BEFORE THE

PUBLIC UTILITY COMMISSION OF OREGON

UE 399

In the Matter of	)
	)
PACIFICORP, d/b/a Pacific Power	)
	)
Request for a General Rate Revision.	)
	)
	)

NEWSUN ENERGY, LLC'S OBJECTION TO FOURTH PARTIAL STIPULATION

BY

JAKE STEPHENS

October 21, 2022

I. INTRODUCTION AND SUMMARY

Q. PLEASE STATE YOUR NAME AND OCCUPATION.

A. My name is Jake Stephens, CEO and founder of NewSun Energy LLC ("NewSun"), a company with offices and employees in Bend, Oregon and Tucson, Arizona. NewSun is a power plant development group focused on renewable energy, primarily photovoltaic solar, and surrounding opportunities. NewSun currently works in several western U.S. states, and is currently focusing its efforts in Oregon. Founded in 2015, NewSun's team has experience in the successful development of several square miles of solar projects, as well as decades of experience in project permitting, finance, interconnection, transmission, operations, and development of dozens of solar, geothermal, and natural gas facilities, both domestic and international.

Q. PLEASE IDENTIFY THE PARTY ON WHOSE BEHALF YOU ARE TESTIFYING.

A. I am testifying on behalf of NewSun.

Q. HAVE YOU TESTIFIED IN FRONT OF THE PUBLIC UTILITY COMMISION OF OREGON BEFORE?

A. No, this will be my first time providing written testimony to the Public Utility Commission of Oregon ("Commission"). I have, however, participated and submitted oral and written comments in other Commission proceedings, and appeared before the Commission to testify at public meetings.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. I discuss my review of the Forth Partial Stipulation in this docket and PacifiCorp's proposed Voluntary Renewable Energy Tariff ("VRET"), which the company named the Accelerated Commitment Tariff, and PacifiCorp's proposed Schedule 273, in particular to discuss a

mixture of consequential issues in proposed PacifiCorp's tariff language that likely have impacts to costs for not only VRET participants, but broader ratepayer cost impacts, as well as effects on the VRET program's viability, and customer exposures related to these issues, including as relates implications for (and/or side-stepping of) other competitive processes and protections. Subtle changes proposed inappropriately conflate various types of defaults, including conflating consequences for non-power-output related defaults with actual facility performance related defaults, with exposure of customers and generators to extreme and inappropriate consequences. These terms ultimately may create, or even require, draconian consequences and create backdoor PacifiCorp rights, and even *obligations* to take disproportionate-to-context actions (such as termination of an entire facility for marginal performance issues and entire replacement thereof), including abilities to assert rights and obligations to do so, and to take actions in non-cost-effective, non-practical, time compressed manners, and/or outside of competitive processes and oversight, without even clarity of transparency obligations to customers as to consequences them before such actions are implemented, much less their having explicit recourse or abilities to evaluate and/or veto cost impacts, or perhaps even opt out, in an entirely voluntary program. These features will not only likely challenge, or entirely undermine, financeability for non-IOU-owned assets, but likely adversely affect RFP bids and VRET program customer pricing which interact with PPA terms and bidding criteria, in particular the mechanics, consequences, and remedies for various types of defaults, where such terms and conditions may, or are even likely to, become incorporated in those venues based on the tariff language the Commission may bless here, as VRET program terms and *requirements*, in the rate case.

