credits;

(iv) all Inventories, including those set forth or disclosed in **Section 2.01(a)(ii) of the Seller Disclosure Schedule**;

(v) the Owned Real Property and all Improvements located therein or thereon;

(vi) all rights, title and interest of Seller in and to any property subject to a personal property lease that is primarily used in or held for use in the operation of the Business, to the extent any such personal property lease is a Purchased Contract;

(vii) Sellers' interests in the Easements and all Improvements located therein or thereon;

(viii) all items of Tangible Personal Property, including as set forth or disclosed in **Section 2.01(a)(vi) of the Seller Disclosure Schedule**;

(ix) all Purchased Contracts;

(x) to the extent transferable pursuant to applicable Law (including upon request or application to a Governmental Authority or which will pass to Purchaser as successor in title to any other Acquired Assets by operation of Law), all Permits (including Environmental Permits) related to the ownership and operation of the Acquired Assets, including as set forth or described in **Section 2.01(a)(x) of the Seller Disclosure Schedule** and including all pending applications for any new Permit or renewal, extension or modification of any existing Permit (the "**Transferred Permits**");

(xi) all documents, books, records and files, including all documents, instruments, papers, electronic correspondence, records and files stored on computer disks or tapes or any other storage medium, studies, reports, drawings, microfilms, photographs, letters, journals, title policies, regulatory filings, purchase orders, invoices, shipping records, operating records, operating, safety and maintenance manuals, engineering design plans, blueprints and as-built plans, user documentation (installation guides, user manuals, training materials, release notes, working papers, etc.), equipment repair, safety, maintenance or service records, technical data, business plans, financial and operating data,

environmental records, plans and studies, accounting and Tax records (including Tax Returns), ledgers, filings or other documentation relating to any litigation or other Liability, internal and external correspondence and other books and records, whether in paper, e-mail, digital or other tangible form (collectively, the “**Records**”), in each case, to the extent used in the ownership or operation of the Acquired Assets or Assumed Liabilities, but excluding any Excluded Contracts and any Records described in **Section 2.01(b)(iv)**;

(xii) all rights of Seller under non-disclosure or confidentiality, non-compete, or non-solicitation agreements with employees and agents of Seller or any Affiliate thereof or with third parties, in each case, to the extent relating to the Business or the Acquired Assets (or any portion thereof);

(xiii) all right, title and interest of any Seller in and to the Intellectual Property set forth or described in **Section 2.01(a)(xiii) of the Seller Disclosure Schedule** and the rights of any Seller to the use of the names of the Project;

(xiv) all causes of action (including counterclaims), defenses, claims, credits, demands, remedies or rights of set-off of any kind against third parties to the extent relating to or arising from any Assumed Liability or the ownership or operation of the Acquired Assets, including all such rights under or pursuant to warranties, representations, covenants, agreements, indemnities or guarantees made or provided in any Purchased Contracts or otherwise, but excluding, for the avoidance of doubt, the Post-Closing Credits;

(xv) all applicable warranties against manufacturers or vendors and all items of personal property due under applicable warranties, in each case as in existence on the date hereof, but excluding such items disposed of by Sellers or their respective Affiliates in the ordinary course of business prior to the Closing in accordance with this Agreement, and including such additional items as may be acquired by Sellers or their respective Affiliates for use in connection with the ownership or operation of the Acquired Assets in the ordinary course of business prior to the Closing in accordance with this Agreement;

(xvi) all goodwill relating to the ownership or operation of the Acquired Assets;

(xvii) all emissions allowances described on **Section 2.01(a)(xvii) of the Seller Disclosure Schedule**;

(xviii) all rights of any Seller against any current or former directors, officers, members, partners, equityholders, managers, advisors or other professionals of such Seller, including any Actions;

(xix) other than any Excluded Asset, all of the right, title and interest of Seller and its Affiliates in and to all other property and assets used or held for use principally in, or that principally arise from, the conduct of the Business, including that which is moveable and immovable, real and personal, tangible or intangible, of every kind and description and wheresoever situated, including the full benefit of all representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and



all security therefore received by Seller on the purchase or other acquisitions of any part of the Acquired Assets.

(xx) the Assets listed on **Section 2.01(a)(xx) of the Seller Disclosure Schedule**; and

(xxi) all other Assets of Sellers, and all assets of Affiliates of Sellers that relate solely to the Project, in each case, that do not constitute Excluded Assets.

(b) Notwithstanding any other provision of this Agreement, Sellers shall not sell, assign, transfer, convey or deliver to Purchaser, and Purchaser shall not purchase, acquire or accept, any right, title and interest in or to any Assets, goodwill or rights of Sellers or any of their respective Affiliates not related to the Acquired Assets, including the following (collectively, the “**Excluded Assets**”):

(i) Sellers’ rights under this Agreement (including the right to receive the Purchase Price) and under any of the Seller Transaction Documents or Purchaser Transaction Documents to be entered into in connection with the transactions contemplated hereby;

(ii) the Sellers’ Marks and all right, title and interest of any Seller in and to the Intellectual Property set forth or described in **Section 2.01(b)(ii) of the Seller Disclosure Schedule**;

(iii) all insurance policies relating to the Acquired Assets, including all insurance recoveries and return of premiums, claim deposits and security deposits due thereunder, rights to assert claims with respect to any such policies and proceeds thereof;

(iv) any Records (A) relating to any Service Provider and any materials to the extent containing information about any Service Provider, disclosure of which to Purchaser as the acquirer of the Business would violate applicable Law, (B) subject to the attorney-client privilege or attorney work product protection of any Seller or associated with its businesses, (C) to the extent relating to any Excluded Asset or Excluded Liabilities and (D) other than those other than those described in **Section 2.01(a)(xi)**;

(v) the Governance Documents, qualifications to do business as a foreign corporation, arrangements with registered agents relating to foreign qualifications, taxpayer and other identification numbers, seals, minute books, blank stock certificates and other documents relating to the organization, maintenance and existence of any Seller or any of its Affiliates, whether before, on or after the Closing Date;

(vi) Excluded Contracts, Permits that are not Transferred Permits and Intellectual Property or Intellectual Property licenses not included among the Acquired Assets;

(vii) all shares of capital stock or other equity interests of any Seller or any of its Affiliates or securities convertible into or exchangeable or exercisable for shares of capital stock or other equity interests of any Seller or any of its Affiliates;

(viii) all claims or causes of action that any Seller may have against any third party with respect to any Excluded Assets or Excluded Liabilities;

(ix) Tax refunds, credits, abatement or similar offsets against Taxes of Seller, other than prepaid Property Taxes as provided in **Section 2.01(a)(i)**;

(x) all bank accounts of any Seller;

(xi) all Cash and all proceeds received from the sale or liquidation of any Excluded Asset;

(xii) all deposits and expenses that have been prepaid by any Seller (or a predecessor owner) (including security deposits with third-party suppliers or vendors, prepaid lease and rental payments and prepaid Property Taxes, postage, utility deposits, and expenses), in each case, solely to the extent attributable to the ownership and operation of the Excluded Assets or Excluded Liabilities (collectively, the “**Excluded Deposits**”);

(xiii) all Post-Closing Credits; and

(xiv) any Asset that would otherwise constitute an Acquired Asset that Purchaser designates in writing to the Seller Representative to be an Excluded Asset at least fourteen (14) days prior to the Closing Date.

(c) Effective at the Closing, upon the terms and subject to the conditions set forth in this Agreement, Purchaser agrees to assume and become responsible for the following Liabilities (solely to the extent that they do not constitute Excluded Liabilities) (collectively, the “**Assumed Liabilities**”):

(i) all Liabilities relating to or arising out of the ownership or operation of the Acquired Assets by Purchaser for periods following the Closing;

(ii) all Liabilities of any Seller under the Purchased Contracts arising after the Closing Date, other than relating to breaches by any Seller or its Affiliate prior to the Closing;

(iii) all Liabilities with respect to the Transferred Permits arising after the Closing Date, other than relating to breaches by any Seller or its Affiliate prior to the Closing;

(iv) (a) all Transaction Transfer Taxes and (b) all Property Taxes allocable to any Post-Closing Tax Period;

(v) all Cure Costs assumed under **Section 2.05(d)** up to an aggregate amount not to exceed \$250,000.

(vi) [reserved];

(vii) all Liabilities set forth or described in **Section 2.01(c)(vii)** of the Seller Disclosure Schedule.

(d) Notwithstanding any other provision of this Agreement, Sellers shall retain, and shall be responsible for paying, performing and discharging when due, and Purchaser shall not assume or have any responsibility for, any of the following Liabilities, whether arising prior to, on or after the Closing Date (collectively, the “**Excluded Liabilities**”):

(i) except as assumed pursuant to **Section 2.01(a)(ix)**, all Indebtedness of Sellers and their respective Affiliates;

(ii) all Liabilities relating to or arising, whether before, on or after the Closing, out of, or in connection with, any of the Excluded Assets or any other Assets of Sellers or their respective Affiliates that are not Acquired Assets;

(iii) all Liabilities arising under (A) any Excluded Contract or (B) Purchased Contract, to the extent relating to breaches by any Seller or its Affiliate prior to the Closing;

(iv) all Liabilities arising under Permits, Environmental Laws or Environmental Claims to the extent arising out of or related to any Sellers’ ownership or operation of the Business or Acquired Assets prior to the Closing;

(v) Liabilities arising from the operation of any successor or transferee liability Laws, including “bulk sales” statutes, to the extent that noncompliance therewith or the failure to obtain necessary clearances would subject Purchaser or the Acquired Assets to the claims of any creditors of Seller, or would subject any of the Acquired Assets to any Liens or other restrictions;

(vi) all Taxes of Sellers and their respective Affiliates, including any such Taxes that Purchaser is liable for as a withholding agent or a transferee (but excluding all Property Taxes allocable to any Post-Closing Tax Period and all Transaction Transfer Taxes);

(vii) all Cure Costs not otherwise assumed under **Section 2.05(d)** in excess of \$250,000 in the aggregate; and

(viii) all Liabilities that are not Assumed Liabilities or that relate to an Excluded Asset, whether arising prior to or after the Closing.

## **Section 2.02 Deposit.**

(a) Simultaneously with the execution of this Agreement, and as security for Purchaser’s performance hereunder, Purchaser will deliver an amount equal to a mutually agreed estimate of ten percent (10%) of the Purchase Price (such amount, the “**Signing Deposit**”) to the Seller Representative, by wire transfer of immediately available funds in U.S. dollars, to be held in one or more segregated accounts (the “**Deposit Account**”, and the amount of funds in the Deposit Account from time to time, the “**Deposit**”). To the extent the Parties agree to increase

Purchase Price before, during or after the Auction, (i) the Parties shall execute and deliver an amendment to this Agreement documenting the same and (ii) Purchaser shall deliver additional cash to the Seller Representative such that the Deposit equals ten percent (10%) of such increased Purchase Price in accordance with the Bid Procedures.

(b) If the Closing occurs, the Seller Representative shall retain the Deposit for further distribution to Sellers and the Deposit shall be applied as a reduction to the Purchase Price payable at the Closing.

(c) If this Agreement is terminated in accordance with **Section 10.01**, the Deposit shall be paid pursuant to, and in accordance with, **Section 10.02(c)**.

**Section 2.03 Purchase Price.** The aggregate purchase price payable by Purchaser to Sellers at Closing for the Acquired Assets and assumption of Assumed Liabilities shall be an amount equal to (a) \$13,125,000.00 (the “**Base Purchase Price**”), *less* (b) the Seller Property Tax Amount, *less* (c) the Net Insurance Proceeds (if any), *less* (d) Operating Profit (if any), *less* (e) the Excess Seller Costs (if any) (such amount, the “**Purchase Price**”).

**Section 2.04 Closing.** The closing of the purchase and sale of the Acquired Assets and the assumption of the Assumed Liabilities (the “**Closing**”) shall take place at the offices of Latham, at 1271 Avenue of the Americas, New York, NY 10020 at 10:00 A.M. (prevailing Eastern time) on the Closing Date, or at such other time and place as Purchaser and the Seller Representative shall mutually agree; provided that the Closing shall be deemed effective for all purposes hereunder as of 12:01 A.M. (prevailing Eastern time) on the Closing Date. At the Closing, Purchaser shall pay an amount equal to (a) the Purchase Price *minus* (b) the Deposit, by wire transfer of immediately available funds in U.S. Dollars to Sellers, to the account(s) designated in writing by the Seller Representative. At the Closing, Purchaser and Sellers shall cause to be delivered to the other the documents and instruments required to be delivered by such Party under **Article VIII** and **Article IX**.

**Section 2.05 Contract Designation; Cure Amounts.**

(a) **Section 2.05 of the Seller Disclosure Schedule** sets forth each Executory Contract and Sellers’ good faith estimate of the amount of the cure amounts payable in respect of each such Executory Contract. In accordance with the Bid Procedures Order, Sellers have delivered written notice of the Executory Contracts to be assumed by Sellers and assigned to Purchaser at the Closing to all non-debtor parties to such Executory Contracts (the “**Initial Contract Notice**”). Until the date that is fifteen (15) Business Days following the date of this Agreement, and subject to Purchaser’s rights under **Section 2.05(c)**, Purchaser shall have the right to deliver to the Seller Representative a list of the Executory Contracts to be assumed by Sellers and assigned to Purchaser at the Closing. To the extent that any objections are received from non-debtor parties to the assignment to Purchaser of such Executory Contracts, Sellers and Purchaser shall use their commercially reasonable efforts to resolve such disputes with the applicable non-debtor party.

(b) In no event shall Sellers reject, or seek to reject, any Contract related to the Acquired Assets or Assumed Liabilities, unless prior written approval has been obtained from

Purchaser; provided that, after the Designation Deadline, Sellers may reject Excluded Contracts without the consent of Purchaser so long as such Executory Contracts were identified to Purchaser in writing prior to the Designation Deadline. Notwithstanding anything to the contrary herein, in the event that any Seller identifies (whether before or after the Designation Deadline) any additional Executory Contracts capable of being assumed or rejected that were not previously identified as such, the Seller Representative shall promptly notify Purchaser of (i) such Executory Contract and (ii) Sellers' good faith estimate of the amount of the Cure Costs payable in respect of each such Executory Contract, and following such notice, Purchaser may designate each such Executory Contract described in the immediately preceding sentence as a Purchased Contract or an Excluded Contract pursuant to this **Section 2.05**, notwithstanding the Designation Deadline.

(c) Notwithstanding anything to the contrary herein, Purchaser may from time to time following service of the Initial Contract Notice and prior to the Designation Deadline, in its sole discretion, by providing written notice to the Seller Representative, (i) designate any Purchased Contract as an Excluded Contract or (ii) to the extent not already rejected, designate any Executory Contract as a Purchased Contract. Such Contract shall (x) in the case of the foregoing clause (i), be added to the schedule of Excluded Contracts on Section 1.01(d) of the Seller Disclosure Schedule and, to the extent applicable, removed from the schedule of Purchased Contracts on **Section 1.01(c) of the Seller Disclosure Schedule** and (y) in the case of the foregoing clause (ii), be added to the schedule of Purchased Contracts on Section 1.01(c) of the Seller Disclosure Schedule and, to the extent applicable, removed from the schedule of Excluded Contracts on **Section 1.01(d) of the Seller Disclosure Schedule**. Any Purchased Contract designated as an Excluded Contract pursuant to this **Section 2.05(c)**, shall be deemed to be an "Excluded Contract" and shall not be deemed to be a "Purchased Contract," for all purposes hereunder, in each case, without further action by the Parties, and Purchaser shall have no liability therefor.

(d) Unless waived by a counterparty to an Executory Contract, at the Closing, Purchaser shall pay in cash an amount and on terms agreed between Purchaser and such counterparty, or otherwise satisfy as agreed between Purchaser and such counterparty, in each case pursuant to Sections 365 and 1123(b)(2) of the Bankruptcy Code and the Confirmation Order, any and all costs or expenses that are required to be paid under Sections 365(b)(1)(A) and 365(b)(1)(B) of the Bankruptcy Code, as applicable, to cure any monetary defaults in connection with the assumption and assignment of the Executory Contracts (such costs and expenses required to be paid by Purchaser, the "**Cure Costs**"), provided, however, Sellers shall be responsible for paying any incremental and remaining Cure Costs in the event the Purchaser has already paid Cure Costs in an aggregate amount not to exceed \$250,000. If an Executory Contract is subject to a cure dispute or other dispute as to the assumption or assignment of such Executory Contract that has not been resolved to the reasonable satisfaction of Purchaser and Sellers prior to the Designation Deadline, then the Designation Deadline shall be extended (but only with respect to such Executory Contract) to no later than the earliest of (A) the date on which such dispute has been resolved to the reasonable satisfaction of Purchaser and Sellers, (B) the date on which such Executory Contract is deemed rejected by operation of Sections 365(d)(4) or 1123(b)(2) of the Bankruptcy Code, as applicable, or (C) the date required by the Bankruptcy Court and set forth in the Confirmation Order.

(e) In the event any Purchased Contract requires a third party's consent to the assignment thereof, Sellers will continue to use commercially reasonable efforts to obtain such consent; provided, that if such consent is made unnecessary by operation of the Confirmation Order or applicable bankruptcy Law, such Purchased Contract will be assigned to Purchaser at the Closing. In addition, no Seller will enter into, or negotiate to enter into, any amendment, extension, termination, modification, cancellation, assignment, transfer or renewal of any such Purchased Contract, or grant any waiver thereunder, or compromise or settle any amount receivable or payable arising thereunder after the Closing, without the prior written consent of Purchaser, which consent shall not be unreasonably withheld, conditioned or delayed. If after the Closing Date such consent is obtained, Purchaser will assume such Purchased Contract as of the date of such consent. For the avoidance of doubt, notwithstanding anything to the contrary in this **Section 2.05(e)**, in no event shall any Seller have any obligation to renew or extend any such Purchased Contract. The Parties shall treat Purchaser or its applicable Affiliate(s) as the owner of such Purchased Contracts for applicable Tax purposes from and after the Closing Date to the maximum extent permitted by Law. For the avoidance of doubt, in no event will the failure to obtain the consent of any third party to the assignment of any Purchased Contract, without more, be a breach of this Agreement.

(f) Notwithstanding anything to the contrary in this Agreement, Purchaser acknowledges that the assumption and assignment of the Purchased Contracts is subject to Bankruptcy Court approval and an Executory Contract shall not be a Purchased Contract until entry of an Order by the Bankruptcy Court approving the assumption and assignment by the Seller to Purchaser such Executory Contract. For the avoidance of doubt, to the extent that an Order is entered by the Bankruptcy Court determining that Sellers may not assume a Purchased Contract or a Purchased Contract is not assignable to Purchaser, then such Purchased Contract will be excluded from the Acquired Assets and be deemed an Excluded Contract.

#### **Section 2.06 Further Assurances; Misallocated Transfers; Wrong Pockets.**

(a) Subject to the terms and conditions of this Agreement, from time to time from the date hereof until the Closing, each Party shall use its commercially reasonable efforts to execute, acknowledge and deliver such other documents and instruments, provide such materials and information, and shall cooperate and shall take such other actions as may reasonably be necessary, proper or advisable, to the extent permitted by Law, to fulfill its obligations under this Agreement and to provide for the reasonable transition of the ownership and operation of the Acquired Assets. Subject to the terms and conditions of this Agreement, at any time or from time to time following the Closing, each Party shall, upon the reasonable request of any other Party, execute and deliver any further instruments or documents and exercise commercially reasonable efforts to take such further actions as may reasonably be required to fulfill and implement the terms of this Agreement.

(b) If, following the Closing, Purchaser or any of its Affiliates hold any Excluded Asset (unless subsequently purchased or leased by Purchaser or any of its Affiliates via a separate transaction), Purchaser shall transfer, or shall cause its applicable Affiliate to transfer, at no cost to the applicable Seller, such Excluded Asset as soon as practicable to the applicable Seller. If, following the Closing, any Seller or any of their respective Affiliates hold any Acquired Asset (unless subsequently purchased or leased by any Seller or any of their respective Affiliates

via a separate transaction), such Seller shall transfer, or shall cause its applicable Affiliates to transfer, such Acquired Asset as soon as practicable to Purchaser. For purposes of this **Section 2.06(b)**, any Net Insurance Proceeds received by Sellers after the Closing (and not taken into account in the calculation of the Purchase Price) shall be deemed to be an Acquired Asset; provided, that the Seller Representative shall forward such Net Insurance Proceeds, as promptly as practicable but in any event within ten (10) Business Days after such receipt, to Purchaser (or other entity nominated by Purchaser in writing to the Seller Representative).

(c) In the event that any Seller receives any payment from a third party (other than Purchaser or any of its Affiliates) after the Closing pursuant to any of the Purchased Contracts (or with respect to the operation by Purchaser of the Business or any Acquired Asset following the Closing) and to the extent such payment is not an Excluded Asset or made in connection with an Excluded Asset or an Excluded Liability, such Seller shall forward such payment, as promptly as practicable but in any event within ten (10) Business Days after such receipt, to Purchaser (or other entity nominated by Purchaser in writing to such Seller). Notwithstanding anything to the contrary in this Agreement, in the event that Purchaser or any of its Affiliates receives any payment from a third party after the Closing on account of, or in connection with, any Excluded Asset, Purchaser shall forward such payment, as promptly as practicable but in any event within ten (10) Business Days after such receipt, to the applicable Seller (or such other entity as such Seller may designate).

**Section 2.07 Withholding.** If any amount is required by Law to be deducted or withheld on account of any Tax with respect to payments made under or in connection with this Agreement to Sellers, then Purchaser shall be entitled to make such deduction or withholding from the amounts required to be paid under this Agreement. Purchaser shall use commercially reasonable efforts to notify Sellers at least five (5) days prior to the Closing Date of any intention to deduct or withhold any such Taxes. The Purchaser shall cooperate in good faith to take such actions reasonably requested by Seller as will minimize or reduce the amount of any such withholding Taxes. To the extent that amounts are so withheld and promptly remitted to the relevant Governmental Authority, such amounts deducted or withheld from payments pursuant to the preceding sentence shall be treated as having been actually paid to Sellers for purposes of this Agreement.

**Section 2.08 Economic Flip.**

(a) From the Flip Date until the earlier of the valid termination of this Agreement and the Closing Date (the “**Post-Flip Period**”), all Operating Expenses shall be funded from the Deposit and Purchaser hereby expressly acknowledges and agrees that Sellers may use the Deposit to fund the Operating Expenses; provided that, notwithstanding anything to the contrary contained herein, Sellers shall not be entitled to use the Deposit to fund more than \$250,000 in Bankruptcy Costs. If at any time during the Post-Flip Period the balance of the Deposit falls below, or in the Seller Representative’s good faith determination based on the then-current projected Operating Expenses is expected to fall below, \$800,000, then, within three (3) Business Days of receipt of notice from the Seller Representative, Purchaser shall pay, or cause to be paid, to the Deposit Account, an amount in cash sufficient to increase the balance of the Deposit to equal or exceed the Signing Deposit (taking into account any then-projected Operating Expenses).

(b) During the Post-Flip Period, (i) unless otherwise agreed by the Parties, Sellers shall, or shall cause, the Project to be operated in accordance with Good Industry Practice and in substantially the same manner as, and with the same level of care, quality, skill and diligence with which, such the Project were operated during the twelve (12)-month period immediately prior to the Flip Date and (ii) Sellers shall provide Purchaser with reasonably requested information related to the operation of the Acquired Assets (including the Project) and the conduct of the Business.

(c) In the event this Agreement is terminated during the Post-Flip Period, Sellers shall within 120 days of the date of such termination, pay to Purchaser any Operating Profit.

(d) Without limiting anything set forth in this **Section 2.08**, nothing contained in this Agreement shall give Purchaser, directly or indirectly, any right to control or direct the Business or the operations of the Project prior to the Closing.

### **ARTICLE III REPRESENTATIONS AND WARRANTIES OF SELLER**

Except as set forth in the disclosure schedule delivered by Sellers to Purchaser concurrently with the execution and delivery of this Agreement (the “**Seller Disclosure Schedule**”), each Seller, as to itself only, hereby represents and warrants to Purchaser as follows:

**Section 3.01 Legal Existence.** Each Seller is a limited liability company duly formed, validly existing and in good standing under the Laws of Delaware. Each Seller is qualified to do business and is in good standing in the states in which the conduct of the Business or locations of its Assets makes such qualification necessary, except where failure to be so qualified or to be in good standing would not, individually or in the aggregate, reasonably be expected to result in a Seller Material Adverse Effect. Each Seller has all requisite organizational power and authority to execute, deliver and perform its obligations under this Agreement and the other agreements and instruments executed and delivered by it in connection with this Agreement (collectively, the “**Seller Transaction Documents**”) and to consummate the transactions contemplated hereby and thereby, and no Seller has any subsidiary that is not otherwise defined as a “Seller” under Annex A to this Agreement (as the case may be).

**Section 3.02 Authority.** Subject to the entry of the Confirmation Order and any other Order from the Bankruptcy Court necessary to consummate the transactions contemplated by this Agreement, (a) the execution and delivery by Sellers of, and the performance by Sellers of their obligations under, this Agreement and the Seller Transaction Documents, and the consummation of the transactions contemplated hereby and thereby, have been duly and validly authorized by all necessary limited liability company actions and (b) this Agreement and, to the extent such Seller is a party thereto, each Seller Transaction Document has been duly and validly executed and delivered by such Seller, and constitutes a legal, valid and binding obligation of such Seller enforceable against such Seller in accordance with its terms, except as the same may be limited by Enforceability Limitations.

**Section 3.03 No Conflicts.** Except for (w) the entry of the Confirmation Order, (x) as described on **Section 3.03 of the Seller Disclosure Schedule**, and (y) as may result from any facts



or circumstances relating solely to the identity or the legal or regulatory status of Purchaser or any of its Affiliates, and assuming all filings, notices, consents, approvals, authorizations, and other actions described on **Section 3.04 of the Seller Disclosure Schedule** have been obtained, the execution and delivery by Sellers of, and the performance of their respective obligations under, this Agreement, the Seller Transaction Documents and the consummation of the transactions contemplated hereby and thereby do not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of the Governance Documents of such Seller;

(b) conflict with or result in a violation or breach of any term or provision of any Law or Order applicable to such Seller or any of its Assets in any material respect;

(c) except as would not be material to the Acquired Assets, taken as a whole, (i) conflict with or result in a violation or breach of, (ii) constitute (with or without notice, lapse of time or both) a default (or give rise to any right of termination, cancellation or acceleration) under, or (iii) require any Seller to obtain any consent, approval or action of, make any filing with or give any notice to any Person as a result or under the terms of, or result in or give to any Person (other than such Seller) any right of termination, consent, cancellation, acceleration or modification in or with respect to, any Contract, Permit or Governmental Approval to which any Seller is a party or by which any Seller's Assets are bound; or

(d) result in the creation or imposition of any Lien on the Acquired Assets (other than (i) Liens imposed under the Governance Documents of any Seller, (ii) restrictions on transfer that may be imposed by applicable federal or state securities Laws, (iii) encumbrances that arise solely out of any actions taken by Purchaser or its Affiliates, or taken on Purchaser's behalf by Purchaser's Representatives or financing sources or by any other Person at the request of Purchaser or its Affiliates, and (iv) such other Liens as will be discharged in full prior to or at the Closing and set forth on **Section 3.03(d) of the Seller Disclosure Schedule**).

**Section 3.04 Governmental; Filings.** Except (a) the entry of the Confirmation Order, (b) prior authorization from FERC under Section 203 of the FPA, (c) for informational filings and request for waiver filings as required pursuant to Schedule 2 of the PJM Open Access Transmission Tariff regarding compensation for reactive supply and voltage control service from the Project, and (d) as set forth on **Section 3.04 of the Seller Disclosure Schedule**, no Governmental Approval on the part of Sellers is required in connection with the execution and delivery by Sellers of this Agreement, the Seller Transaction Documents to which any Seller is a party or the consummation of the transactions contemplated hereby and thereby except (i) where the failure to obtain any such Governmental Approval would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole, and (ii) those as would be required solely as a result of the identity or the legal or regulatory status of Purchaser or any of its Affiliates.

**Section 3.05 Ownership of Assets.** Except as set forth on **Section 3.05 of the Seller Disclosure Schedule**, Sellers have good and valid title (and as to Owned Real Property, good and marketable title) to, or, in the case of any leased, subleased or licensed property, valid and subsisting leasehold interests in or a legal, valid and enforceable license to use, all of the Acquired Assets, free and clear of all Liens other than Permitted Liens.

**Section 3.06 Legal Proceedings.** Except as set forth on **Section 3.06 of the Seller Disclosure Schedule**, there are no Actions pending or threatened in writing or, to the Knowledge of Sellers, orally against any Seller or affecting any of the Acquired Assets, and there are no Orders outstanding against any Seller or affecting the Acquired Assets, in either case, that would (a) individually or in the aggregate, would reasonably be expected to be material to the Acquired Assets, taken as a whole, or (b) reasonably be expected to result in the issuance of an Order restraining, enjoining or otherwise prohibiting, delaying or making illegal the sale of the Acquired Assets by Sellers under this Agreement or the performance by Sellers of their obligations under this Agreement or the Seller Transaction Documents.

**Section 3.07 Financial Statements and Condition.** Prior to the execution of this Agreement, true and complete copies of the following financial statements (collectively, the “**Financial Statements**”) have been made available to Purchaser: (a) the audited consolidated balance sheets and statements of comprehensive income, member’s equity and cash flows of Lincoln Power, L.L.C. and its subsidiaries as of and the years ended December 31, 2021 and December 31, 2020; and (b) the unaudited consolidated balance sheet and statement of operations of Lincoln Power, L.L.C. and its subsidiaries as of and for the year ended December 31, 2022 and the three (3) months ended on March 31, 2023 (the “**Balance Sheet Date**”). Except as set forth on **Section 3.07 of the Seller Disclosure Schedule**, the Financial Statements have been prepared from the books and records of Lincoln Power, L.L.C. and its subsidiaries and present fairly, in all material respect, the consolidated financial position and results of operations of Lincoln Power, L.L.C. and its subsidiaries, as of the dates and for the periods indicated in such Financial Statements in conformity with GAAP (except, in the case of the Financial Statements referred to in clause (b) above, for the absence of footnotes and other presentation items and for normal year end adjustments).

**Section 3.08 No Undisclosed Liabilities.** There are no Liabilities relating to the Acquired Assets that would be required by GAAP to be reflected or reserved against on the balance sheet, including the notes thereto, except (a) Liabilities that are reflected on, reserved against or otherwise described in the Financial Statements that would be extinguished upon Closing, (b) Liabilities set forth on **Section 3.08 of the Seller Disclosure Schedule**, (c) Liabilities arising pursuant to or in connection with this Agreement or the transactions contemplated hereby, (d) Liabilities incurred in the ordinary course of business consistent with past practice since the Balance Sheet Date, or (e) Excluded Liabilities.

**Section 3.09 Absence of Changes.** Except (a) for activities undertaken in connection with the transactions contemplated by this Agreement or the preparation of the Bankruptcy Cases and actions related thereto or (b) as set forth on **Section 3.09 of the Seller Disclosure Schedule**, since the Balance Sheet Date, (i) Sellers have conducted the Business only in the ordinary course of business consistent with past practice, and (ii) Sellers have not taken any action (or failed to take any action) that would be prohibited by **Section 5.03** if such action were taken (or failed to be taken) after the date of this Agreement and prior to the Closing.

**Section 3.10 Compliance with Laws.** Except as set forth on **Section 3.10 of the Seller Disclosure Schedule**, since January 1, 2021 (a) Sellers are, and have been, in compliance in all material respects with all Laws and material Orders, in each case, applicable to the Acquired Assets and (b) as of the date hereof, Sellers have not received any written notice from any Governmental

Authority of a violation in any material respect of any Laws or material Orders, in each case, applicable to the Acquired Assets. Since January 1, 2021, and except where the failure to be, or to have been, in compliance with such Orders or Laws would not be material to the Acquired Assets, taken as a whole, (i) there has been no action taken by any Seller or by any officer, director or employee of any Seller, or to the Knowledge of Seller, any agent, other Representative or intermediary of any Seller, in each case, acting on behalf of such Seller, in violation of any applicable Anti-Corruption Law, (ii) no Seller has been convicted of violating any Anti-Corruption Laws or subjected to any investigation by a Governmental Authority for violation of any applicable Anti-Corruption Laws, (iii) no Seller has conducted or initiated any internal investigation or made a voluntary, directed, or involuntary disclosure to any Governmental Authority regarding any alleged act or omission arising under or relating to any noncompliance with any Anti-Corruption Law and (iv) no Seller has received any written notice, request or citation for any actual or potential noncompliance with any of the foregoing.

### **Section 3.11 Real Property.**

(a) **Section 3.11(a)(i) of the Seller Disclosure Schedule** sets forth a complete and accurate legal description of each parcel of real property owned in fee by a Seller and pertaining to the Project (the “**Owned Real Property**”). Except as set forth on **Section 3.11(a)(ii) of the Seller Disclosure Schedule**, a Seller has good and marketable title to the Owned Real Property free and clear of all Liens other than Permitted Liens.

(b) The Owned Real Property constitutes all of the real property used in or held for us in respect of the Project, and no Seller leases, subleases or licenses any real property in respect of the Project.

(c) **Section 3.11(c)(i) of the Seller Disclosure Schedule** sets forth a complete and accurate description of any Contract pursuant to which any Seller has an easement, right-of-way, license or similar interest in real property in respect of the Project (each, an “**Easement**”; such real property being referred to as the “**Easement Real Property**” and, the Easement Real Property, taken together with the Owned Real Property, the “**Real Property**”). Except as set forth on **Section 3.11(c)(ii) of the Seller Disclosure Schedule**, a Seller has a good and valid easement or license interest in the Easement Real Property, as applicable, free and clear of all Liens other than Permitted Liens.

(d) **Section 3.11(d)(i) of the Seller Disclosure Schedule** sets forth a complete and accurate list of any Contract pursuant to which any Seller has leased, subleased or otherwise granted any Person the right to cross, use or occupy (or similar right) any Real Property or any portion thereof (the “**Real Property Rights**”). Except as set forth on **Section 3.11(d)(ii) of the Seller Disclosure Schedule**, none of the Owned Real Property and no interest of any Seller in the Easement Real Property, is subject to or encumbered by any purchase options, rights of first refusals, rights of first offer or other rights to sell, assign or dispose any interest in such Real Property.

(e) None of the Real Property is subject to any written notice of any pending proceeding to condemn or take by power of eminent domain all or any part of the Real Property, and, to the Knowledge of Seller, no such proceeding has been threatened.

(f) Except as set forth in **Section 3.11(f) of the Seller Disclosure Schedule**, Sellers have not received written notice of any default under any covenants, restrictions or other encumbrances affecting the Real Property, except for such defaults as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole.

(g) All of the land used by Sellers in the conduct of its business pertaining to the operation of the Project as presently conducted is included in the Real Property. All of the buildings, structures and other improvements used by Sellers in the conduct of its business pertaining to the operation of the Project are located on the Real Property.

### **Section 3.12 Intellectual Property.**

(a) **Section 3.12 of the Seller Disclosure Schedule**, lists (i) all registered Intellectual Property and any applications therefor owned by Sellers and used in connection with the Business (other than any Sellers' Marks) and (ii) all Contracts granting rights under the Intellectual Property of any third party included in the Acquired Assets (excluding any "click-wrap" or "shrink-wrap" software licenses, other non-exclusive licenses pertaining to commercially available software or Contracts granting licenses which are incidental to the primary commercial objective of the Contract).

(b) No Seller has received any written notice that the operation of the Business as currently conducted is infringing any Intellectual Property of any other Person. To the Knowledge of Seller, (i) the operation of the Business has not, and does not, infringe in any respect on the Intellectual Property of any Person and (ii) no Person is infringing upon any Intellectual Property that is an Acquired Asset.

### **Section 3.13 Seller Contracts.**

(a) As of the date hereof, **Section 3.13(a) of the Seller Disclosure Schedule** sets forth a true, correct and complete list of the following Contracts related to the Acquired Assets or the Business and to which any Seller is a party or by which any Seller is bound (collectively, the "**Seller Contracts**"):

- (i) Contracts with any Affiliate or officer or director of Seller;
- (ii) Contracts for the sale, lease, license or other disposition of any of the assets of Seller for consideration in excess of one hundred thousand dollars (\$100,000) individually;
- (iii) Contracts relating to the acquisition by Seller of any operating business or the capital stock of any other Person;
- (iv) Contracts that, by their specific terms, require that transferees of the Project or the Acquired Assets be made a party thereto;
- (v) Contracts that restrain, restrict, limit or impede the ability of Purchaser to compete with or conduct any business or line of business in any geographic area;

(vi) Contracts that are a settlement, conciliation or similar agreement with any Governmental Authority or pursuant to any Seller is obligated to make payments or offer credits, offsets or rebates or provide similar concessions after the date hereof involving a value or amount, individually or in the aggregate, in excess of two hundred fifty thousand dollars (\$250,000);

(vii) Contracts pursuant to which (A) Seller is granted any license to any Intellectual Property that is an Acquired Asset, (B) Seller grants to any Person any license to any Owned Intellectual Property, or (C) Seller is restricted in Seller's ability to use, disclose, license or enforce, or grant an exclusive right to use, any Intellectual Property (including royalty, joint development, concurrent use, settlement, indemnification, tolling and consent to use agreements or contracts), in each case other than licenses for commercially available, unmodified, "off-the-shelf" software used by the Business solely for internal use, for an aggregate fee, royalty or other consideration for any such software or group of related software licenses of no more than one hundred thousand dollars (\$100,000);

(viii) Contracts (excluding Hedging Arrangements) involving annual aggregate consideration or payment obligations in excess of \$250,000 for the purchase, exchange, sale, transportation, storage, parking, loaning, distribution, wheeling, facility or meter construction, unloading, delivery or balancing of natural gas, coal, oil or other fuel;

(ix) Contracts involving annual aggregate consideration or payment obligations for the future purchase, exchange or sale of electric power, capacity or ancillary services;

(x) Contracts for the transmission, purchase, exchange, sale or delivery of electric power in any form (other than any Contracts for transmission services provided under a tariff of general applicability), including energy, capacity or any ancillary services;

(xi) electric, oil or natural gas interconnection Contracts;

(xii) Contracts under which any Seller or any Acquired Asset has created, incurred, assumed or guaranteed any outstanding Indebtedness;

(xiii) Contracts relating in any way to outstanding Hedging Arrangements with terms that are longer than thirty (30) days;

(xiv) Contracts that contain covenants of any Seller or any Acquired Asset (A) not to compete in any line of business, with any Person or in any geographical area; (B) not to offer or sell any product or service to any Person or class of Persons, (C) to offer, sell or purchase any product or service to or from any Person or class of Persons on an exclusive basis or to purchase "full requirements" from any Person or (D) granting "most favored nation" or similar rights to any Person;

(xv) Contracts that establish any partnership, joint venture or similar arrangement involving the sharing of profits or losses with a third party;

(xvi) Contracts with a Governmental Authority, except for normal and customary agreements for the provision of utilities, water or sewer that are provided on the basis of a tariff or similar generally applicable rates, terms and conditions;

(xvii) except as described above, all Contracts that require that any Support Obligation be maintained by or on behalf of any Seller or any Acquired Asset;

(xviii) except as described above, all other Contracts (A) for the future sale or acquisition of any Acquired Asset or (B) that grant a right or option to purchase any Acquired Asset, other than, in each case, sales or exchanges of electric power, capacity or ancillary services in the ordinary course of business; and

(xix) except as described above, all other Contracts requiring payments by or to any Seller in excess of \$250,000 for each individual Contract or \$500,000 in the aggregate for a series of related Contracts, except sales or exchanges of electric power, capacity or ancillary services in the ordinary course of business.