Q. **CAN YOU GENERALLY DESCRIBE THE VRET?**

A. The VRET is a voluntary program that allows nonresidential retail electric customers of PacifiCorp to obtain power supply from one or more renewable energy resources ("VRET Resources"), generally for large, industrial customers seeking to, *on a voluntary basis,* accelerate decarbonization associated with their loads and beyond that which is already happening under state mandates or otherwise. VRET Resources may be owned by PacifiCorp or third parties. The output of VRET Resources may also be acquired by PacifiCorp from third-party developers, like NewSun, through a Power Purchase Agreement ("PPA"). Environmental attributes from VRET Resources will be retired on behalf of participating customers, presumably to satisfy their internal corporate goals. Interested customers may sign up to become "VRET Participants", which would then provide off-take pass-through backstops for targeted procurements of renewable resources to match up with some or all of their projected energy consumption, presumably at a price premium which *prospective* participants *may* be willing to support, subject to further scrutiny and negotiations with PacifiCorp, including associated contractual agreements with PacifiCorp, and PPAs between PacifiCorp and third party facility developers or owners (where the VRET Resources will not be owned by PacifiCorp), for resources eventually selected and agreed to. All of this is subject not only to all related contractual terms *and tariff terms,* with implications that PPA and other contract terms *must* conform with tariff requirements, as may be approved by this Commission. VRET Resources for *prospective* VRET participants at their respective *prospective* participation levels will *initially* and generally, in practice, be selected by PacifiCorp through a competitive resource procurement process, essentially from a pool of resources bid into and evaluated as

part of PacifiCorp's larger "RFP" procurement processes, which draw in a broad range of market bids. Those RFP bids are evaluated alongside any of PacifiCorp's own self-developed resources, from which collectively PacifiCorp presumably procures the best resources for its general ratepayers more broadly. Which in essence means the candidate VRET resources are the leftovers and tag-alongs after PacifiCorp skims its top tier resources off the top (or, for whatever reason, are resources still remaining after RFP selections are complete). PacifiCorp could also run special competitive processes for VRET Resources only, but that is not the current de facto paradigm of implementation. Regardless, such RFPs are subject to this Commission's oversight and rules to protect and ensure competitive processes, which rules and processes are intended to provide oversight, scrutiny, and stakeholder and expert review of numerous aspects, ranging from total procurement scale, to minimum bidder criteria, to scoring, to *PPA terms and conditions*, and have multiple steps of review and scrutiny, including stakeholder comments, rounds of staff reviews, independent evaluator involvement, and public meetings related to these and other criteria. Participating customers will be responsible for paying the incremental costs of any VRET Resources.

Q. PLEASE SUMMARIZE YOUR PRINCIPAL CONCERNS WITH PACIFICORP'S PROPOSED VRET TARIFF LANGUAGE AND YOUR RECOMMENDATIONS.

A. NewSun generally supports the VRET program. NewSun initially had minimal concerns with PacifiCorp's ACT and Schedule 273 (notwithstanding it does have concerns about areas in which PacifiCorp is granted outsized discretion on matters which should have more transparency obligations, so appropriate scrutiny and recourse can occur if such is merited). As this docket evolved, however, language was added to Schedule 273 that would require or allow (with implied Commission approval through this rate case process) PacifiCorp to impose

non-standard and/or inappropriate and PPA-price and facility-financing consequential PPA terms on VRET resources (and even non-VRET resources) contracted from third-party developers with respect to defaults and associated risks or requirements of PPA termination, and further rights and/or obligations created for PacifiCorp to then secure replacement resources, for entire facilities, irrespective of the nature of defaults or alternative remedies which might be available. As explained in greater detail below, requiring third-party wholesale power suppliers to accept such non-standard or risk amplifying PPA terms will stifle competition from third-party developers, reduce viable bidders and resource options, raise resulting VRET program costs, and favor PacifiCorp's self-build alternatives—along with similar implications for non-VRET resource procurement due to the *de facto* ties and interfaces of associated RFP process. They also open the door for PacifiCorp to unilaterally acquire unnecessary replacement VRET Resources in a manner that is neither regulated nor subject to competitive procurement, by creating circumstances and obligations under Commission approved tariff language implying obligations to do so, but without appropriate explicit checks and balances and, at a minimum, ambiguity which could be exploited for PacifiCorp self-dealing at customer expense, outside appropriate oversight, and which banks financing projects (and thus the developers bidding projects) which would need to interpret in the most adverse manner, i.e. attaching maximal risk and cost thereto.

Based on the forgoing, I recommend that the Commission only approve the Fourth Partial Stipulation and corresponding Schedule 273 subject to the condition that PacifiCorp (1) **redact** from Schedule 273 **and prohibit** any language implying that "defaults" generally should or will result termination or replacement of a VRET Resource or PPA resource, a severe consequence that VRET tariff should be silent upon lest unintended consequences occur

and RFP requirements be inappropriately determined outside the appropriate rules and oversight process; and (2) **clarify** instead that PacifiCorp (a) *may* (not "shall") take "reasonable" actions to address any shortfalls of received or projected renewables attributes relative to VRET Resource output deficiencies *relative* to applicable participants' needs, which (b) is permissible whether due to VRET Resource defaults or otherwise (such shortfalls may or may not be related to facility performance, perhaps instead due to natural weather variations or amplified load needs); (c) must be evaluated alongside other remedies, that (i) need not include replacement of entire resources and (ii) may include shorter term, longer term, and/or partial and incremental actions; and (c) must be subject to (i) coordination with, and (ii) the approval of, affected participants, with (iii) full transparency on any potential impacts to projected costs impacts, benefits, deficiency, and the timing of the same, for any potential actions or inactions related thereto. Additionally tariff language should clarify (3) that any beneficial retirement of banked "RECs" (or other attributes) for customers also beneficially accrue to the resources which had previously overproduced them and should occur before any related damages are charged under a PPA; VRET Resources would not be exposed to damages or harm for deficiencies when PacifiCorp is simultaneously using prior over-production to the benefit of its program and customers. Finally, (4) the Commission should clarify that any replacement or augmenting resources for the VRET program are subject to competitive bidding requirements, i.e. the RFP process.

Q. DID PACIFICORP'S INITIAL SCHEDULE 273 LANGUAGE MANDATE NON-STANDARD PPA TERMS FOR VRET RESOURCES?

A. No. The language to which NewSun now objects was not included in PacifiCorp's initial filing in this proceeding. In the original version of Schedule 273 filed with PacifiCorp's initial testimony, the applicable provision read:

> "In the event of yearly under generation from the renewable energy resource(s) facilitated through the contract, the Company will purchase renewable energy certificates on the Customer's behalf to ensure the Customer's subscribed quantity of energy is covered."

NewSun had no objection to this original tariff language.

Q. WHY DIDN'T NEWSUN ENERGY PREVIOUSLY FILE TESTIMONY ON THIS ISSUE?

A. As mentioned above, the objectionable default and termination language was not reflected in PacifiCorp's initial filing in this proceeding and was only added by PacifiCorp months later and after opening testimony was filed. When NewSun became aware of the revised Schedule 273 language, NewSun timely objected to the language. Indeed, NewSun engaged in extensive settlement discussion efforts to explain and seek simple, reasonable remedies to these concerns, including providing proposed language to make these clarifications. Changes were not made that remedied the issues.

Q. WHAT SPECIFIC TARIFF LANGUATE DOES NEWSUN NOW FIND OBJECTIONABLE?

A. Following PacifiCorp's initial filing, the above-quoted provision evolved considerably. PacifiCorp and the settling parties filed the Fourth Partial Stipulation on September 30, 2022, and testimony in support of the Fourth Partial Stipulation was filed on October 7, 2022. Attached to the Fourth Partial Stipulation is the proposed Schedule 273, which is materially

different from the original version of Schedule 273 included in PacifiCorp's original filing. The iteration of Schedule 273 filed with the Fourth Stipulation now reads:

> "In the event that the renewable energy supplier is in *default* of the terms of its PPA or is no longer able to supply bundled renewable energy to the Customer, the Company will make reasonable efforts to begin to procure a new PPA with *another* renewable energy supplier as soon as practicable with the cost of the renewable energy to the Customer *revised* accordingly. . . ." (emphasis added)

Meanwhile the stipulation itself has the following further language, which partially overlaps the above:

> "PacifiCorp *shall* take reasonable efforts to begin procurement of a replacement resource(s) *if an ACT program resource defaults* under the PPA, so that *in the event of termination,* a replacement resource(s) can be available as soon as practicable. PacifiCorp *will coordinate with participating customers* ***if*** *the PPA is terminated*. RECs resulting from a resource's performance above any performance guarantee shall be banked on behalf and *for the benefit of participants in the event of future underperformance. At PacifiCorp's discretion,* it may retire on behalf of participants some or all of the banked RECs based on consistent performance of the resource. PacifiCorp *shall* retire RECs for all program *participants* and shall have no obligation to manage different WREGIS accounts for each participating customer." (emphasis and bold added)

Although the change in wording may appear subtle, the changes in meaning are significant.

Q. PLEASE SUMMARIZE YOUR CONCERNS WITH THE FOURTH PARTIAL STIPULATION.

A. The current version of Schedule 273 reflects an assumption that (a) any non-delivery of power by a VRET Resource is an event of default of the underlying PPA, and (b) that *any* default of *any type* is (i) grounds for replacement actions to commence; (ii) grounds for PPA termination; (iii) solely are energy or output related (by implication of this course of action being required or appropriate); (iv) *best* remedied by these sort of replacement and termination actions; (v) should result in replacement of an *entire* VRET resource; (v) that shortfalls relative to need only occur due to a VRET resource deficiency; (vi) alternatives are not available which may be superior; (vii) there should be no obligation to evaluate other alternatives; (vii) such actions should be taken irrespective of cost impacts, never mind timing considerations, customer preferences, or surrounding considerations, such as whether PacifiCorp has by the time such events occurred sufficiently decarbonized under other regulatory obligations as to mitigate the customer preference to take a specific remedial action at all, much less at a potential premium (much less a non-transparent obligation to take whatever cost is unilaterally "revised" by PacifiCorp as allowed by tariff); and (viii) should result in obligations and rights of PacifiCorp to take actions of these and *only* these types, with no obligations for consideration of alternatives or rights of customers to understand basic aspects of the deficiencies nor proposed remedies affecting them. PacifiCorp's changes to Schedule 273 to assume that the remedy for any non-delivery of power from a VRET Resource is termination and replacement of the underlying PPA defies common sense, oversight, and basic transparency, irrespective of consequences or costs, even if the deficiency might just be due to a couple bad weather years, a facility might be proposing or implementing, or there is just a long-term underperformance of a

fraction of the targeted output level; the presumption that *buying a whole new power plant*, rather than offsetting some incremental shortfall, is absurd, as it would reduce resources available by most of a power plant, thus increasing the size and challenges of replacement procurement; PacifiCorp lumps all performance shortcomings into the same mega-cure solution *requirement* (not *option*). As drafted, Schedule 273 also appears to authorize—if not compel—PacifiCorp to terminate a PPA with a VRET Resource for *any* event of default no matter how minor, lumping together *in the tariff* a conflation of equality for *all* default types. This is categorically absurd, putting billing disputes in the same tariff-required remedial action rights for PacifiCorp as fraud, negligence, or complete facility failures; such should not be permitted at all, much memorialized in a tariff to then bias and inform future RFP terms and PPA negotiations for VRET and non-VRET resources Taken together, these terms essentially require a renewable developer to guarantee the output of a VRET Resources to any standard PacifiCorp might require, irrespective of interactivity with other PPA terms, and create a negotiation position for PacifiCorp in future PPAs that all PPA defaults have risk of the same most-draconian, and most-unfinanceable consequences. These terms are not only commercially unreasonable, they are contrary to industry standards wholesale power contract terms and basic common sense, as well as undermine the competitive bidding and PPA negotiation process and basic financeability of RFP bidder facilities (and/or create cost premium risks that will ultimately accrue to ratepayers and/or VRET participants in the form of less competitive solicitations, bias towards PacifiCorp owned resources (which will not in practice face the same consequences and risks of a PPA counterparty which must finance its facilities and may not grant itself exemptions).