(b) Notwithstanding the foregoing, the Parties agree that the purchase orders, sales orders and similar Contracts and all other Contracts set forth in **Section 1.01(c) of the Seller Disclosure Schedules** shall constitute Seller Contracts, unless they are or become Excluded Assets. As of the date hereof, all of the material Contracts of each Seller is listed in either **Section 1.01(c) of the Seller Disclosure Schedules** or **Section 1.01(d) of the Seller Disclosure Schedules**. Except as set forth on **Section 3.13(b) of the Seller Disclosure Schedule** or as may be limited by the Enforceability Limitations, each Seller Contract is in full force and effect and constitutes a legal, valid and binding obligation, enforceable in accordance with its terms, of the applicable Seller, except as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole. No Seller is in breach of, or default under, any Seller Contract and, to the Knowledge of Sellers, no counterparty to any Seller Contract is in breach of or default under, any Seller Contract, except, in each case, for such defaults as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole. True and complete copies of each Seller Contract, in each case as amended, and in effect as of the date of this Agreement, have been made available to Purchaser.

**Section 3.14 Taxes.** Except as set forth in **Section 3.14 of the Seller Disclosure Schedule** and except with respect to any Taxes the nonpayment of which is permitted or required under the Bankruptcy Code, (a) all material Tax Returns of Sellers required to be filed have been or will be filed when due in accordance with all applicable Laws; (b) all Taxes of Sellers that are due and payable have been paid in full within the time required by Law; (c) there is no Action or audit claim now pending with respect to any material Tax of Sellers; (d) there are no outstanding agreements extending the statutory period of limitation applicable to any claim for, or the period for the collection or assessment of, material Taxes of Sellers; (e) there are no Liens on any of the Acquired Assets for Taxes (other than Permitted Liens); (f) no claim has ever been made by any Taxing Authority in a jurisdiction where Sellers do not file Tax Returns with respect to the ownership of the Acquired Assets or the Business that such entity may be subject to Tax by that jurisdiction with respect to the Acquired Assets or the Business; and (g) none of the Acquired Assets are treated as equity interests in any Person for Tax purposes.

**Section 3.15 Employees.** No Seller has, and since July 5, 2017 has not had, any employees. Sellers and the Business are, and since January 1, 2021 have been, in compliance in all material respects with all Laws relating to labor and employment matters, including provisions thereof relating to wages, hours, equal opportunity, fair labor standards, nondiscrimination, workers compensation, collective bargaining, workplace safety, immigration, employee and worker classification, and the payment and withholding of social security and other payroll Taxes and contributions. No Seller sponsors, maintains, participates in, contributes to or has any obligation to contribute to, and since January 1, 2021, has sponsored, maintained, participated in, contributed to or had an obligation to contribute to any Employee Plan.

**Section 3.16 Insurance.** **Section 3.16 of the Seller Disclosure Schedule** sets forth a true, correct and complete list, as of the date hereof, of all insurance policies maintained by Sellers or their respective Affiliates that insure the Acquired Assets or the Business or the ownership or operation thereof (collectively, the “**Insurance Policies**”).

**Section 3.17 Environmental Matters.**

(a) Sellers and the Acquired Assets are, and since January 1, 2021 have been, in compliance in all material respects with all Environmental Laws applicable to the Acquired Assets. Except as set forth on **Section 3.17 of the Seller Disclosure Schedule**:

(i) there are no material Environmental Claims pending or, to the Knowledge of Seller, threatened against Sellers or the Acquired Assets including those which would reasonably be expected to result in the imposition of any material Liability to the Project pursuant to any Environmental Law following the Closing;

(ii) there is no site to which Hazardous Substances stored or generated by Sellers or the Acquired Assets have been transported that is the subject of any environmental action or that would be reasonably expected to result in a material Environmental Claim;

(iii) since January 1, 2021, there has been no material Release or threatened Release on, at, from or under any Real Property;

(iv) since January 1, 2021, neither Seller nor any other Person managing the Project or employed by Seller or such manager, in the course of such employment, has disposed of, transported or arranged for the transportation or disposal of any Hazardous Materials generated by the Project to any off-site location, or exposed any Person to any Hazardous Materials, which would give rise to material Liabilities under applicable Environmental Laws;

(v) no Seller is currently operating the Business under any outstanding compliance or consent Order or decree issued or entered into under any Environmental Law; and

(b) Other than Permitted Liens, no Liens exist pursuant to Environmental Law related to Sellers, the Business, the Project, the Owned Real Property or the Acquired Assets.

(c) Sellers have made available to Purchaser with copies of all material environmental site assessments, environmental compliance audits, and other material reports or analyses of pending or reasonably foreseeable requirements or costs to maintain or achieve compliance with Environmental Laws or Environmental Permits relating to the Business that are in Seller's possession or control, including all material reports or analyses concerning air emissions allowances, in each case, that are in its possession or under its control and have been prepared since January 1, 2021.

**Section 3.18 Permits and Regulatory Matters.** **Section 3.18 of the Seller Disclosure Schedule** sets forth a true, correct and complete list of all material Permits owned or held by any Seller as of the date of this Agreement that are required for the ownership, maintenance, occupancy, management and operation of the Acquired Assets (collectively, the “**Material Permits**”). True and complete copies of all Material Permits have been made available to Purchaser. Except as set forth on **Section 3.18 of the Seller Disclosure Schedule**, (a) each Material Permit is in full force and effect and is not subject to appeal, rescission or cancellation and (b) the applicable Seller is in material compliance with all Material Permits held by it.

**Section 3.19 Affiliate Transactions.** Except as set forth on **Section 3.19 of the Seller Disclosure Schedule**, (a) no obligations, Contracts or other Liabilities exist between any Seller, on the one hand, and one or more of such Seller's Affiliates or any other Seller, on the other hand, that is related to any of the Acquired Assets and will continue in effect subsequent to the Closing, and (b) other than any other Seller, none of the Sellers' respective Affiliates owns or has any interest in any property (whether real, personal or mixed and whether tangible or intangible) which is used or held for use in the operation of the Acquired Assets.

**Section 3.20 Condition of Assets.** Subject to planned or unplanned outages or disclosed legal or regulatory restrictions on the Acquired Assets in existence as of the date of this Agreement or on the Closing Date and except as set forth on **Section 3.20 of the Seller Disclosure Schedule** or as would not, individually or in the aggregate, reasonably be expected to be material to the Acquired Assets, taken as a whole, the Acquired Assets (a) are in good working order and condition, ordinary wear and tear excepted and (b) have been maintained in accordance with Good Industry Practice. No casualty or condemnation event has occurred with respect to the Project other than casualty events that have been fully repaired or are being repaired under a program approved by Purchaser.

**Section 3.21 Brokers.** Except for Guggenheim Securities, LLC, the fees and expenses of which will be paid by Sellers, no broker, finder or agent acting on behalf of Sellers or their respective Affiliates is entitled to any fee or commission with respect to the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby.

**Section 3.22 Support Obligations.** All of the Support Obligations that have been provided by, or on behalf of, any Seller or its Affiliates, including Support Obligations provided by any issuer of any letters of credit, any lender, or any other third-party provider of a Support Obligation, in each case, in respect of the Business or the Acquired Assets that are outstanding as of the Closing Date are as described on **Section 3.22 of the Disclosure Schedule** (the “**Specified Support Obligations**”). True and complete copies of such Support Obligations have been made available to Purchaser.



**Section 3.23 Bankruptcy Notice.** The Sellers have given notice of the sale to all known Persons entitled to such notice, including all known Persons that have asserted Liens on the Acquired Assets and all non-debtor parties to the Purchased Contracts, and other notice as provided in the Bid Procedures Order. Sellers shall give such additional notice as the Bankruptcy Court shall direct or as Purchaser may reasonably request relating to this Agreement or the transactions contemplated hereunder.

#### **ARTICLE IV REPRESENTATIONS AND WARRANTIES OF PURCHASER**

Except as set forth in the disclosure schedule delivered by Purchaser to Sellers concurrently with the execution and delivery of this Agreement (the “**Purchaser Disclosure Schedule**”), Purchaser hereby represents and warrants to Sellers as follows:

**Section 4.01 Legal Existence.** Purchaser is a limited liability company duly formed, validly existing and in good standing under the Laws of the State of Delaware. Purchaser is qualified to do business and is in good standing in the states that the conduct of its business or locations of its Assets makes such qualification necessary, except where failure to be so qualified or to be in good standing would not, individually or in the aggregate, reasonably be expected to have a Purchaser Material Adverse Effect. Purchaser has all requisite organizational power and authority to execute, deliver and perform its obligations under this Agreement and the Purchaser Transaction Documents.

**Section 4.02 Authority.** Subject to the entry of the Confirmation Order and any other Order from the Bankruptcy Court necessary to consummate the transactions contemplated by this Agreement, (a) the execution and delivery by Purchaser of, and the performance by Purchaser of its obligations under, this Agreement and the Purchaser Transaction Documents, and the consummation by Purchaser of the transactions contemplated hereby and thereby, have been duly and validly authorized by all required action on the part of Purchaser and (b) this Agreement and each of the Purchaser Transaction Documents has been duly and validly executed and delivered by Purchaser and constitutes a legal, valid and binding obligation of Purchaser enforceable against Purchaser in accordance with its terms, except as the same may be limited by the Enforceability Limitations.

**Section 4.03 No Conflicts.** Except as described on **Section 4.03 of the Purchaser Disclosure Schedule** and, in the case of clauses (b) and (c) below, except as would not, individually or in the aggregate, reasonably be expected to impair or materially delay Purchaser’s ability to perform its obligations hereunder or under the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby, and assuming all filings, notices, consents, approvals, authorizations, and other actions described on **Section 4.04 of the Purchaser Disclosure Schedule** have been obtained, the execution and delivery by Purchaser of, and the performance of its obligations under, this Agreement, the Purchaser Transaction Documents and the consummation of the transactions contemplated hereby and thereby do not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of any Governance Document of Purchaser;

(b) conflict with or result in a violation or breach of any term or provision of any Law or Order applicable to Purchaser or any of its Assets in any material respect; or

(c) (i) conflict with or result in a material violation or material breach of, (ii) constitute (with or without notice, lapse of time or both) a material default (or give rise to any right of termination, cancellation or acceleration) under, or (iii) require Purchaser to obtain any consent, approval or action of, make any filing with or give any notice to any Person as a result or under the terms of, any material Contract, Permit or Governmental Approval to which Purchaser is a party or by which any of its Assets is bound.

**Section 4.04 Governmental Approvals.** Except (a) the entry of the Confirmation Order, (b) prior authorization from FERC under Section 203 of the FPA, (c) for informational filings and request for waiver filings as required pursuant to Schedule 2 of the PJM Open Access Transmission Tariff regarding compensation for reactive supply and voltage control service from the Project, (d) for the issuance of an order by FERC (i) either accepting succession to, or the replacement of, the Project's FERC tariff regarding reactive power and voltage control service and (ii) the grant of MBR Authority by FERC with respect to the Project, (e) the EWG status with respect to the Project becoming effective; (f) PJM's acceptance of the Affiliate of Purchaser for the Project as a market participant in PJM, and (g) except as set forth in **Section 4.04 of the Purchaser Disclosure Schedule** or as would not, individually or in the aggregate, reasonably be expected to impair or materially delay Purchaser's ability to perform its obligations hereunder or under the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby, no Governmental Approval on the part of Purchaser is required in connection with the execution and delivery by Purchaser of this Agreement, the Purchaser Transaction Documents or the consummation of the transactions contemplated hereby and thereby.

**Section 4.05 Legal Proceedings.** There are no Actions pending or threatened in writing or, to the Knowledge of Purchaser, orally, against Purchaser or any of its Assets that would, individually or in the aggregate, reasonably be expected to impair or materially delay Purchaser's ability to perform its obligations hereunder or under the Purchaser Transaction Documents or to consummate the transactions contemplated hereby or thereby. There are no Orders restraining, enjoining or otherwise prohibiting, delaying or making illegal the purchase by Purchaser of the Acquired Assets or the assumption of the Assumed Liabilities under this Agreement or the performance by Purchaser of its obligations under this Agreement or the Purchaser Transaction Documents.

**Section 4.06 Investment Representations.** Purchaser is a knowledgeable and sophisticated investor experienced (or owned or managed by Persons experienced) in evaluating investments and, in particular (either on its own or with advisors), power generation facilities and has the knowledge, experience and resources to enable it to evaluate and to bear the risks of the investment contemplated hereunder.

**Section 4.07 Financial Ability; Solvency.** Concurrently with the execution and delivery of this Agreement, Purchaser Parent has delivered to the Seller Representative a duly executed equity commitment letter (the "**Equity Commitment Letter**"), pursuant to which, Purchaser Parent has agreed to provide equity financing to Purchaser in connection with the transactions contemplated by this Agreement in an amount sufficient to pay the Purchase Price and any other

costs, fees and expenses which may be required to be paid by or on behalf of Purchaser at Closing under this Agreement and the other Purchaser Transaction Documents. The Equity Commitment Letter is in full force and effect, has not been withdrawn, rescinded, terminated or otherwise modified in any respect and no such amendment, rescission, termination or modification is contemplated. There are no side letters, understandings or other agreements or arrangements relating to the Equity Commitment Letter which could impose any new or additional or more restrictive conditions precedent to the funding of amounts under the Equity Commitment Letter, resulting in any delay in the funding of such amounts or result in the reduction to the aggregate amount available under the Equity Commitment Letter on the Closing Date. Purchaser acknowledges that receipt or availability of funds or financing by Purchaser or any of its Affiliates shall not be a condition to Purchaser's obligations hereunder. No funds to be paid to any Seller have derived from or will have been derived from, or constitute, either directly or indirectly, the proceeds of any criminal activity under the anti-money laundering Laws of the United States. Upon consummation of the transactions contemplated by this Agreement, (a) Purchaser will not be insolvent as defined in Section 101 of the Bankruptcy Code, (b) Purchaser will not be left with unreasonably small capital, (c) Purchaser will not have incurred debts beyond its ability to pay such debts as they mature and (d) the capital of Purchaser will not be impaired.

**Section 4.08 Brokers.** No broker, finder or agent acting on behalf of Purchaser or its Affiliates is entitled to any fee or commission with respect to the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby that would be payable by any Seller or any of their Affiliates.

## ARTICLE V COVENANTS RELATING TO SELLERS

**Section 5.01 Investigation by Purchaser.** From the date of this Agreement until the earlier of the Closing and the date that this Agreement is terminated in accordance with its terms (the "**Interim Period**"), Sellers shall provide Purchaser and its Representatives with reasonable access, upon reasonable prior notice and during normal business hours, to the officers of Sellers and the Plant General Manager of the Project and all other reasonable information related to the Acquired Assets and the Assumed Liabilities in the possession or control of Sellers, but only to the extent that such access does not unreasonably interfere with the business and operations of Sellers or the Project. Notwithstanding the foregoing, Sellers shall not be required to furnish any such information or access where the furnishing of such information or access would (a) violate any Law, Order, Permit or Governmental Approval applicable to Sellers or any of their respective Affiliates or Assets, including the Project, (b) result in the waiver or loss of attorney-client privilege with respect to any information, (c) result in a breach of a Contract to which Sellers or any of their respective Affiliates are a party; provided that Sellers shall use commercially reasonable efforts to obtain waivers of confidentiality provisions in Contracts to allow access by Purchaser, or (d) result in the disclosure of any trade secret, proprietary or confidential information of third parties (including any bids received from others in connection with the transactions contemplated by this Agreement and the information and analysis (including financial analysis) relating to such bids). Sellers shall collectively have the right to have a Representative present at all times during any such inspection, interview or examination by Purchaser or its Representatives and to impose reasonable restrictions and requirements for liability and safety purposes. Nothing in this **Section 5.01** shall entitle Purchaser, during the Interim Period, to conduct any sampling,

monitoring or other surface, subsurface or invasive investigation, assessment or analysis of soil, groundwater, building materials, ambient air, or other environmental media or emissions on any Real Property owned or leased by Sellers without the Seller Representative's prior written consent, which consent may be withheld in the Seller Representative's sole discretion. Except as expressly set forth in this Agreement, none of Purchaser, its Affiliates or their respective Representatives shall, prior to the Closing, contact any of the employees, customers, suppliers, distributors, contractors, lenders or agents (or Representatives of any of the foregoing) of any Seller in connection with the transactions contemplated by this Agreement without the prior written consent of the Seller Representative; provided, that nothing in this Agreement shall prohibit Representatives of or advisors to Purchaser from contacting the advisors to Sellers that are Sellers' retained professionals in the Bankruptcy Cases.

**Section 5.02 Conduct of Business.** During the Interim Period, Sellers shall use commercially reasonable efforts to conduct the Business and operate the Acquired Assets in the ordinary course of business consistent with past practice and Good Industry Practice, including compliance with Laws or Orders (including the Bankruptcy Code and any Orders entered by the Bankruptcy Court in the Bankruptcy Cases); provided that the foregoing shall not prohibit Sellers from taking, or failing to take, any actions as may be required by applicable Law or Order (including the Bankruptcy Code and any Orders entered by the Bankruptcy Court in the Bankruptcy Cases). Without limiting the foregoing, Sellers shall maintain and renew if applicable (a) the Material Permits and (b) the Insurance Policies set forth on **Section 3.16 of the Seller Disclosure Schedule**, including property insurance, to provide coverage with respect to the Acquired Assets through the Closing.

**Section 5.03 Certain Restrictions.** During the Interim Period, Sellers shall refrain from taking any of the following actions in respect of the Acquired Assets and Assumed Liabilities, except (u) with respect to those matters set forth on **Section 5.03 of the Seller Disclosure Schedule**, (v) as expressly permitted or required by this Agreement or the PJM Settlement, (w) with Purchaser's prior written consent, (x) as required by the terms of any Transferred Permit, or (y) as required by applicable Law or Orders (including the Bankruptcy Code and any Orders entered by the Bankruptcy Court in the Bankruptcy Cases):

(a) selling, transferring, conveying, releasing, liquidating, retiring, surrendering or otherwise disposing of, or leasing, mortgaging, encumbering or assigning, any Acquired Assets other than (x) dispositions of obsolete Assets or (y) sales, transfers or exchanges of electric power, capacity, emissions allowances or ancillary services, in the case of each of (x) and (y), in the ordinary course of business consistent with past practice;

(b) merging or consolidating with any other Person, entering into a joint venture with any other Person or acquiring (whether by merger, purchase of equity securities in, or purchase of Assets of, or by any other manner) any other Person or any business, division or other material Assets of any other Person that would constitute Acquired Assets or give rise to an Assumed Liability;

(c) allowing the Project to engage in any material new line of business, or make any material change in the conduct of the Business;

(d) (i) enter into any employment, deferred compensation, severance, consulting or similar agreement or arrangement (or amend any such agreement or arrangement) with any individual or (ii) create any Employee Plan;

(e) recognize any labor organization as a collective bargaining representative of any Persons whose place of employment is the Project, or enter into a collective bargaining agreement with any labor organization effecting any such Persons;

(f) cancel or compromise any material debt or claim or waive or release any material right of Seller relating to any Acquired Asset;

(g) amend its Governance Documents or take any other action which would reasonably be expected to have a material and adverse effect on the ability of Seller to consummate the Transactions or would otherwise materially and adversely affect the Business or the value, utility or transferability of any of the Acquired Assets;

(h) incurring any material Liens or permitting any material Liens to be imposed on any Acquired Assets (other than Permitted Liens);

(i) entering into, amending, modifying or terminating (partially or completely and other than pursuant to the expiration of the term thereof) any Seller Contract (or any Contract that, if in existence on the date of this Agreement would have been required to be disclosed on **Section 3.13(a) of the Seller Disclosure Schedule**), other than, in each case, the expiration of any Seller Contract in accordance with its terms or the entry into, amendment, modification or termination (whether partial or complete) of any Hedging Arrangements in the ordinary course of business consistent with past practice;

(j) entering into any Contract with any Affiliate or amending or modifying any Contract with an Affiliate, in each case, to the extent related to the Acquired Assets or Assumed Liabilities;

(k) paying or making any non-cash dividend or other non-cash distribution from the Acquired Assets;

(l) except as may be required to meet the requirements of applicable Law or GAAP, changing any accounting method or practice in a manner that is inconsistent with past practices in a way that would materially and adversely affect the Acquired Assets;

(m) granting any exclusive right or license in any material Intellectual Property included in the Acquired Assets or (without consulting with Purchaser in advance) failing to renew or exercise any rights of renewal with respect to any right in or license to any Intellectual Property included in the Acquired Assets and necessary for the conduct of the Business;

(n) amending any Material Permit or Transferred Permit (whether or not a Material Permit), or agreeing to a stipulation or settlement with a Governmental Authority relating to any Material Permit or Transferred Permit, other than routine renewals that do not impose additional material limitations on the Business or the Acquired Assets;

(o) entering into, amending or modifying any Support Obligation in a manner that would result in the aggregate outstanding amount of Support Obligations maintained by or on behalf of Sellers as of the Closing being increased as compared to the aggregate outstanding amount of Support Obligations maintained by or on behalf of Sellers as of the date of this Agreement;

(p) purchasing any equity securities of any Person that would become Acquired Assets;

(q) failing to maintain any Records in the ordinary course of business;

(r) cancelling, compromising, settling, releasing or discharging any Actions or any other material claim of the Sellers;

(s) entering into any agreement or commitment that would subject the Business to any non-competition, non-solicitation or any other material restrictions on the operation of the Business following the Closing, or that limits or restricts the use of the Intellectual Property included in the Acquired Assets following the Closing;

(t) transferring any tangible Acquired Assets to any other location if, at the Closing, such transfer would cause such Acquired Assets to not be at a location that is otherwise part of the Acquired Assets;

(u) entering into any Alternative Transaction, other than an Alternative Transaction with the Successful Bidder;

(v) waiving or sharing any attorney-client privilege or attorney work product protection that Sellers have agreed to share with Purchaser pursuant to the terms of this Agreement;

(w) other than in the ordinary course of business consistent with past practice, liquidating, retiring, selling, transferring, conveying or otherwise disposing of any emissions allowances used in the operation of the Business; or

(x) agreeing or committing to do or engage in any of the foregoing.

Notwithstanding anything else contained in this **Section 5.03**, (x) Sellers may take any actions consistent with Good Industry Practice with respect to emergency situations or to comply with the express terms of any Seller Contract so long as Sellers shall, upon receipt of notice of any such actions, promptly inform Purchaser of any such actions taken outside the ordinary course of business consistent with past practices and (y) Sellers shall have no obligation to enter into any Contract, including any Hedging Arrangements.

#### **Section 5.04 Governmental Approvals; Third Party Consents.**

(a) During the Interim Period, Sellers shall use commercially reasonable efforts to obtain and maintain in full force and effect all consents, approvals or actions of, make all filings with and give all notices to Governmental Authorities and any other Person necessary to permit

Sellers to perform their obligations under this Agreement and to consummate the transactions contemplated hereby, including maintaining all Permits.

(b) During the Interim Period, the Seller Representative shall promptly notify counsel to Purchaser of any oral or written communication they receive from any Governmental Authority relating to the matters that are the subject of this Agreement, including with respect to any Transferred Permits or otherwise with respect to the Business or any Acquired Assets, and, to the extent permitted by Law, (i) permit counsel to Purchaser to review in advance any communication proposed to be made by any Seller or any of their respective Affiliates to any Governmental Authority and (ii) provide counsel to Purchaser with copies of all material correspondence, filings or other communications between them or any of their Affiliates or Representatives, on the one hand, and any Governmental Authority or members of its staff, on the other hand, in each case of clauses (i) and (ii), relating to the matters that are the subject of this Agreement, including with respect to any Transferred Permits or otherwise with respect to the Business or any Acquired Assets.

#### **Section 5.05 Governmental Filings.**

(a) Within fifteen (15) Business Days following the date of this Agreement (subject to extension by mutual agreement of the Parties, which agreement to extend shall not be unreasonably withheld, conditioned or delayed by either Party), Sellers shall take all actions reasonably necessary to cooperate with Purchaser in the preparation of and submission to FERC, jointly with Purchaser, an application under Section 203 of the FPA for prior approval of the transactions contemplated herein. Sellers shall reasonably cooperate with Purchaser in connection with the preparation and filing of such application and also any rate approvals required under Section 205 of the FPA. Sellers shall promptly comply with, or cause to be complied with, any requests by FERC for additional information concerning such applications.

(b) CFIUS.

(i) Sellers shall, and shall cause their respective Affiliates to, use commercially reasonable efforts to cooperate with Purchaser to (A) submit to CFIUS a CFIUS Declaration or a CFIUS Notice as promptly as possible after the date hereof, (B) in the event the Parties submit a CFIUS Declaration and CFIUS requests that the Parties file a written notice pursuant to 31 C.F.R. § 800.407(a)(1): (x) submit to CFIUS a draft CFIUS Notice as promptly as possible and (y) submit a formal CFIUS Notice pursuant to the DPA as soon as practicable or, if applicable, after receipt of any comments to the draft CFIUS Notice, and (C) provide any supplemental information and other related information requested by CFIUS pursuant to the DPA as soon as practicable (and, in any case, within the time periods required by CFIUS); provided, however, that Sellers, after consultation with Purchaser, may request in good faith an extension of time pursuant to the DPA to respond to CFIUS requests for information.

(ii) Sellers shall, and shall cause their respective Affiliates to, use commercially reasonable efforts to obtain CFIUS Clearance. Sellers shall, in connection with the efforts to obtain CFIUS Clearance, (A) cooperate in all respects and consult with Purchaser in connection with the CFIUS Declaration or CFIUS Notice, as applicable,

including by allowing Purchaser to have a reasonable opportunity to review in advance and comment on drafts of filings and submissions, (B) to the extent not prohibited by CFIUS, promptly inform Purchaser of any communication received by Sellers from, or given by Sellers to, CFIUS, including by promptly providing copies to Purchaser of any such written communications, (C) permit Purchaser to review in advance any substantive communication that it gives to, and consult with each other in advance of any conference, meeting, or substantive telephone call with CFIUS, and to the extent not prohibited by CFIUS, provide Purchaser the opportunity to attend and participate in any conference, meeting, or substantive telephone call with CFIUS and (D) avoid and, if necessary, eliminate impediments to obtaining CFIUS Clearance.

(iii) Sellers shall not, and shall cause their respective Affiliates not to, take or agree to take any action, condition or restriction required by CFIUS in connection with obtaining CFIUS Clearance except with the advance written consent of Purchaser. In addition, commercially reasonable efforts shall not be construed to require Sellers to enter into litigation to overturn or challenge any governmental determination or action with respect to the DPA.

(c) Sellers shall consult and cooperate with Purchaser in the timely preparation and submission of any notifications or registrations required to comply with the PJM Open Access Transmission Tariff and other applicable PJM rules or requirements.

(d) With respect to the filings and submissions contemplated by this **Section 5.05(a) and (c)** and other filings and submissions to Governmental Authorities that may be necessary to effect the transactions contemplated by this Agreement, including the transfer and reissuance of any Transferred Permits, Sellers shall, and shall cause their respective Affiliates to, (i) cooperate and coordinate with Purchaser in the making of such filings and submissions, (ii) supply Purchaser with any information that may be required in order to make such filings and submissions, (iii) supply any additional information that may be required or requested by any applicable Governmental Authority, and (iv) use their respective commercially reasonable efforts to take all actions reasonably necessary to obtain the Governmental Approvals and any other required regulatory approvals or consents promptly and in any event prior to the End Date (without limiting any post-Closing obligation). Sellers shall (and shall cause their respective Affiliates to, if applicable) promptly inform counsel to Purchaser of any substantive communication from any Governmental Authority regarding the transactions contemplated by this Agreement in connection with such filings. If Sellers or any of their respective Affiliates receives any comments or a request for additional information or documentary material with respect to the transactions contemplated by this Agreement, including with respect to the transfer and reissuance of any Transferred Permit, from any Governmental Authority, the Seller Representative shall make (or, cause to be made), as promptly as reasonably practicable and after consultation with the Purchaser, an appropriate response to such request.

(e) Before or after Closing, Sellers shall (i) respond promptly (and, in any event, within ten (10) Business Days) to any request for additional information, documents or other materials made by any Governmental Authority with respect to any filings and submissions or any of the transactions contemplated by this Agreement, including with respect to any Transferred Permit or otherwise with respect to the Business or Acquired Assets, (ii) promptly notify counsel



to Purchaser of, any communications from or with any Governmental Authority in connection with any of the transactions contemplated by this Agreement, including with respect to any Transferred Permit or otherwise with respect to the Business or the Acquired Assets, and, to the extent reasonably practicable, enable counsel to Purchaser to participate in any such communications, (iii) not participate in any prescheduled telephonic or in-person meeting with any Governmental Authority in connection with any of the transactions contemplated by this Agreement, including with respect to any Transferred Permit or otherwise with respect to the Business or Acquired Assets, unless Sellers consult with counsel to Purchaser in advance and, to the extent permitted by such Governmental Authority, gives counsel to Purchaser a reasonable opportunity to attend, participate and speak thereat and (iv) furnish such information and assistance as may be reasonably requested in connection with the preparation of necessary filings or submission of information to the applicable Governmental Authority and provide counsel to Purchaser the opportunity to review in advance any document, opinion or proposal to be made or submitted to any Governmental Authority, including with respect to any Transferred Permit or otherwise with respect to the Business or Acquired Assets.

**Section 5.06 Replacement of Security.** Purchaser shall use all commercially reasonable efforts to replace or provide for the replacement of, on, or as promptly as practicable after the Closing Date, but in no event later than forty five (45) days thereafter, all of the Specified Support Obligations that pertain to Purchased Contracts with new letters of credit, guarantees or other security (each new letter of credit, guarantee or other security, a “**Replacement Support Obligation**” and collectively, the “**Replacement Support Obligations**”), in each case, such that (a) all contractual requirements under the Purchased Contracts corresponding to such Specified Support Obligations are satisfied in full and (b) each applicable Seller (or its applicable Affiliates) and each applicable issuer, lender or other provider of any Specified Support Obligation is fully and unconditionally released from its obligations to the beneficiaries of the applicable Specified Support Obligations (or, in the case of letters of credit, such beneficiary will return such letters of credit to such Seller (or its applicable Affiliates) or Seller Representative). With respect to any such Specified Support Obligation that is not replaced at Closing with a Replacement Support Obligation, for the period beginning on the Closing Date and continuing until the earlier of (x) forty-five (45) days thereafter or (y) Purchaser has provided for a Replacement Support Obligation in respect of such Specified Support Obligation, (A) each applicable Seller (or its applicable Affiliates) shall maintain in effect and will not amend or terminate any such Specified Support Obligations, (B) Purchaser agrees to and shall reimburse such applicable Seller (or its applicable Affiliates) for all amounts paid and expenses incurred by such Seller or its applicable Affiliate from and after the Closing Date under or in connection with any demand upon any of such Specified Support Obligations relating to post-Closing Date transactions and shall reimburse such Seller (or its applicable Affiliates) upon demand for such Seller’s (or such applicable Affiliate’s) out-of-pocket costs for providing such corresponding Specified Support Obligations and (C) Purchaser shall have the right to contact and have discussions with each beneficiary of a Specified Support Obligation and each issuer, lender or other provider of a Specified Support Obligation in order to satisfy its obligations under this section; provided that the Seller Representative shall be entitled to participate in any such contacts or discussions.

**Section 5.07 Transition Cooperation.** Sellers shall, at Purchaser’s reasonable out-of-pocket cost and expense, reasonably cooperate with Purchaser and shall take such other actions as may reasonably be necessary, proper or advisable, to the extent permitted by Law, to fulfill its

obligations under this Agreement and to provide for the reasonable transition of the ownership and operation of the Acquired Assets to the Purchaser.

**Section 5.08 Insurance Proceeds.** If during the Interim Period, any Acquired Asset is damaged or destroyed by any casualty loss, Sellers shall, and shall cause its Affiliates to, use commercially reasonable efforts to obtain any available insurance proceeds (any such insurance proceeds actually received by any Seller or reasonably expected to be received by any Seller prior to the Closing Date, the “**Insurance Proceeds**”). In the Seller Representative’s reasonable discretion and in discussion with Purchaser, the Sellers may apply all or any portion of the Insurance Proceeds actually received during the Interim Period to repair or restore such Acquired Asset to its prior condition.

## **ARTICLE VI COVENANTS RELATING TO PURCHASER**

### **Section 6.01 Governmental Approvals; Third Party Consents.**

(a) During the Interim Period, Purchaser shall use commercially reasonable efforts to obtain and maintain in full force and effect all consents, approvals or actions of, make all filings with and give all notices to Governmental Authorities and any other Person necessary to permit Purchaser to perform its obligations under this Agreement and to consummate the transactions contemplated hereby.

(b) During the Interim Period, Purchaser shall promptly notify the Seller Representative of any oral or written communication it receives from any Governmental Authority relating to the matters that are the subject of this Agreement and, to the extent permitted by Law, (i) permit the Seller Representative to review in advance any communication proposed to be made by Purchaser or any of its Affiliates to any Governmental Authority and (ii) provide the Seller Representative with copies of all material correspondence, filings or other communications related between Purchaser or any of its Affiliates or Representatives, on the one hand, and any Governmental Authority or members of its staff, on the other hand, in each case of clauses (i) and (ii), relating to matters that are the subject of this Agreement.

### **Section 6.02 Governmental Filings.**

(a) Within fifteen (15) Business Days following the date of this Agreement (subject to extension by mutual agreement of the Parties, which agreement to extend shall not be unreasonably withheld, conditioned or delayed by either Party), Purchaser shall take all actions reasonably necessary to prepare, in consultation with Sellers, and submit to FERC jointly with Sellers, an application under Section 203 of the FPA for prior approval of the transactions contemplated herein. Purchaser shall reasonably cooperate with Sellers in connection with the preparation and filing of such application. Purchaser shall promptly comply with, or cause to be complied with, any requests by FERC for additional information concerning such application. Within fifteen (15) Business Days following the date of this Agreement, Purchaser shall take all actions reasonably necessary to file with FERC (i) to either succeed to, or to replace, the Project’s FERC tariff regarding reactive power and voltage control service and (ii) to obtain MBR Authority with respect to the Project. Sellers shall reasonably cooperate with Purchaser in connection with

the preparation and filing of such applications. Sellers shall reasonably cooperate with Purchaser to comply with, or cause to be complied with, any requests by FERC for additional information concerning such applications.

(b) CFIUS.

(i) Purchaser shall, and shall cause its Affiliates to, use commercially reasonable efforts to (A) submit to CFIUS a CFIUS Declaration or a CFIUS Notice as promptly as possible after the date hereof, (B) in the event the Parties submit a CFIUS Declaration and CFIUS requests that the Parties file a written notice pursuant to 31 C.F.R. § 800.407(a)(1): (x) submit to CFIUS a draft CFIUS Notice as promptly as possible and (y) submit a formal CFIUS Notice pursuant to the DPA as soon as practicable or, if applicable, after receipt of any comments to the draft CFIUS Notice and (C) provide any supplemental information and other related information requested by CFIUS pursuant to the DPA as soon as practicable (and, in any case, within the time periods required by CFIUS); provided, however, that Purchaser, after consultation with Sellers, may request in good faith an extension of time pursuant to the DPA to respond to CFIUS requests for information.

(ii) Purchaser shall, and shall cause its Affiliates to, use commercially reasonable efforts to obtain CFIUS Clearance. Purchaser shall, in connection with the efforts to obtain CFIUS Clearance, (A) cooperate in all respects and consult with Sellers in connection with the CFIUS Declaration or CFIUS Notice, as applicable, including by allowing Sellers to have a reasonable opportunity to review in advance and comment on drafts of filings and submissions, (B) to the extent not prohibited by CFIUS, promptly inform Sellers of any communication received by Purchaser from, or given by Purchaser to, CFIUS, including by promptly providing copies to Sellers of any such written communications, (C) permit Sellers to review in advance any substantive communication that it gives to, and consult with each other in advance of any conference, meeting, or substantive telephone call with CFIUS, and to the extent not prohibited by CFIUS, provide Sellers the opportunity to attend and participate in any conference, meeting, or substantive telephone call with CFIUS and (D) enter into such commercially reasonable assurances or agreements requested or required by CFIUS or the President of the United States to obtain CFIUS Clearance; provided, however that Purchaser shall not be required to (w) take any action that would violate any Law applicable to Purchaser or any of its Affiliates, (x) sell, divest, or dispose of any assets or businesses that it or any of its Affiliates hold, (y) provide Sellers with copies of or permit Sellers to review or receive the “personal identifier information” required under 31 C.F.R. § 800.502(c)(5)(vi)(B), or (z) otherwise adopt conditions or restrictions that would reasonably be expected to have, individually or in the aggregate, a Purchaser Material Adverse Effect (disregarding for this purpose, clause (a) of the definition of Purchaser Material Adverse Effect).