Q. **YOU CHARACTERIZE THE NEW PPA REQUIREMENTS IN SCHEDULE 273 AS "NON-STANDARD." IS THERE REALLY SUCH A THING AS INDUSTRY-STANDARD PPA TERMS?**

A. Yes, absolutely. Industry-standard wholesale agreements include master agreements developed by the Edison Electric Institute ("EEI"), the Western Systems Power Pool ("WSPP"), and the International Swap Dealers Association ("ISDA"). These master agreements have been widely-used in the electric industry for decades to buy and sell wholesale power. PacifiCorp is specifically listed as a member organization of the WSPP, which means that it is eligible to use the WSPP Master Agreement for wholesale power transactions. Additionally, there are standard industry understandings that certain types of termination risk are not financeable and, if any risk of termination applies to a type of default, require robust opportunities not only for the seller (or facility owner) to cure, but also for their financiers to have "step in rights" to also cure; in other words, the lenders very much require the *right* to cure defaults with any termination. If such does not exist, or is insufficiently robust (never mind exposed to capricious and arbitrary termination or hair triggers) then the risks and costs of capital go up, and thus prices, or even become entirely infeasible.

Q. PURSUANT TO THESE INDUSTRY-STANDARD WHOLESALE POWER AGREEMENTS, IS A GENERIC DEFAULT OF ANY TYPE GROUNDS FOR PPA TERMINATION? WHAT ABOUT OTHER PPAS? WHY OR WHY NOT?

A. No. Under each of the master agreements mentioned above, various types of defaults have different rights, remedies, consequences, and cures, depending on the type and nature of the issue and default. PPA termination for a new power facility is a serious and severe consequence, reserved for material, substantial events explicitly defined as having that

consequence, and subject to applicable remedies before such extreme consequences, because new facilities are generally debt financed, with the debt payment underwritten by projected power sale revenues, which cannot occur if the PPA is terminated, which would likely bankrupt the facility, cause debt payment defaults, and which, ultimately, lenders to new facilities will not consider, as it would create substantial risk of their failure to recover their investments.

Q. ASSUMING WE WERE ONLY TALKING ABOUT SITUATIONS IN WHICH NOT ALL THE POWER PROPOSED WAS DELIVERED ACCORDING TO PPA REQUIREMENTS (WHICH LIMITATTION IS NOT THE CASE FOR PACIFICORP'S PROPOSED ANY DEFAULT LANGUAGE), PURSUANT TO THESE INDUSTRY-STANDARD WHOLESALE POWER AGREEMENTS, *IS THE NON-DELIVERY OF POWER AN EVENT OF DEFAULT*?

A. No. Under each of the master agreements mentioned above, the non-delivery of power is *not* an event of default, and the remedy for non-delivery does *not* include termination of the transaction.

Q. WHAT ARE THE REMEDIES FOR NON-DELIVERY OF POWER UNDER THE WSSP MASTER AGREEMENT?

A. Section 21.3 of the WSPP Master Agreement sets forth the calculation of monetary damages for the non-delivery of power. The measure of damages is the amount by which the cost of replacement power obtained by the purchaser exceeds the contract price. In other words, if the seller fails to deliver power and the purchaser has to obtain replacement power, then the seller owes the purchaser the difference in price. Critically, Section 21.3(b) states that monetary damages for replacement power are the "sole and exclusive remedy" for the non-delivery of

power. "The Parties agree that the amounts recoverable under this Section 21.3 are a reasonable estimate of loss and not a penalty, and represent the sole and exclusive remedy for the Performing Party. Such amounts are payable for the loss of bargain and the loss of protection against future risks." Further, Section 22 of the WSPP Master Agreement sets forth the applicable events of default. The non-delivery of power is *not* identified as an event of default under Section 22. Sections 21.3 and 22 of the WSPP are attached as Exhibit 101 hereto.