(iii) Purchaser shall not, and shall cause their respective Affiliates not to, take or agree to take any action, condition or restriction required by CFIUS in connection with obtaining CFIUS Clearance except with the advance written consent of the Seller Representative. In addition, commercially reasonable efforts shall not be construed to

require Purchaser to enter into litigation to overturn or challenge any governmental determination or action with respect to the DPA.

(c) Purchaser shall consult and cooperate with Sellers in the timely preparation and submission of any notifications or registrations required to comply with the PJM Open Access Transmission Tariff and other applicable PJM rules or requirements.

(d) Within five (5) Business Days following the entry of the Confirmation Order (or such later time as may be agreed by Purchaser and the Seller Representative in writing), Purchaser shall, and shall cause its Affiliates to, make all appropriate applications, notices, reports, disclosures, submissions, or other filings with the applicable Governmental Authorities, including any required filings or submissions as may be required for the transfers of control of the Acquired Assets and to assume all rights and obligations required by the PJM Settlement.

(e) With respect to the filings and submissions contemplated by this **Section 6.02** and any other filings and submissions to Governmental Authorities that may be necessary to effect the transactions contemplated by this Agreement, including the transfer and reissuance of any Transferred Permits, Purchaser shall, and shall cause its Affiliates to, (i) cooperate and coordinate with Sellers in the making of such filings and submissions; (ii) supply Sellers with any information that may be required in order to make such filings and submissions; (iii) supply any additional information that may be required or requested by any applicable Governmental Authority; and (iv) use their respective commercially reasonable efforts to take all action reasonably necessary to obtain the Governmental Approvals and any other required regulatory approvals or consents promptly and in any event prior to the End Date. Purchaser shall (and shall cause its Affiliates to, if applicable) promptly inform the Seller Representative of any substantive communication from any Governmental Authority regarding the transactions contemplated by this Agreement in connection with such filings. If Purchaser or any of its Affiliates receives any comments or a request for additional information or documentary material with respect to the transactions contemplated by this Agreement from any Governmental Authority Purchaser shall make (or, cause to be made), as promptly as reasonably practicable and after consultation with the Seller Representative, an appropriate response to such request.

(f) Purchaser shall (i) respond promptly (and, in any event, within ten (10) days) to any request for additional information, documents or other materials made by any Governmental Authority with respect to any filings or any of the transactions contemplated by this Agreement, (ii) promptly notify counsel to Sellers of, any communications from or with any Governmental Authority in connection with any of the transactions contemplated by this Agreement and, to the extent reasonably practicable, enable counsel to Sellers to participate in any such communications, (iii) not participate in any prescheduled telephonic or in-person meeting with any Governmental Authority in connection with any of the transactions contemplated by this Agreement unless Purchaser consults with counsel to Sellers in advance and, to the extent permitted by such Governmental Authority, gives the Seller Representative a reasonable opportunity to attend, participate and speak thereat, and (iv) furnish such information and assistance as may be reasonably requested in connection with the preparation of necessary filings or submissions to the applicable Governmental Authority and provide counsel to Sellers the opportunity to review in advance any document, opinion or proposal to be made or submitted to

any Governmental Authority. All filing fees relating to this **Section 6.02** shall be borne and paid fully by Purchaser.

**Section 6.03 Insurance.** No Seller shall be responsible from and after the Closing for providing any insurance with respect to the Acquired Assets for events or occurrences occurring after the Closing. Purchaser acknowledges that all insurance arrangements maintained by Sellers or otherwise for the benefit of the Acquired Assets shall be terminated as of the Closing and no further business interruption, property or liability shall be covered under any such insurance arrangements.

**Section 6.04 Investigation by Purchaser; No Other Representations; Non-Reliance of Purchaser.** Purchaser has substantial familiarity with the Business and understands the risks inherent therewith. Furthermore, Purchaser (for itself and on behalf of its Affiliates, Representatives and financing sources), has conducted an independent investigation, verification, review and analysis of the business, operations, Assets, Liabilities, results of operations, financial condition, technology and prospects of the Business, and Purchaser, its Affiliates and their advisors and Representatives have had access to the personnel, properties, premises and records of Sellers and the Business for such purpose. In entering into this Agreement, except for the specific representations and warranties expressly made by Sellers in **Article III** (in each case, as modified by the Seller Disclosure Schedules), Purchaser (for itself and on behalf of its Affiliates, Representatives and financing sources) acknowledges that (a) none of Sellers or any other Person is making or has made any representation or warranty, expressed or implied, at law or in equity, in respect of Sellers or the Acquired Assets, the Assumed Liabilities, the Business or any Assets, Liabilities, operations, prospects or condition (financial or otherwise) thereof, including with respect to merchantability or fitness for any particular purpose of any Assets, the nature or extent of any Liabilities, the prospects of the Business, the effectiveness or the success of any operations, or the veracity, accuracy or completeness of any confidential information memoranda, documents, projections, material or other information (financial or otherwise) regarding the Business furnished to Purchaser or its Affiliates or their advisors or Representatives or made available to Purchaser, its Affiliates or their advisors or Representatives in any data rooms, management presentations or in any other form in expectation of, or in connection with, the transactions contemplated hereby; (b) it is specifically disclaiming any such other representations or warranties that may have been made by any Person other than those expressly made by Sellers in **Article III**, and acknowledges that Sellers and their respective Affiliates hereby specifically disclaim any such other representation or warranty made by any Person; and (c) it is specifically disclaiming any obligation or duty by Sellers or any of their respective Affiliates or any other Person to make any disclosures of fact not required to be disclosed pursuant to the specific representations and warranties set forth in **Article III**, except to the extent disclosure is required pursuant to this Agreement. In entering into this Agreement, except for the specific representations and warranties expressly made by Purchaser in **Article IV** (in each case, as modified by the Purchaser Disclosure Schedules), Sellers (for themselves and on behalf of their respective Affiliates, Representatives and financing sources) acknowledge that none of Purchaser or any other Person is making or has made any others representation or warranty, expressed or implied, at law or in equity.

## ARTICLE VII ADDITIONAL COVENANTS

**Section 7.01 Certain Tax Matters.**

(a) **Straddle Period.** When it is necessary under this Agreement to allocate Taxes, other than Transaction Transfer Taxes, between the Pre-Closing Tax Period and the Post-Closing Tax Period, Property Taxes shall be allocated based on a prorated daily basis, Taxes imposed on transactions shall be allocated to the date of the transaction giving rise to the Tax, and all other Taxes shall be allocated based on an interim closing of the books as of the Closing.

(b) **Transfer Taxes.** All transfer, documentary, sales, use, stamp, recording, registration, controlling interest transfer and other similar Taxes and fees (including any penalties and interest, but, for the avoidance of doubt, excluding any Taxes of Sellers that are imposed on income or gain (which Taxes are Excluded Liabilities)) (the “**Transfer Taxes**”) incurred in connection with this Agreement and the transactions contemplated hereby, if any, and any costs associated therewith (collectively, the “**Transaction Transfer Taxes**”), shall be borne by Purchaser. The Party responsible under applicable Law for filing any Tax Return with respect to an applicable Transaction Transfer Tax shall prepare such Tax Return and provide a copy to the other Party for its review and approval within a reasonable period of time prior to filing such Tax Return. The Parties shall cooperate in good faith to take such commercially reasonable actions as will minimize or reduce the amount of such Transaction Transfer Taxes.

(c) **Purchase Price Allocation.** The Parties agree that the aggregate consideration (including any Assumed Liabilities and any other items treated as consideration for U.S. federal income tax purposes and all other tax purposes) paid in exchange for the Acquired Assets will be allocated among the Acquired Assets in a manner consistent with applicable tax Law (the “**Allocation**”). Within thirty (30) days of the Closing Date pursuant to **Section 2.05**, Purchaser shall deliver to the Seller Representative a draft of the Allocation. The Seller Representative shall be deemed to agree with the draft Allocation unless the Seller Representative delivers a written dispute notice to Purchaser within fifteen (15) days from the receipt thereof setting forth in reasonable detail the reason for any objections and any proposed adjustments to the draft Allocation. Purchaser and the Seller Representative shall negotiate in good faith to resolve any disputed items. If the Parties fail to resolve any disputed items within fifteen (15) Business Days of the delivery of Purchaser’s dispute notice, the Parties shall submit the dispute to the Independent Accountant for resolution, and the Independent Accountant shall resolve any such dispute promptly (but in any event within ten (10) Business Days after the submission of the dispute to the Independent Accountant). Sellers and Purchaser each shall be liable for and pay one-half of the fees and other costs charged by the Independent Accountant. The Seller Representative and Purchaser shall use commercially reasonable efforts to update and adjust the Allocation, in a manner consistent with applicable tax Law, following any adjustment to the aggregate consideration paid in exchange for the Acquired Assets pursuant to this Agreement. Except to the extent otherwise required by any applicable tax Law, Purchaser and Sellers shall prepare all Tax Returns, in a manner consistent with the Allocation (as agreed upon by the Parties or as determined by the Independent Accountant and as may be adjusted pursuant to this Agreement); provided, however, that nothing contained herein shall prevent Purchaser or Sellers from settling any proposed deficiency or adjustment by any Taxing Authority based upon or arising out of the Allocation, and neither Purchaser nor Seller shall be required to litigate before any court any proposed deficiency or adjustment by any Taxing Authority challenging such

Allocation. Each of Purchaser and Sellers shall promptly notify the other in writing upon receipt of notice of any pending or threatened Tax audit or assessment challenging the Allocation.

(d) **Property Taxes.** All Property Taxes shall be apportioned between the Sellers, on the one hand, and Purchaser, on the other hand, under the principles set forth in Section 7.01(a) and based solely on the amounts of such Property Taxes reflected on the most recent bills received with respect to such Property Taxes. At least five (5) Business Days prior to the Closing Date, the Seller Representative shall deliver to Purchaser Sellers' good faith calculation of any such Property Taxes that are known or reasonably capable of estimation on or before such date and that are allocable to Sellers (the dollar amount of such Property Taxes, after application of this paragraph, being the "**Seller Property Tax Amount**"); provided, for the avoidance of doubt, that the Seller Property Tax Amount (i) shall take into account all refunds, overpayments and prepayments of, and credits in respect of, the applicable Property Taxes and (ii) may be a positive or a negative number. Such calculation shall be final absent manifest error, and the Seller Representative shall, upon Purchaser's reasonable request, provide Purchaser with access to the Records used in calculating the Seller Property Tax Amount. Purchaser shall pay or cause to be paid to the Taxing Authorities all Property Taxes relating to the taxable period in which the Closing occurs without thereby becoming entitled to any additional payment from any Seller, and no Party shall be liable to make any additional payment to any other Party in the event the Seller Property Tax Amount varies from the actual amount of Property Taxes allocable to Sellers for the Straddle Period.

#### **Section 7.02 Bankruptcy Court Matters.**

(a) Sellers shall diligently pursue the Bankruptcy Court's entry of the Confirmation Order and any other Order reasonably necessary in connection with the transactions contemplated by this Agreement as promptly as reasonably practicable. Purchaser agrees that it will promptly take such actions as are reasonably requested by the Sellers to assist in obtaining entry of the Confirmation Order and a finding of adequate assurance of future performance by Purchaser, including, if necessary, furnishing affidavits, non-confidential financial information, or other documents or information for filing with the Bankruptcy Court and making such representatives of Purchaser and its respective Affiliates available to testify before the Bankruptcy Court for the purposes of, among other things, providing adequate assurances of future performance by Purchaser as required under Section 365 of the Bankruptcy Code, and demonstrating that Purchaser is a "good faith" purchaser under Section 363(m) of the Bankruptcy Code and that the Purchase Price was not controlled by an agreement in violation of Section 363(n) of the Bankruptcy Code. In the event the entry of the Confirmation Order or any other Order in connection with the transactions contemplated by this Agreement shall be appealed, Sellers and Purchaser shall use their respective commercially reasonable efforts to defend such appeal. The Confirmation Order and any other sale-related Order must each be in form and substance reasonably acceptable to Purchaser and the Seller Representative.

(b) Sellers, on the one hand, and Purchaser, on the other hand, shall appear formally or informally in the Bankruptcy Court if reasonably requested by the other or required by the Bankruptcy Court in connection with the transactions contemplated by this Agreement and keep the other Parties reasonably apprised of the status of material matters related to this Agreement, including, upon reasonable request promptly furnishing the other Parties with copies

of notices or other communications received by such Party from the Bankruptcy Court or any third party or any Governmental Authority with respect to the transactions contemplated by this Agreement.

(c) The Confirmation Order shall, among other things, (i) approve, pursuant to Sections 105, 363 and 365 of the Bankruptcy Code, (A) the execution, delivery and performance by Sellers of this Agreement, (B) the sale of the Acquired Assets to Purchaser on the terms set forth herein and free and clear of all Liabilities and Liens (other than Liabilities and Liens included in the Assumed Liabilities and Permitted Liens) and (C) the performance by Sellers of their obligations under this Agreement, (ii) approve Sellers' assumption and assignment to Purchaser of the Purchased Contracts, (iii) find that Purchaser is a "good faith" buyer within the meaning of Section 363(m) of the Bankruptcy Code, (iv) find that Purchaser is not a successor to Sellers and grant Purchaser the protections of Section 363(m) of the Bankruptcy Code, (v) find that Purchaser shall have no Liability or responsibility for any Liability or other obligation of Sellers arising under or related to the Acquired Assets other than as expressly set forth in this Agreement, (vi) find that Purchaser has provided adequate assurance (as that term is used in Section 365 of the Bankruptcy Code) of future performance in connection with the assumption of the Purchased Contracts, (vii) find that Purchaser shall have no Liability for any Excluded Liability and (viii) find that the consideration provided by Purchaser for the Acquired Assets under this Agreement constitutes fair consideration and reasonably equivalent value for purposes of all laws of the United States, any state, territory, possession or the District of Columbia, and the transactions under this Agreement may not be avoided under Section 363(n) of the Bankruptcy Code. Nothing in this Agreement shall require Purchaser, Sellers or their respective Affiliates to give testimony to or submit any pleading, affidavit or information to the Bankruptcy Court or any Person that is untruthful or to violate any duty of candor or other fiduciary duty to the Bankruptcy Court or their respective stakeholders.

(d) Notwithstanding anything to the contrary herein, Purchaser agrees and acknowledges that Sellers and their respective Affiliates, including through their representatives, are and may continue until the entry of the Confirmation Order soliciting or responding to inquiries, proposal or offers from third parties with respect to the Acquired Assets or any reorganization, merger, transaction, consolidation, business combination, joint venture, partnership, financing, or restructuring or similar transaction, and may facilitate, including furnishing any information (subject to entering into a customary confidentiality agreement) with respect to, any effort or attempt by any Person to seek to do any of the foregoing in connection with the same.

(e) Sellers and Purchaser agree that, in the event that Sellers do not choose Purchaser as the Successful Bidder at the Auction undertaken pursuant to the Bid Procedures, if and only if (i) Purchaser is selected as the Back-Up Bidder at the Auction, and (ii) Sellers give written notice to Purchaser on or before the Back-Up Termination Date, stating that Sellers (A) failed to consummate the sale of the Acquired Assets with the winning bidder, and (B) terminated the purchase agreement with the winning bidder, Purchaser shall be deemed the Successful Bidder and shall promptly consummate the transactions contemplated hereby upon the terms and conditions as set forth herein (provided that the End Date shall be deemed to be 180 days following the date on which Sellers deliver such notice to Purchaser), including the payment of the Purchase Price, as may be increased by Purchaser at the Auction.



(f) Nothing in this Agreement, including this **Section 7.02**, shall require any director or officer of any Seller to violate the fiduciary duties they owe to such Seller. No action or inaction on the part of any director or officer of any Seller that such director or officer reasonably believes is required by the fiduciary duties they owe to such Seller shall be limited or precluded by this Agreement; provided, however, that no such action or inaction shall be deemed to prevent Purchaser from exercising any termination rights it may have hereunder as a result of such action or inaction.

(g) Sellers shall provide Purchaser (through counsel) a draft of each document proposed to be filed in the Bankruptcy Court or any other tribunal or regulatory body affecting the Purchaser, the Confirmation Order, this Agreement, or the transactions contemplated thereunder or hereunder at least three (3) Business Days prior to filing such document or as soon as reasonably practicable prior to filing such document.

**Section 7.03 Record Retention and Access.** Purchaser, for a period of seven (7) years following Closing, will retain the Records that are Acquired Assets and are in existence as of the Closing Date and will provide the Seller Representative and its Representatives with access to such records on reasonable advance notice and during normal business hours for review and copying at Sellers' cost; provided that Purchaser may destroy Records from time to time and prior to the end of such period in accordance with its normal document retention policy so long as Purchaser notifies the Seller Representative at least ten (10) Business Days in advance and provides Sellers an opportunity to remove or copy such Records during such advance period at Sellers' cost.

**Section 7.04 Employee Matters.**

(a) Sellers shall cause Lincoln Operating Services, LLC (“**LOS**”) to terminate the employment of all Project Personnel on the Closing Date, prior to the Closing. No later than five (5) Business Days prior to the Closing Date, Purchaser or an Affiliate of Purchaser shall make an offer of employment, effective as of the Closing Date, to those certain employees of LOS listed on **Section 7.04(a) of the Seller Disclosure Schedule**. Such employees of LOS who affirmatively accept Purchaser's or its Affiliate's offer of employment shall commence working for Purchaser or its Affiliate immediately following the Closing and are hereinafter referred to as the “**Transferred Employees**.” Such offers of employment shall be for the same job or position and at the same work location as in effect immediately prior to the Closing Date: (i) at a base salary or wage rate that is no less than the base salary or wage rate provided immediately prior to the Closing Date; (ii) with bonus and incentive opportunities (including a target bonus) with value that is no less than the value of the bonus and incentive opportunities (and target bonus), if any, provided immediately prior to the Closing Date; (iii) employee benefits substantially similar in the aggregate to the benefits provided to the employee prior to the Closing Date; and (iv) entitlement to severance benefits in accordance with the terms previously provided to Purchaser (the “**Offer Terms**”). Purchaser shall be obligated to and shall provide severance benefits in accordance with the terms previously made available to Purchaser with respect to any such Project Personnel who is either not given an offer of employment with Offer Terms consistent with this **Section 7.04(a)** or who is given an offer of employment but with terms of employment inconsistent with the Offer Terms set forth in this **Section 7.04(a)**.

(b) Purchaser shall, or shall cause an Affiliate of Purchaser to, provide each Transferred Employee with employment consistent with the Offer Terms for the twelve (12) month period following the Closing Date (the “**Continuation Period**”). Should Purchaser terminate any Transferred Employee’s employment (other than for cause) during the Continuation Period, Purchaser will pay the terminated Transferred Employee severance benefits in accordance with the terms previously made available to Purchaser. Within a reasonable time following the end of the calendar year in which the Continuation Period occurs (and in any event on or prior to March 15 of the immediately succeeding calendar year), Purchaser may, in its sole discretion, determine and pay or cause an Affiliate to pay to each Transferred Employee such Transferred Employee’s annual bonus earned for such calendar year, if any.