Q. WHAT ARE THE REMEDIES FOR NON-DELIVERY OF POWER IN THE EEI MASTER AGREEMENT?

A. Like the WSPP, Articles 4.1 of the EEI Master Agreement states that the remedy for the failure to deliver power is payment of replacement power costs. Article 4.1 says, in pertinent part, that "[i]f Seller fails to schedule and/or deliver all of part of the Product pursuant to a Transaction, . . .then Seller shall pay Buyer . . . an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price." Further, Article 5.1(c) expressly provides an Event of Default shall *not* include "a Party's obligations to deliver or receive the Product, the exclusive remedy for which is provided in Article Four . . ." Articles Four and Five of the EEI Master Agreement are attached as Exhibit 102 hereto.

Q. WHAT ARE THE REMEDIES FOR NON-DELIVERY OF POWER IN THE ISDA POWER ANNEX?

A. The same construct for the payment of replacement power costs found in the WSPP Master Agreement and the EEI Master Agreement is also used ISDA North American Power Annex.

In fact, Section 6(c)(i) of the ISDA North American Power Annex is essentially identical to Article 4.1 of the EEI Master Agreement. Section 6(e) declares as follows:

> "For breach of any provision for which an express remedy or measure of damages is provided, such express remedy or measure of damages shall be the sole and exclusive remedy, the obligor's liability shall be limited as set forth in such provision and all other remedies or damages at law or in equity are waived."

Sections 6(c) and 6(e) of the ISDA North American Power Annex are attached as Exhibit 103 hereto.

Q. WHY IS THE NON-DELIVERY OF POWER NOT CONSIDERED AN EVENT OF DEFAULT IN INDUSTRY STANDARD WHOLESALE POWER CONTRACTS?

A. The industry standard wholesale power contracts recognize two important facts. First, the non-delivery of wholesale power is common-place and usually not the result of any "wrong-doing" by the seller. By its very nature, generating and delivering an uninterrupted stream of electrons in exactly the right amount over hundreds of miles of (often aging) infrastructure in every hour of every day of a delivery period is extremely difficult. Second, these contracts recognize that money damages are a sufficient remedy for the non-delivery of power. To allow buyers to terminate every PPA for every non-delivery would result in cascading defaults with respect to both up-stream and down-stream supply agreements and would inevitably result in interruptions in service that would paralyze the industry, as well as undermine the ability to finance new facilities, as discussed above, by threatening their financeability.

This is particularly true of intermittent renewable generating resources that are weather-dependent. Instead of recognizing and accommodating natural resource weather variability,

PacifiCorp inappropriately demands a performance guarantee as if dealing with fossil fuel energy resource. Renewable energy projects are subject to the variability of the sun, the rain, the wind, and more recently wildfires, and are unable to guarantee a particular output on any particular hour or day. That is the nature of intermittent resources.

Regardless, a variety of remedies for various defaults may exist, just as a variety of remedies for shortfalls of projected or desired energy deliveries may exist, irrespective of whether such is classified as a "default" (lower case "d"), a formal "Event of Default" (capital "D"), or otherwise. These might even include something as simple as obligations to implement a curative plan or other communications among the parties.

Q. **DID PACIFICORP OR THE SETTLING PARTIES GIVE ANY EXPLAINATION FOR DEPARTING FROM INDUSTRY STANDARD CONTRACT TERMS?**

A. No. The only statement regarding this issue is contained in the Joint Stipulating Parties testimony:

> "In order to ensure that the resources perform to the benefit of the program, PacifiCorp shall take reasonable efforts to begin procurement of a replacement source(s) if an ACT program resource default under the power purchase agreement (PPA), so that in the event of termination, a replacement resource(s) can be available as soon as practicable. PacifiCorp will coordinate with participating customers if the PPA is terminated."[1]

[1] UE 399 Joint Stipulating Parties/100, McVee, Bolton, Gehrke, Kronauer, Cebulko, Opatrny, p. 4 lines 19 through p. 5 line 2.