(c) Purchaser shall cause the Transferred Employees to receive service credit for all service with LOS and its Affiliates prior to the Closing Date, and credit for all service with any predecessor to LOS and its Affiliates, to the extent recognized under any equivalent Employee Plan of LOS or any of its Affiliates (“**LOS Plan**”), for all purposes under the Purchaser Employee Plans, including eligibility to participate, vesting credit, eligibility to commence benefits and benefit accrual, and including, without limitation, for purposes of determining the rate of accrual of paid time off and entitlement to severance benefits.

(d) On the Closing Date, each Transferred Employee shall immediately be eligible to commence participation in the Employee Plan of Purchaser or its Affiliates (“**Purchaser Employee Plan**”) that are made available to such Transferred Employees. Purchaser or its Affiliates shall (i) cause to be waived (for each Transferred Employee and his or her eligible spouse and dependents) all pre-existing condition exclusions and actively at work requirements and similar limitations, eligibility waiting periods and evidence of insurability requirements under any Purchaser Employee Plan to the same extent waived or satisfied by a Transferred Employee under a LOS Plan immediately prior to the Closing Date, and (ii) cause any deductible, co-insurance and covered out-of-pocket expenses paid under a LOS Plan in the plan year which includes the final date of the Term to be taken into account for purposes of satisfying the corresponding deductible, coinsurance and maximum out of pocket provisions under any applicable Purchaser Employee Plan.

(e) Each Transferred Employee who is a participant in the 401(k) plan of LOS or its Affiliates (the “**LOS 401(k) Plan**”) shall cease to be an active participant under such plan effective as of the Closing Date. Purchaser agrees to cause a 401(k) plan of Purchaser or its Affiliates to accept a “direct rollover” to such 401(k) plan of the account balances (including an in-kind rollover of promissory notes evidencing all outstanding loans) of all Transferred Employees under the LOS 401(k) Plan if such rollover is elected in accordance with applicable Law by such employees.

(f) To the fullest extent permitted under applicable Law, for purposes of determining the number of vacation or paid time off days to which each Transferred Employee shall be entitled following the Closing Date, Purchaser shall assume and honor all vacation or paid time off days accrued by such Transferred Employee during his or her employment with LOS but unused as of the Closing Date and Purchaser shall hold harmless Seller, LOS and their respective Affiliates in respect of any liabilities with respect to such accrued vacation or paid time off days.

(g) Notwithstanding anything in this Agreement to the contrary, nothing contained herein, whether express or implied, shall constitute or be deemed to be (i) an establishment of, amendment to, or other modification of any LOS Plan or any Purchaser Employee Plan, or (ii) a contract for employment. This **Section 7.04** is solely for the benefit of Purchaser and Sellers (and their respective Affiliates, successors and permitted assigns), and nothing in this Agreement, either express or implied, is intended to confer any third-party beneficiary or other Person any rights, benefits, remedies, obligations or liabilities of any nature whatsoever under this **Section 7.04** to any other Person, including any current or former employee of Sellers, Purchaser, LOS, or their respective Affiliates. Nothing in this **Section 7.04**, express or implied, shall provide any Person (including any Transferred Employee) with any right to continued employment with Purchaser, or any of their Affiliates, or any other Person or to any particular term or condition of employment.

## ARTICLE VIII CONDITIONS TO OBLIGATIONS OF PURCHASER

The obligation of Purchaser to consummate the transactions described in **Section 2.01**, **Section 2.03** and **Section 2.04** are subject to the fulfillment, at or before the Closing, of each of the following conditions (all or any of which may, to the extent permitted by Law, be waived in whole or in part by Purchaser in its sole discretion):

**Section 8.01 Representations and Warranties.** The representations and warranties of Sellers contained in this Agreement shall be true and correct as of the first to occur of the Flip Date and the Closing Date as though such representations and warranties were made on and as of the Flip Date or the Closing Date, as applicable (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date), except where the failure of such representations and warranties to be so true and correct (in each case, disregarding all qualifications and exceptions contained therein to materiality or Seller Material Adverse Effect), would not, individually or in the aggregate, reasonably be expected to result in a Seller Material Adverse Effect, other than (i) any representation in **Section 3.01**, **Section 3.02**, **Section 3.05** and **Section 3.21**, which shall be true and correct in all respects (with the exception of de minimis inaccuracies) as of the first to occur of the Flip Date and the Closing Date as though such representations and warranties were made on and as of the Flip Date or the Closing Date, as applicable (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date) and (ii) the representation in **Section 3.08**, which shall be true and correct in all respects as of the first to occur of the Flip Date and the Closing Date, except as would not result in a Liability to the Project or the Acquired Assets equal to or in excess of the Base Purchase Price.

**Section 8.02 Seller Material Adverse Effect.** No Seller Material Adverse Effect shall have occurred since the date of this Agreement through the first to occur of the Flip Date and the Closing Date.

**Section 8.03 Performance.** Sellers shall have performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be so performed or complied with by Sellers at or before the Closing.

**Section 8.04 Officers' Certificate.** Sellers shall have delivered to Purchaser an officer's certificate, dated the Closing Date and executed on behalf of Sellers, certifying that all of the conditions set forth in **Section 8.01**, **Section 8.02** and **Section 8.03** have been satisfied.

**Section 8.05 Orders and Laws.** There shall not be in effect on the Closing Date any Order or Law restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

**Section 8.06 Governmental Approvals.** All Governmental Approvals set forth on **Section 8.06 of the Seller Disclosure Schedule** shall have been obtained, made or given, and all terminations or expirations of applicable waiting periods imposed by any Governmental Authority with respect to the transactions contemplated hereby shall have occurred.

**Section 8.07 Sellers' Closing Deliverables.** Sellers shall have delivered, or caused to be delivered, to Purchaser the following:

- (a) an IRS Form W-9 from each Seller;
- (b) with respect to the Project, a recordable special warranty deed substantially in the form attached hereto as **Exhibit B** duly executed and acknowledged by the applicable Seller (the "**Deed**"), conveying good and marketable fee title to the Owned Real Property free and clear of all Liens other than Permitted Liens, together with any transfer tax declarations or other forms required in order to enter the Deed in the real property records of the applicable jurisdiction where the real property to be conveyed by the Deed is located; and
- (c) a bill of sale or bills of sale, as requested by Purchaser, duly executed by Sellers conveying all items of Tangible Personal Property, substantially in the form attached hereto as **Exhibit C** (collectively, the "**Bill of Sale**").

**Section 8.08 Bankruptcy Court Requirements.** The Bankruptcy Court shall have entered (i) the Bid Procedures Order, (ii) the Confirmation Order and (iii) any other Order reasonably necessary to consummate the transactions contemplated by this Agreement, and the Confirmation Order and any sale-related Order shall be a Final Order.

**Section 8.09 CFIUS Clearance.** CFIUS Clearance shall have been obtained and shall remain in full force and effect.

**Section 8.10 Successful Bidder.** Purchaser shall have been deemed the Successful Bidder, including pursuant to **Section 7.02(e)**.

Purchaser may not rely on the failure of any condition set forth in **Sections 8.01** through **8.09** as a basis for not fulfilling its obligation to effect the Closing if Purchaser has breached in any material respect its obligations under this Agreement in any manner that shall have materially caused such failure.

## ARTICLE IX CONDITIONS TO OBLIGATIONS OF SELLER

The obligation of Sellers to consummate the transactions described in **Section 2.01**, **Section 2.03** and **Section 2.04** are subject to the fulfillment, at or before the Closing, of each of the following conditions (all or any of which may, to the extent permitted by Law, be waived in whole or in part by the Seller Representative in its sole discretion):

**Section 9.01 Representations and Warranties.** The representations and warranties of Purchaser contained in this Agreement shall be true and correct as of the Closing Date as though such representations and warranties were made on and as of the Closing Date (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date), except where the failure of such representations and warranties to be true and correct (in each case disregarding all qualifications and exceptions contained therein relating to materiality, material adverse effect or word of similar import) would not, individually or in the aggregate, reasonably be expected to have a Purchaser Material Adverse Effect, other than any representation in **Section 4.01**, **Section 4.02**, and **Section 4.08**, which shall be true and correct in all respects (with the exception of de minimis inaccuracies) as of the Closing Date as though such representations and warranties were made on and as of the Closing Date (or, to the extent such representations and warranties expressly relate to an earlier date, on and as of such earlier date).

**Section 9.02 Performance.** Purchaser shall have performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be performed or complied with by Purchaser at or before the Closing.

**Section 9.03 Officer's Certificates.** Purchaser shall have delivered to the Seller Representative an officer's certificate, dated the Closing Date and executed on behalf of Purchaser, certifying that all of the conditions set forth in **Section 9.01** and **Section 9.02** have been satisfied.

**Section 9.04 Orders and Laws.** There shall not be in effect on the Closing Date any Order or Law restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

**Section 9.05 Governmental Approvals.** All Governmental Approvals set forth on **Section 9.05 of the Purchaser Disclosure Schedule** shall have been obtained, made or given, and all terminations or expirations of applicable waiting periods imposed by any Governmental Authority with respect to the transactions contemplated hereby shall have occurred.

**Section 9.06 Purchaser's Closing Deliverables.** Purchaser shall have delivered, or caused to be delivered, to the Seller Representative the Bill of Sale, duly executed by Purchaser or applicable Affiliates of Purchaser.

**Section 9.07 Bankruptcy Court Requirements.** The Bankruptcy Court shall have entered the Confirmation Order and the Confirmation Order shall be a Final Order.

**Section 9.08 CFIUS Clearance.** CFIUS Clearance shall have been obtained and shall remain in full force and effect.

Seller may not rely on the failure of any condition set forth in **Sections 9.01** through **9.07** as a basis for not fulfilling its obligation to effect the Closing if Seller has breached in any material respect its obligations under this Agreement in any manner that shall have materially caused such failure.

**ARTICLE X  
TERMINATION**

**Section 10.01 Termination.** This Agreement may be terminated, and the transactions contemplated hereby may be abandoned, at any time prior to the Closing:

- (a) by mutual written consent of Purchaser and the Seller Representative;
- (b) by either Purchaser or Seller:

- (i) if the Closing has not occurred on or before the date is 180 days following the date of this Agreement (the “**End Date**”) (which date may be extended by Purchaser or the Seller Representative, by written notice to the other, for one additional sixty (60) day period if (A) one or more applicable Governmental Approvals set forth on **Section 8.06 of the Seller Disclosure Schedules** has not been duly obtained, made or given (or any terminations or expirations of applicable waiting periods imposed by any Governmental Authority with respect to the transactions contemplated hereby shall have not occurred), and such Party reasonably believes that the relevant Governmental Approvals will be obtained during such extension period, and (B) all of the other conditions to Closing set forth in **Article VIII and Article IX** (other than (x) those conditions that by their nature are to be satisfied at the Closing, which at such time are capable of being satisfied, and (y) the conditions set forth in **Section 8.05, Section 8.06, Section 9.04 or Section 9.05**) are satisfied) (such date, as may be extended pursuant to the foregoing sentence, the “**Termination Date**”); provided that the right to terminate this Agreement pursuant to this **Section 10.01(b)(i)** shall not be available (1) to Purchaser, if Purchaser is then in default or breach of this Agreement such that the conditions specified in **Section 9.01 or Section 9.02** would not be satisfied and (2) to the Seller Representative, if Sellers are then in default or breach of this Agreement such that the conditions specified in **Section 8.01 or Section 8.03** would not be satisfied;

- (ii) if any Governmental Authority shall have issued a Final Order or enacted any Law or taken any other final action restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated by this Agreement and such Order or Law or other Action is or shall have become final and nonappealable;

- (iii) if at the end of the Auction (if any), Purchaser is not determined by Sellers to be either the Successful Bidder or the Back-up Bidder; or

- (iv) if an Order of the Bankruptcy Court is entered denying approval of the Confirmation Order and such Order denying approval shall have become a non appealable Final Order.

- (c) by Purchaser, (i) if there has been a breach by any Seller or the Seller Representative, as applicable, of any covenant, agreement or obligation of such Seller or the Seller Representative contained in this Agreement or (ii) if any representation or warranty of any Seller is or shall have become untrue, in either case such that the conditions set forth in **Section 8.01 or Section 8.03** would not be satisfied, and such breach or inaccuracy is not curable, or, if curable, is not cured within the earlier of (A) thirty (30) days after written notice of such breach is given to

the Seller Representative by Purchaser and (B) the Termination Date; provided that the right to terminate this Agreement pursuant to this **Section 10.01(c)** shall not be available to Purchaser if Purchaser is in default or breach of this Agreement such that the conditions specified in **Article IX** would not be satisfied;

(d) by Purchaser, if Sellers have failed to consummate the transactions contemplated hereby on the date that the Closing would have occurred, pursuant to and subject to the provisions of **Section 2.04**, if Sellers had not failed to consummate the transactions contemplated hereby, and all of the conditions set forth in **Article IX** would have been satisfied if the Closing were to have occurred on such date, and the Purchaser has notified the Seller Representative in writing that Purchaser is ready, willing and able to consummate the transactions contemplated by this Agreement and Sellers do not consummate the Closing within three (3) Business Days of such written notice;

(e) by the Seller Representative, (i) if there has been a breach by Purchaser of any covenant, agreement or obligation of Purchaser contained in this Agreement or (ii) if any representation or warranty of Purchaser is or shall have become untrue, in either case such that the conditions set forth in **Section 9.01** or **Section 9.02** would not be satisfied, and such breach or inaccuracy is not curable, or, if curable, is not cured within the earlier of (A) thirty (30) days after written notice of such breach is given to Purchaser by Seller and (B) fifteen (15) days prior to the End Date; provided, however, that no cure period shall apply to Purchaser's obligation to pay the Purchase Price. The right to terminate this Agreement pursuant to this **Section 10.01(e)** shall not be available to the Seller Representative if any Seller or the Seller Representative is in default or breach of this Agreement such that the conditions specified in **Article VIII** would not be satisfied;

(f) by the Seller Representative, if Purchaser has failed to consummate the transactions contemplated hereby on the date that the Closing would have occurred, pursuant to and subject to the provisions of **Section 2.04**, if Purchaser had not failed to consummate the transactions contemplated hereby, and all of the conditions set forth in **Article VIII** would have been satisfied if the Closing were to have occurred on such date, and the Seller Representative has notified Purchaser in writing that Sellers are ready, willing and able to consummate the transactions contemplated by this Agreement;

(g) automatically and without further action by any Person upon the consummation of any Alternative Transaction;

(h) by Purchaser, upon written notice to the Seller Representative, at any time following the Partial Satisfaction Date and on or prior to the Flip Date;

(i) by mutual written consent of Purchaser and the Seller Representative no more than sixty (60) days prior to the End Date, if Purchaser and the Seller Representative reasonably determine that CFIUS Clearance will not be obtained prior to the End Date;

(j) by either Purchaser or the Seller Representative, upon written notice to the other, in the event of a CFIUS Denial; or

(k) by the Seller Representative, if the Partial Satisfaction Date has occurred, by delivering written notice to Purchaser on the date that is no earlier than twenty (20) days prior to the End Date (the “**Secondary End Date**”).

**Section 10.02 Effect of Termination.**

(a) Except as provided in this **Section 10.02**, if this Agreement is validly terminated pursuant to **Section 10.01**, then this Agreement will forthwith become null and void and there will be no liability or obligation on the part of any Party or any other Person in respect of this Agreement other than for willful and intentional breaches of this Agreement prior to such termination; provided that the agreements of the Parties in **Article I, Section 6.04** this **Section 10.02** and **Article XI** will continue to apply following any termination hereof.

(b) Notwithstanding this **Section 10.02** or anything else in this Agreement to the contrary, Purchaser affirms that it is not a condition to the Closing or to any of its obligations under this Agreement that Purchaser obtain financing for or related to any of the transactions contemplated by this Agreement.

(c) If this Agreement is terminated in accordance with **Section 10.01**, the Deposit shall be released in accordance with and subject to the following provisions:

(i) If the Seller Representative terminates this Agreement pursuant to **Section 10.01(e)** or **Section 10.01(f)** or this Agreement is otherwise terminated by Purchaser or the Seller Representative at a time when the Seller Representative was entitled to terminate this Agreement pursuant to **Section 10.01(e)** or **Section 10.01(f)**, the Deposit shall be retained by the Seller Representative for further distribution to Sellers. The Parties acknowledge and agree that (A) the Parties have expressly negotiated the provisions of this **Section 10.02(c)(i)**, (B) in light of the circumstances existing at the time of the execution of this Agreement (including the inability of the Parties to quantify the damages that may be suffered by Sellers and its Affiliates) the provisions of this **Section 10.02(c)(i)** are reasonable, (C) the Deposit represents a good faith, fair estimate of the damages that Sellers and their respective Affiliates would suffer, and (D) the Deposit shall be payable as liquidated damages (and not as a penalty) without requiring Sellers or any other Person to prove actual damages. Subject to Sellers’ rights set forth in **Section 12.08**, Sellers’ receipt of the Deposit pursuant to this **Section 10.02(c)(i)** shall be the sole and exclusive remedy of Sellers and their respective Affiliates against Purchaser and its Affiliates, financing sources and Representatives for any Losses suffered as a result of the failure of the transactions contemplated hereby to be consummated or for a breach or failure to perform hereunder; provided, however, that nothing set forth (x) herein shall affect the obligations of Purchaser, or its applicable Affiliate, pursuant to the Confidentiality Agreement and (y) in this **Section 10.02(c)(i)** shall be deemed to limit or release any Liability of the Purchaser for Fraud or an intentional and willful breach of its obligations under this Agreement.

(ii) If this Agreement is terminated pursuant to **Section 10.01(h)**, **Section 10.01(i)**, so long as at the time of such termination all of the conditions specified in **Article VIII** have been satisfied or waived (other than (x) the condition set forth in



**Section 8.09**, (y) the condition set forth in **Section 8.05** (solely as it relates to CFIUS) and (z) those conditions that by their nature are to be satisfied at the Closing, **Section 10.01(j)** or, so long as a breach of, or default under, this Agreement by any Seller or the Seller Representative is not the primary cause of the conditions specified in **Article VIII** not having occurred by the Secondary End Date, **Section 10.01(k)**, or otherwise terminated by Purchaser or the Seller Representative for any reason (other than in the circumstances described in **Section 10.02(c)(i)**) when this Agreement could have been terminated pursuant to (A) **Section 10.01(h)**, (B) **Section 10.01(i)**, (C) so long as at the time of such termination all of the conditions specified in **Article VIII** have been satisfied or waived (other than (x) the condition set forth in **Section 8.09**, (y) the condition set forth in **Section 8.05** (solely as it relates to CFIUS) and (z) those conditions that by their nature are to be satisfied at the Closing, **Section 10.01(j)** or (D) so long as a breach of, or default under, this Agreement by any Seller or the Seller Representative is not the primary cause of the conditions specified in **Article VIII** not having occurred by the Secondary End Date, **Section 10.01(k)**, (1) \$250,000 of the Deposit (less any Operating Expenses if such termination occurs following the Flip Date) shall be retained by the Seller Representative for further distribution to the Sellers and (2) the remainder of the Deposit shall promptly following such termination be refunded to Purchaser, to the account(s) designated by Purchaser.

(iii) If this Agreement terminates for any reason other than in the circumstances described in **Section 10.02(c)(i)** or **Section 10.02(c)(ii)**, the then-current balance of the Deposit (less any Operating Expenses if such termination occurs following the Flip Date) shall promptly following such termination be refunded to Purchaser, to the account(s) designated by Purchaser.

## **ARTICLE XI NON-SURVIVAL; SELLER REPRESENTATIVE**

**Section 11.01 Non-Survival of Representations; Warranties and Covenants.** The Parties, intending to modify any applicable statute of limitations, agree that (a)(i) the representations and warranties in this Agreement and in any certificate delivered pursuant hereto and (ii) the covenants in this Agreement only requiring performance at or prior to the Closing shall, in each case, terminate and be of no further force and effect effective as of the Closing and shall not survive the Closing for any purpose, and thereafter there shall be no liability on the part of, nor shall any claim be made by or on behalf of, any Party or any Party's Affiliates in respect thereof and (b) the covenants in this Agreement that contemplate performance after the Closing or expressly by their terms survive the Closing shall survive the Closing in accordance with their respective terms (the "**Surviving Covenants**") until the earlier of (i) full performance of such covenant in accordance with its terms and (ii) three (3) years following the Closing Date; provided that, notwithstanding the foregoing, the covenant in **Section 7.03** shall survive until fully performed in accordance with its terms. Except with respect to the Surviving Covenants or Fraud, no other remedy shall be asserted or sought by any Party, and each Party shall cause its Affiliates not to assert or seek any other remedy, against any other Party or any of its Affiliates under any contract, misrepresentation, tort, strict liability, or statutory or regulatory Law or theory or otherwise, all such remedies being hereby knowingly and expressly waived and relinquished to the fullest extent permitted under applicable Law. Each Party acknowledges and agrees, on its own

behalf and on behalf of its Affiliates that the agreements contained in this **Section 11.01** are an integral part of the transactions contemplated hereby and that, without the agreements set forth in this **Section 11.01**, none of the Parties would enter into this Agreement. Notwithstanding anything to the contrary contained in this Agreement, nothing shall limit any claims for Fraud.

### **Section 11.02 Seller Representative.**

(a) The Parties have agreed that it is desirable to designate a representative to act on behalf of Sellers for certain limited purposes as specified herein (the “**Seller Representative**”). Lincoln Power, L.L.C. shall be the agent and attorney-in-fact for each Seller to act as the Seller Representative under this Agreement in accordance with the terms of this **Section 11.02**. In the event of the resignation of the Seller Representative, a successor Seller Representative shall be appointed by the resigning Seller Representative.

(b) The Seller Representative is hereby authorized and empowered to act for, and on behalf of, any or all of Sellers (with full power of substitution in the premises) in connection with such matters as are reasonably necessary for the consummation of the transactions contemplated by this Agreement, including (i) to receive or direct the receipt or distribution of all payments owing to Sellers under this Agreement, (ii) to withhold any amounts received on behalf of Sellers in order to satisfy any actual or potential liabilities of Sellers under this Agreement, (iii) to make any payments on behalf of Sellers and collect from Sellers any amounts paid in settlement of any claims under this Agreement, (iv) to terminate, amend, waive any provision of or abandon this Agreement or any of the Seller Transaction Documents, (v) to act as the representative of Sellers to review and authorize all claims and disputes or question the accuracy thereof, (vi) to negotiate and compromise on Sellers’ behalf with Purchaser any claims asserted hereunder and to authorize payments to be made with respect thereto, (vii) to distribute or direct the distribution of any payments to Sellers as contemplated by this Agreement, (viii) to take such further actions as are authorized in this Agreement or the Seller Transaction Documents and (ix) in general, do all things and perform all acts, including executing and delivering all agreements (including the Seller Transaction Documents), certificates, receipts, consents, elections, instructions and other documents contemplated by or deemed by the Seller Representative to be necessary or desirable in connection with this Agreement, the Seller Transaction Documents and the transactions contemplated by this Agreement. Purchaser shall be entitled to rely on such appointment and to treat the Seller Representative as the duly appointed attorney-in-fact of each Seller. Notices given to the Seller Representative in accordance with the provisions of this Agreement shall constitute notice to Sellers for all purposes under this Agreement. The Seller Representative shall not have any duties or responsibilities except those expressly set forth in this Agreement, and no implied covenants, agreements, functions, duties, responsibilities, obligations or liabilities shall be read into this Agreement or shall otherwise exist against the Seller Representative.

(c) The appointment of the Seller Representative is an agency coupled with an interest and is irrevocable and any action taken by the Seller Representative pursuant to the authority granted in this **Section 11.02** shall be effective and absolutely binding on each Seller notwithstanding any contrary action of or direction from such Seller, and the dissolution or other termination of existence, of any Seller shall not terminate the authority and agency of the Seller Representative. Purchaser and any other party to any Seller Transaction Document in dealing with

the Seller Representative may conclusively rely, without inquiry, upon any act of the Seller Representative as the act of Sellers.

(d) The Seller Representative shall not be liable to any Seller, with respect to any action taken or omitted to be taken by the Seller Representative in its role as the Seller Representative under or in connection with this Agreement or any Seller Transaction Document. Acquiror and Merger Sub acknowledge and agree that the Holder Representative is party to this Agreement solely for purposes of serving as the “Seller Representative”.

(e) The Seller Representative shall receive no compensation for service as such but shall receive reimbursement from, and be indemnified by, Sellers for any and all expenses, charges and liabilities, including reasonable attorneys’ fees incurred by the Seller Representative in the performance or discharge of its duties set forth in this **Section 11.02**.

## **ARTICLE XII MISCELLANEOUS**

**Section 12.01 Entire Agreement.** This Agreement and the agreements and documents referred to herein contain the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersede all prior agreements and understandings, whether written or oral, relating to such subject matter in any way. The Parties have voluntarily agreed to define their rights, liabilities and obligations with respect to the transactions contemplated hereby exclusively in contract pursuant to the express terms and provisions of this Agreement, and, except in the case of Fraud, the Parties expressly disclaim that they are owed any duties or are entitled to any remedies not expressly set forth in this Agreement. Furthermore, this Agreement embodies the justifiable expectations of sophisticated parties derived from arm’s-length negotiations and shall not be deemed to create a partnership between Sellers or any of their respective Affiliates, on the one hand, and Purchaser or any of its Affiliates, on the other hand, and no Person has any other special relationship with another Person that would justify any expectation beyond that of an ordinary buyer and an ordinary seller in an arm’s-length transaction.

### **Section 12.02 Expenses; Payments.**

(a) Except as otherwise specified in this Agreement, whether or not the transactions contemplated hereby are consummated, each Party shall pay its own costs and expenses; provided, however, that Purchaser shall pay all filing fees with respect to any CFIUS Notice and the obtainment of all Governmental Approvals required to be made pursuant to **Section 8.06**.

(b) Each Party agrees that, where not otherwise specified, all amounts required to be paid hereunder shall be paid in United States currency and, except as otherwise expressly set forth in this Agreement, without discount, rebate or reduction and subject to no counterclaim or offset, on the dates specified herein.

### **Section 12.03 Confidentiality.**

(a) From and after the Closing, each Party will, and will cause its Affiliates and Representatives to, hold in strict confidence all documents and information concerning another

Party or any of its Affiliates furnished to it by another Party or such other Party's Affiliates or Representatives in connection with this Agreement or the transactions contemplated hereby (the "**Confidential Information**"), and treat all such Confidential Information as proprietary, secret and confidential; provided, however, from and after the Closing, (x) such confidentiality obligations of Purchaser and its Affiliates and Representatives shall terminate with respect to all Confidential Information other than with respect to any Confidential Information that relates exclusively to Sellers or Sellers' Affiliates or the Excluded Assets or Excluded Liabilities and (y) without limiting **Section 12.19**, all Confidential Information relating to the Acquired Assets or their respective businesses or operations shall be deemed to be the Confidential Information of Purchaser. Except with respect to Purchaser to the extent Purchaser's confidentiality obligations are terminated from and after the Closing pursuant to the previous sentence, in no event shall either Party distribute to third parties any Confidential Information; provided, however, that nothing in this **Section 12.03** shall limit the disclosure by any Party of any Confidential Information:

(i) to the extent requested or required by Law or Order (provided that the disclosing Party agrees to give the non-disclosing Party prompt and reasonably sufficient written notice thereof so as to enable the non-disclosing Party to seek a protective order, oppose any action by the disclosing Party, or pursue any other appropriate remedy, if so desired by the non-disclosing Party). If such a protective order or other remedy is not obtained, or if the non-disclosing Party, in its sole discretion, waives in writing compliance with this Agreement, the disclosing Party (or such other Person required to disclose the Confidential Information) may disclose only that portion of the Confidential Information that it is legally required to disclose to avoid contempt or other penalty in the reasonable opinion of counsel to the disclosing Party (or such other Person required to disclose the Confidential Information), and shall exercise commercially reasonable efforts to obtain reliable assurance that confidential treatment will be accorded such Confidential Information so disclosed; provided that notwithstanding the foregoing clause (i) either Party may disclose information in response to routine examinations by Governmental Authorities not targeted at the Acquired Assets, the transactions contemplated by this Agreement or the Confidential Information without first complying with the provisions of this clause (i);

(ii) in an Action brought by a Party in pursuit of its rights or in the exercise of its remedies under this Agreement or the transactions contemplated hereby;

(iii) to the extent that such Confidential Information can be shown to have come within the public domain through no action or omission of the disclosing Party or its Affiliates or Representatives; and

(iv) later acquired by the receiving Party from another source if the receiving Party is not aware that such source is under an obligation to another Party hereto to keep such Confidential Information confidential.

(b) To the extent that any Confidential Information may include materials subject to the attorney-client privilege, no Seller is waiving, and no Seller will be deemed to have waived or diminished, its attorney work-product protections, attorney-client privileges or similar protections and privileges as a result of disclosing any Confidential Information (including

Confidential Information related to pending or threatened litigation) to Purchaser, its Affiliates or their respective Representatives, regardless of whether any Seller has asserted or is or may be entitled to assert such privileges and protections. In furtherance of the foregoing, neither Purchaser nor its Affiliates shall claim or contend, in any Action involving either Party, that any Seller waived its attorney work-product protections, attorney-client privileges or similar protections and privileges with respect to any information, documents or other material (whether or not disclosed to Purchaser or its Affiliates) solely due to such Seller's disclosure of Confidential Information (including Confidential Information related to pending or threatened litigation) to Purchaser, its Affiliates or their respective Representatives.

(c) For the avoidance of doubt, the terms of the Confidentiality Agreement shall continue in full force and effect in accordance with its terms until the consummation of the Closing.

**Section 12.04 Announcements.** From the date of this Agreement until, or in connection with, the Closing, none of Sellers, Purchaser or any of their respective Affiliates shall issue or make any reports, statements or releases to the public or generally to the employees, customers, suppliers or other Persons to whom Sellers or the Business sell goods or provide services or with whom Sellers or the Business otherwise have significant business relationships with respect to this Agreement or the transactions contemplated hereby without the consent of, in the case of Sellers, Purchaser, or in the case of Purchaser, the Seller Representative, which consent shall not be unreasonably withheld, conditioned or delayed; provided that for purposes of clarity, the foregoing shall not restrict reports, statements or releases (a) that are necessary for the procurement of any required consents, approvals, payoff letters and similar documentation or (b) that a Party determines in good faith, after consultation with legal counsel, is required by Law. Sellers and Purchaser shall also obtain the other Parties' prior approval of any press release to be issued announcing the consummation of the transactions contemplated by this Agreement. For the avoidance of doubt, nothing in **Section 12.03** or this **Section 12.04** shall limit Sellers ability to disclose information or make announcements that Sellers determine, in good faith, are reasonably necessary in the conduct of the Bankruptcy Cases. Purchaser shall promptly, and in any event within thirty (30) days after the Closing Date, discontinue the use of or any reference to any and all of the Sellers' Marks or any stationary, signage or other materials displaying or otherwise using any Sellers' Mark.

**Section 12.05 No Waiver.** Any term or condition of this Agreement may be waived at any time by the Party that is entitled to the benefit thereof, but no such waiver shall be effective unless set forth in a written instrument duly executed by or on behalf of the Party waiving such term or condition. No waiver by any Party of any term or condition of this Agreement, in any one or more instances, shall be deemed to be or construed as a waiver of the same or any other term or condition of this Agreement on any prior or future occasion.

**Section 12.06 Amendments.** Any provision of this Agreement may be modified, supplemented or waived only by an instrument in writing duly executed by Purchaser and the Seller Representative. Any such modification, supplement or waiver shall be for such period and subject to such conditions as shall be specified in the instrument effecting the same and shall be binding upon each of Purchaser and Sellers, and any such waiver shall be effective only in the specific instance and for the purposes for which given. No course of dealing between or among any Persons having any interest in this Agreement shall be deemed effective to modify, amend or

discharge any part of this Agreement or any rights or obligations of any Person under or by reason of this Agreement.

**Section 12.07 Addresses for Notices.** All notices and other communications required or permitted to be given or made under this Agreement shall be given or made in writing, by physical (including by mail or courier) or electronic mail delivery to the address specified below or such other address as shall be designated in a notice in writing. Notices will be effective and deemed to have been given (a) when personally delivered, sent by email (so long as the sender of such email does not receive an automatic reply from the recipient's email server indicating that the recipient did not receive such email) or sent by reputable overnight express courier (charges prepaid), or (b) three (3) days following mailing by certified or registered mail, postage prepaid and return receipt requested.

If to Sellers or the Seller Representative:

Lincoln Power, L.L.C.  
c/o Cogentrix Energy Power Management, LLC  
13860 Ballantyne Corporate Place – Suite 300  
Charlotte, NC 28277  
Attn: General Counsel  
Email: georgeknapp@cogentrix.com

with copies (which shall not constitute notice) to:

Latham & Watkins LLP  
1271 Avenue of the Americas  
New York, NY 10020  
Attn: David Allinson; Caroline Reckler  
Email: david.allinson@lw.com; caroline.reckler@lw.com

If to Purchaser:

Middle River Power VII LLC  
11 West 42<sup>nd</sup> Street, 9<sup>th</sup> Floor  
New York, New York 10036  
Attn: Kiran Ramineni  
Email: kramineni@avenuecapital.com

with a copy (which shall not constitute notice) to:

Baker Botts L.L.P.  
700 K Street, N.W.  
Washington, D.C. 20001-5692  
Attn: Elaine M. Walsh; Scott R. Bowling  
Email: elaine.walsh@bakerbotts.com; scott.bowling@bakerbotts.com

**Section 12.08 Specific Performance.**

(a) Purchaser acknowledges that the rights of Sellers to consummate the transactions contemplated hereby are unique and recognize and affirm that in the event any of the provisions of this Agreement are not performed in accordance with their specific terms or otherwise are breached, money damages would be inadequate (and therefore Sellers would have no adequate remedy at law) and Sellers would be irreparably damaged. Accordingly, Purchaser agrees that, subject to **Section 10.02** and the next sentence of this **Section 12.08**, (i) Sellers shall be entitled to specific performance, an injunction or other equitable relief (without posting of bond or other security or needing to prove irreparable harm or damages) to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and the terms and provisions hereof, in addition to any other remedy to which Sellers may be entitled, at law or in equity, and (ii) the right of specific performance and other equitable relief is an integral part of the transactions contemplated by this Agreement and without that right as provided in this **Section 12.08**, Sellers would not have entered into this Agreement.

(b) If, on or prior to the Termination Date, any Seller brings any Action, in each case, in accordance with the terms hereof, to enforce specifically the performance of the terms and provisions hereof by Purchaser, the Termination Date shall automatically be extended (i) for the period during which such Action is pending, plus ten (10) Business Days or (ii) by such other time period established by the court presiding over such Action, as the case may be.

(c) Notwithstanding anything to the contrary contained herein, while Sellers may pursue both a grant of specific performance to the extent permitted by this **Section 12.08** and the forfeiture of the Deposit by Purchaser, under no circumstances shall Sellers be permitted or entitled to receive both (A) a grant of specific performance to require Purchaser to consummate the Closing and (B) the forfeiture of the Deposit by Purchaser.

**Section 12.09 Captions.** The captions and section headings appearing in this Agreement are included solely for convenience of reference and are not intended to affect the interpretation of any provision of this Agreement.

**Section 12.10 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under applicable Law, but if any provision of this Agreement or the application of any such provision to any Person or circumstance shall be held to be prohibited by or invalid, illegal or unenforceable under applicable law in any respect by a court of competent jurisdiction, such provision shall be ineffective only to the extent of such prohibition or invalidity, illegality or unenforceability, without invalidating the remainder of such provision or the remaining provisions of this Agreement, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. Furthermore, in lieu of such illegal, invalid or unenforceable provision, there shall be added automatically as a part of this Agreement a legal, valid and enforceable provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible.

**Section 12.11 Assignment.** This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided that neither this Agreement nor any of the rights, interests or obligations hereunder may

be assigned or delegated by any Party (including by operation of law) without the prior written consent of the other Parties; provided, however, that Purchaser may assign its rights, interests and obligations hereunder to any Affiliate or Affiliates of Purchaser, or to Purchaser's lenders for collateral security purposes, but such assignment shall not release Purchaser from its obligations hereunder.

**Section 12.12 No Third-Party Beneficiary.** The terms and provisions of this Agreement are intended solely for the benefit of each Party hereto and their respective successors or permitted assigns, and it is not the intention of the Parties to confer third-party beneficiary rights upon any other Person other than with respect to the Non-Party Affiliates identified in **Section 12.13(b)**, Latham under **Section 12.19**, each of which provisions is intended to be for the benefit of the Persons covered thereby or to be paid thereunder and may be enforced by such Person.

**Section 12.13 Disclaimer; Non-Recourse.**

(a) EXCEPT AS OTHERWISE EXPRESSLY PROVIDED HEREIN, (I) THE ACQUIRED ASSETS AND ASSUMED LIABILITIES ARE BEING TRANSFERRED "AS IS, WHERE IS, WITH ALL FAULTS," AND, (II) WITHOUT LIMITING THE GENERALITY OF **Section 6.04**, SELLERS EXPRESSLY DISCLAIM ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, AS TO THE CONDITION, VALUE OR QUALITY OF THE ACQUIRED ASSETS AND ASSUMED LIABILITIES OR THE PROSPECTS (FINANCIAL OR OTHERWISE), RISKS AND OTHER INCIDENTS OF THE BUSINESS, OR THE PROJECT.

(b) All claims or causes of action (whether in contract or in tort or otherwise) that may be based upon, arise out of or relate to this Agreement, or the negotiation, execution or performance of this Agreement (including any representation or warranty made in or in connection with this Agreement or as an inducement to enter into this Agreement), may be made only against the Persons that are expressly identified as Parties. No Person who is not a named party to this Agreement, including any past, present or future direct or indirect director, officer, employee, incorporator, member, manager, partner, equityholder, Affiliate, agent, attorney or other Representative of any named party to this Agreement (such Persons, collectively, "**Non-Party Affiliates**"), shall have any liability (whether in contract or in tort or otherwise, or based upon any theory that seeks to impose liability of an entity party against its owners or Affiliates) for any obligations or liabilities arising under, in connection with or related to this Agreement or for any claim based on, in respect of, or by reason of this Agreement or its negotiation or execution, and each Party waives and releases all such Liabilities, claims and obligations against any such Non-Party Affiliates. Non-Party Affiliates are expressly intended as third-party beneficiaries of this **Section 12.13(b)**.

(c) Notwithstanding anything to the contrary contained herein or provided for under any applicable Law or Order, nothing shall limit the obligations of, or preclude or derogate from any claim or cause of action against Purchaser Parent pursuant to the Confidentiality Agreement in accordance with the terms of such Contract.

**Section 12.14 Counterparts.** This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument and any of



the Parties to this Agreement may execute this Agreement by signing any such counterpart. In the event that any signature is delivered by e-mail delivery of a “.pdf” format data file, such signature shall create a valid and binding obligation of the Party executing (or on whose behalf such signature is executed) with the same force and effect as if such facsimile or “.pdf” signature page were an original thereof.

**Section 12.15 Governing Law.** This Agreement shall be interpreted and construed in accordance with the laws of the State of Delaware and any and all Actions related to or arising out of or relating to this Agreement, whether sounding in contract, tort or statute, shall be governed by the laws of the State of Delaware, including its statutes of limitations, without giving effect to any conflict of law or other rule that would result in the application of the laws of a different jurisdiction.

**Section 12.16 Consent to Jurisdiction.** The Parties irrevocably agree that, during the period from the date hereof until the date on which the Bankruptcy Cases are closed or dismissed, any Action seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby shall be brought exclusively in the Bankruptcy Court. The Parties further irrevocably agree that, after the Bankruptcy Cases are closed or dismissed, any Action with respect to this Agreement or the transactions contemplated hereby shall be brought against any of the Parties exclusively in either the United States District Court for the District of Delaware or any state court of the State of Delaware located in such district, and each of the Parties hereby irrevocably consents to the jurisdiction of such court and the Bankruptcy Court (and of the appropriate appellate courts therefrom) in any such Action and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such Action in such courts or that any such Action which is brought in such courts has been brought in an inconvenient forum. Process in any Action may be served on any party anywhere in the world, whether within or without the jurisdiction of the Bankruptcy Court, the United States District Court for the District of Delaware or any state court of the State of Delaware. Without limiting the foregoing, each Party agrees that service of process on such Party in the manner as provided in **Section 12.07** for notices shall be deemed effective service of process on such Party.

**Section 12.17 Waiver of Jury Trial.** TO THE FULLEST EXTENT PERMITTED BY LAW, EACH PARTY HEREBY WAIVES ALL RIGHTS TO A TRIAL BY JURY IN ANY LEGAL ACTION, SUIT, OR PROCEEDING (WHETHER ARISING IN CONTRACT, TORT OR OTHERWISE) TO ENFORCE OR INTERPRET THE PROVISIONS OF THIS AGREEMENT OR THAT OTHERWISE RELATES TO THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED HEREBY OR THE RELATIONSHIPS ESTABLISHED AMONG THE PARTIES HEREUNDER.

**Section 12.18 Disclosure.** Any fact or item disclosed in any section of the Seller Disclosure Schedule shall be deemed disclosed in each other section of the Seller Disclosure Schedule to which such fact or item may apply so long as (a) such other section is specifically referenced by applicable cross-reference or (b) it is reasonably apparent on the face of such disclosure that such disclosure is applicable to such other section. The headings contained in the Seller Disclosure Schedule are for convenience of reference only and shall not be deemed to modify or influence the interpretation of the information contained in the Seller Disclosure

Schedule or this Agreement. The Seller Disclosure Schedule is not intended to constitute, and shall not be construed as, an admission or indication that any such fact or item is required to be disclosed. Any fact or item disclosed in the Seller Disclosure Schedule shall not by reason only of such inclusion be deemed to be material, to establish any standard of materiality or to define further the meaning of such terms for purposes of this Agreement and matters reflected in the Seller Disclosure Schedule are not necessarily limited to matters required by this Agreement to be reflected herein and may be included solely for information purposes. No disclosure in the Seller Disclosure Schedule relating to any possible breach or violation of any Contract, Law or Order shall be construed as an admission or indication that any such breach or violation exists or has actually occurred. The information contained in the Seller Disclosure Schedule shall be kept strictly confidential by the Parties pursuant to the terms of **Section 12.03** and no third party may rely on any information disclosed or set forth therein.

**Section 12.19 Legal Representation.** Purchaser agrees, on their own behalf and on behalf of their directors, managers, members, partners, officers, employees and Affiliates and each of their successors and assigns (all such parties, the “**Waiving Parties**”), that Latham & Watkins LLP (“**Latham**”) (or any successor thereto) may represent Sellers or any direct or indirect director, manager, member, partner, officer, employee, equityholder, Affiliate or other Representative of any Seller, in connection with any dispute, Action or obligation arising out of or relating to this Agreement, any agreement entered into in connection herewith or the transactions contemplated hereby (any such representation, the “**Post-Closing Representation**”) notwithstanding its representation (or any continued representation) of Sellers, and Purchaser consents thereto on behalf of itself and the Waiving Parties, and Purchaser irrevocably waives (and will not assert) any conflict of interest or any objection arising therefrom or relating thereto. Purchaser acknowledges that the foregoing provision applies whether or not Latham provides legal services to the Business or the Project after the Closing Date. Purchaser irrevocably acknowledges and agrees, for itself and the Waiving Parties, that all communications among Latham, Sellers or any director, officer, manager, member, employee or other Representative of any of the foregoing made in connection with the negotiation, preparation, execution, delivery and performance under, or any dispute or proceeding arising out of or relating to, this Agreement, any agreement entered into in connection herewith, the transactions contemplated hereby or any matter relating to any of the foregoing, are Excluded Assets and privileged communications and the attorney-client privilege and the expectation of client confidence belongs to solely to Sellers and may be controlled by Sellers and shall not pass to or be claimed by Purchaser and from and after the Closing none of Purchaser or any Person purporting to act on behalf of or through Purchaser or any of the Waiving Parties will seek to obtain the same by any process. From and after the Closing, Purchaser, on behalf of itself and the Waiving Parties, waives and will not assert any attorney-client privilege with respect to any communication among Latham, Sellers or any director, officer, manager, member, employee or other Representative of any of the foregoing occurring prior to the Closing in connection with any Post-Closing Representation. Notwithstanding the foregoing, in the event that a dispute arises between Purchaser, on the one hand, and a third party, on the other hand, Purchaser may assert the attorney-client privilege to prevent disclosure of confidential communications to such third party.

**Section 12.20 Release.**

(a) Effective as of the Closing, each Seller Released Party shall release and forever discharge each Purchaser Released Party from any and all Liabilities, claims and causes of

action, whether known or unknown, including any derivative claims, asserted by or on behalf of the Seller Released Parties, based on or relating to, or in any manner arising from, in whole or in part, (i) the Released Claims and (ii) any events, circumstances or actions occurring, existing or taken prior to or as of the Closing Date in connection with or relating to the Released Claims, in each case except (A) in the case of Fraud and (B) for rights and obligations arising from or in connection with this Agreement, the Seller Transaction Documents or the Purchaser Transaction Documents.

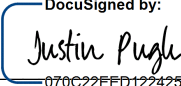
(b) Effective as of the Closing, each Purchaser Released Party shall release and forever discharge each Seller Released Party from any and all Liabilities, claims and causes of action, whether known or unknown, including any derivative claims, asserted by or on behalf of the Purchaser Released Parties, based on or relating to, or in any manner arising from, in whole or in part, (i) the Released Claims and (ii) any events, circumstances or actions occurring, existing or taken prior to or as of the Closing Date in connection with or relating to the Released Claims, in each case except (A) in the case of Fraud and (B) for rights and obligations arising from or in connection with this Agreement, the Seller Transaction Documents (other than the Deed executed and acknowledged pursuant to **Section 8.07(b)**) or the Purchaser Transaction Documents.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, this Agreement has been duly executed and delivered by the duly authorized representative of each party hereto as of the date first above written.


**SELLERS:**

**Cogentrix Lincoln Holdings II, LLC**  
**Lincoln Power, L.L.C.**  
**Elgin Energy Center Holdings, LLC**  
**Elgin Energy Center, LLC**  
**Valley Road Holdings, LLC**  
**Valley Road Funding, LLC**  
**Rocky Road Power, LLC**

DocuSigned by:  
  
By: \_\_\_\_\_  
Name: Justin Pugh  
Title: Chief Restructuring Officer

**PURCHASER:**

**Middle River Power VII LLC**

By:   
Name: Sonia Gardner  
Title: Authorized Signatory

**EXHIBIT A**

**[Reserved.]**

**EXHIBIT B**  
**FORM OF DEED**

[See attached.]

**SPECIAL WARRANTY DEED**

ILLINOIS

*Above Space for Recorder's Use Only*

THE GRANTOR, **ROCKY ROAD POWER, LLC, also known as ROCKY ROAD POWER, L.L.C.**, a Delaware limited liability company, having a mailing address at

\_\_\_\_\_, and authorized to transact business in the State of Illinois, for and in consideration of TEN and 00/100 DOLLARS, and other good and valuable considerations in hand paid, does GRANT, BARGAIN, SELL AND CONVEY to *(Name and Address of Grantee(s):)* \_\_\_\_\_, a(n) \_\_\_\_\_, having a mailing address at \_\_\_\_\_

\_\_\_\_\_, and authorized to transact business in the State of Illinois, the following described Real Estate, situated in the Counties of COOK and KANE in the State of Illinois to wit: **(See Exhibit A for legal description attached here to and made part hereof.)**, hereby releasing and waiving all rights under and by virtue of the Homestead Exemption Laws of the State of Illinois.

Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any way appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim or demand whatsoever, of the party of the first part, either in law or equity, of, in and to the above described premises, with the hereditaments and appurtenances: TO HAVE AND TO HOLD the said premises as above described, with the appurtenances, unto the party of the second part, its successors and assigns forever.

And the party of the first part, for itself, and its successors, does covenant, promise and agree, to and with the party of the second part, its successors and assigns, that it has not done or suffered to be done, anything whereby the said premises hereby granted are, or may be, in any manner encumbered or charged, except as herein recited, and that IT WILL WARRANT AND DEFEND the said premises against all persons lawfully claiming, or to claim the same, by, through or



under it, SUBJECT TO: general taxes for 2024 and subsequent years; covenants, conditions and restrictions of record, if any;

Permanent Real Estate Index Numbers: 01-19-301-035-0000 Vol. 001 and 01-19-301-037-0000 Vol. 001 (Cook County; correspond to Parcel 1 as described hereinafter); and 03-25-226-001 (Kane County; corresponds to Parcel 4 as described hereinafter)

Address of Real Estate:  
Pond Gate Drive and Rock Road Drive  
Barrington Hills and East Dundee, Illinois

The date of this deed of conveyance is \_\_\_\_\_, 2023.  
*[Signature page of Grantor follows on the next page.]*

**Grantor:**

**ROCKY ROAD POWER, LLC, also known as ROCKY ROAD POWER, L.L.C.**, an Illinois limited liability company

By: \_\_\_\_\_  
Name  
Title:

State of \_\_\_\_\_, County of \_\_\_\_\_

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that \_\_\_\_\_ personally known to me to be the same person(s) whose name(s) is(are) subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he/she(they) signed, sealed and delivered the said instrument as his/her(their) free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

*(Impress Seal Here)*

Given under my hand and official seal .

*(My Commission Expires:*  
\_\_\_\_\_ )

\_\_\_\_\_  
Notary Public

**EXHIBIT A**

**LEGAL DESCRIPTION**

For the Premises commonly known as:  
Rocky Road Power Facility

Legal Description:

PARCEL 1:

LOT 31 IN POND GATE FARM SUBDIVISION ADDITION, BEING A SUBDIVISION OF PART OF THE NORTH 69.695 ACRES OF THE NORTHWEST 1/4 OF SECTION 30, TOWNSHIP 42 NORTH, RANGE 9 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED SEPTEMBER 30, 2001 AS DOCUMENT 0010876354, IN COOK COUNTY, ILLINOIS.

PARCEL 2:

EASEMENT FOR INGRESS AND EGRESS FOR THE BENEFIT OF PARCEL 1 OVER THE DRIVEWAY ACCESS EASMENT DEPICTED ON LOTS 29 AND 30 IN AFORESAID POND GATE FARM SUBDIVISION ADDITION, AND AS CREATED BY AND DESCRIBED AS PRIVATE ACCESS EASEMENT IN THE FIRST AMENDMENT OF POND GATE FARM DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS AND EASEMENTS RECORDED SEPTEMBER 20, 2001 AS DOCUMENT 0010876356, IN COOK COUNTY, ILLINOIS.

PARCEL 3:

NON-EXCLUSIVE EASEMENT FOR THE BENEFIT OF PARCEL 1 FOR THE PURPOSE OF INGRESS AND EGRESS OVER AREAS MARKED AS PRIVATE STREETS ON THE PLAT OF POND GATE FARM SUBDIVISION RECORDED MAY 30, 2001 AS DOCUMENT NUMBER 0010456380, AND ON THE PLAT OF POND GATE FARM SUBDIVISION ADDITION RECORDED SEPTEMBER 20, 2001 AS DOCUMENT NUMBER 0010876354, IN COOK COUNTY, ILLINOIS.

PARCEL 4:

LOT 1 IN ROCKY ROAD POWER SUBDIVISION PART OF THE NORTHEAST 1/4 OF SECTION 25, TOWNSHIP 42 NORTH, RANGE 8 EAST OF THE THIRD PRINCIPAL MERIDIAN, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 19, 1999 AS DOCUMENT 1999K018491, IN THE VILLAGE OF EAST DUNDEE, KANE COUNTY, ILLINOIS.

<p>This instrument was prepared by: Mark Leskiw Latham &amp; Watkins LLP 1271 Avenue of the Americas New York, New York 10020</p>	<p>Send subsequent tax bills to:</p>	<p>Recorder – mail recorded document to:</p>
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**EXHIBIT C**

**FORM OF BILL OF SALE**

[See attached.]

**BILL OF SALE AND ASSIGNMENT AND ASSUMPTION AGREEMENT**

This BILL OF SALE AND ASSIGNMENT AND ASSUMPTION AGREEMENT (this “Bill of Sale”) is made as of [x], 2023, by and among (a) Cogentrix Lincoln Holdings II, LLC, a Delaware limited liability company, Lincoln Power, L.L.C., a Delaware limited liability company, Elgin Energy Center Holdings, LLC, a Delaware limited liability company, Elgin Energy Center, LLC, a Delaware limited liability company, Valley Road Holdings, LLC, a Delaware limited liability company, Valley Road Funding, LLC, a Delaware limited liability company, and Rocky Road Power, LLC, a Delaware limited liability company (collectively, “Sellers”), and (b) Ricochet Power, LLC, a Delaware limited liability company (“Purchaser”).

**WHEREAS**, Sellers and Purchaser entered into that certain Asset Purchase Agreement, dated as of July 24, 2023 (as amended, the “Asset Purchase Agreement”);

**WHEREAS**, pursuant to the Asset Purchase Agreement, each Seller has agreed to sell, grant, convey, assign, transfer and deliver to Purchaser all of such Seller’s respective right, title and interest in, to and under the Acquired Assets, and Purchaser has agreed to acquire the Acquired Assets; and

**WHEREAS**, pursuant to the Asset Purchase Agreement, each Seller has agreed to assign the Assumed Liabilities to Purchaser, and Purchaser has agreed to assume, timely perform and discharge in accordance with their respective terms, the Assumed Liabilities.

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound hereby, it is hereby agreed that:

1. **Definitions**. Unless otherwise defined herein, all capitalized terms used in this Bill of Sale shall have the meanings set forth in the Asset Purchase Agreement.

2. **Transfer of Assets**. Effective as of the Closing, each Seller hereby sells, grants, conveys, assigns, transfers and delivers to Purchaser all of such Seller’s respective right, title and interest in, to and under the Acquired Assets, and Purchaser hereby accepts such sale, grant, conveyance, assignment, transfer and delivery of the Acquired Assets free and clear of all Liens except for Permitted Liens. Notwithstanding anything to the contrary in this Bill of Sale, none of the Excluded Assets nor any other assets, properties or rights of Sellers, other than the Acquired Assets), are being sold, granted, conveyed, assigned, transferred or delivered to Purchaser by this Bill of Sale.

3. **Assignment and Assumption of Assumed Liabilities**. Effective as of the Closing, each Seller hereby assigns, transfers, conveys and grants to Purchaser all of such Seller’s respective legal, beneficial, and other right, title, benefit, privileges, and interest in and to each of the Assumed Liabilities, all in accordance with the terms and conditions of the Asset Purchase Agreement. In consideration of said assignment, transfer, conveyance and granting, Purchaser hereby assumes and agrees to perform and discharge when due the Assumed Liabilities, all in accordance with the terms and conditions of the Asset Purchase Agreement. Notwithstanding the foregoing, Purchaser shall not assume and shall not be liable or responsible for the Excluded

Liabilities, all of which are retained by the Sellers in accordance with the terms of the Asset Purchase Agreement.

4. Subject to the Asset Purchase Agreement. This Bill of Sale is subject in all respects to the terms and conditions of the Asset Purchase Agreement, and all of the representations, warranties, covenants and agreements of Sellers and Purchaser contained therein. Nothing in this Bill of Sale shall supersede, amend, alter or modify (nor shall it be deemed or construed to supersede, amend, alter or modify) any of the terms or conditions of the Asset Purchase Agreement in any manner whatsoever. In the event of any conflict between the, provisions of this Bill of Sale and the provisions of the Asset Purchase Agreement, the provisions of the Asset Purchase Agreement shall control and prevail.

5. Representations and Warranties. Except as set forth in the Asset Purchase Agreement, Sellers do not make any representations or warranties, express or implied, with respect to the Acquired Assets or the Assumed Liabilities, and Sellers expressly disclaim any implied warranties.

6. Miscellaneous. Article XII of the Asset Purchase Agreement, to the extent applicable, shall apply to this Bill of Sale *mutatis mutandis*.

*[Signature pages follow]*

IN WITNESS WHEREOF, the undersigned have executed and delivered this Bill of Sale as of the date first written above.

**SELLERS:**

COGENTRIX LINCOLN HOLDINGS II, LLC  
LINCOLN POWER, L.L.C.  
ELGIN ENERGY CENTER HOLDINGS, LLC  
ELGIN ENERGY CENTER, LLC  
VALLEY ROAD HOLDINGS, LLC  
VALLEY ROAD FUNDING, LLC  
ROCKY ROAD POWER, LLC

By: \_\_\_\_\_  
Name:  
Title:



**PURCHASER:**

[∅]

By: \_\_\_\_\_  
Name:  
Title:

**ANNEX A**

**SELLERS**

Cogentrix Lincoln Holdings II, LLC

Lincoln Power, L.L.C.

Elgin Energy Center Holdings, LLC

Elgin Energy Center, LLC

Valley Road Holdings, LLC

Valley Road Funding, LLC

Rocky Road Power, LLC