Q. WHY IS THE NON-STANDARD PPA LANGUAGE IN SCHEDULE 273 PROBLEMATIC?

A. The non-standard PPA language mandated by Schedule 273 will essentially be a poison-pill in PacifiCorp's VRET Resource acquisition process. At a minimum, it will have high likelihood of adversely affecting (1) the candidate pool of resource options, likely reducing bidders and options; and (2) the prices of those options, which bidders must price relative to the full PPA terms and conditions, including termination risk. This risk extends beyond just direct impact to VRET Resources procurement and its participants, to ratepayers more broadly. PacifiCorp has informed the Commission and stakeholders that it intends to acquire VRET Resources in its pending Request For Proposals ("RFP"). NewSun's concern is that PacifiCorp intends to use the non-standard, bidder risk amplifying, and financing-challenged PPA default and termination language from Schedule 273 as part of the required PPA terms and conditions in the RFP, which thus makes these terms as part of its VRET Resource selection criteria, and impacts the bidder pool, as bidders in the RFP are expected to conform and price to the pro forma PPA. Third-party developers seeking to bid resources into the RFP will either self-select out of RFP and VRET participation, if non-delivery of power is to be required as an event of default, or if they will agree to such a term they will price their bids to account for the additional risks, raising the price of non-PacifiCorp owned bids (but not their own), with material risk that the cost for such will be prohibitively high as discussed further below. Nor will such developers be able to agree to terms that essentially require PacifiCorp to terminate and replace PPA for any event of default regardless of the nature of the default or availability of other remedies. This will almost certainly deter and disqualify many potential bidders. Worse yet, these impact will be non-visible to the Commission, ratepayers, and participants,

because bidders will simply fail to materialize or self-price at higher levels, without visibility to what the prices would have been in absence of these commercially challenged terms.

Additionally, PacifiCorp's proposed rules seem to create an opportunity for PacifiCorp to procure the replacement resources from its own, self-built resources, in a rush, under a "shall" obligation, outside of the competitive bidding oversight processes, either directly, due to requirements and time-sensitivity artificially contrived for a contrived and inappropriate remedy to most circumstances, and/or to then seek and compel the Commission to grant exceptions for the same. Of course, PacifiCorp would solely control the visibility, timing, and discretion of when and how it would assert the "need" to terminate and replace, and thus have disproportionate control over which resources are available (never mind other costs and consequences, such as transmission upgrades it might need to rate-base to meet this obligation).

The net result of these outcomes is a bias towards PacifiCorp-owned resources and a reduction of competition, all to the detriment of participants and ratepayers, but without even the opportunity for transparency on the differences. To the extent non-PacifiCorp bidders are participating, they will have to speculate on what terms they might negotiate, but PacifiCorp will have created a negotiation leverage dynamic to its own advantage, and get to point to this tariff as the Commission having *required and blessed* these burdensome terms and cost-increasing requirements. If bidders do participate under these terms, their prices will be artificially elevated, having the effect of making PacifiCorp-owned resources look more favorable than its competition, to the effect of self-favoring their own resources. This is of course exactly the opposite of the intended effect and protections which competitive bidding guidelines, and related Commission rules and oversight—and extensive set of mechanics and

protections—are intended to prevent. In short, PacifiCorp's actions here, in the rate case, *not in the RFP docket process,* threaten to side-step, subvert, and pervert the entire regulatory oversight process to their advantage, here in a venue where most RFP-interested stakeholders are either not participating or not paying attention to these types of issues.

Thus, substantial abuse obligations are created in the ambiguities and obligations of PacifiCorp's proposed language. None of which the customer would have a consent right to under the VRET program. Rather, PacifiCorp would unilaterally "revise" the participant by after-the-fact notice, never having had the obligation to let them inform the outcome or opt out of the consequences of PacifiCorp's unsupervised and, ostensibly, tariff blessed and mandated actions.

Q. WILL PACIFICORP'S NON-STANDARD PPA LANGUAGE IMPACT VRET RESOURCE BID PRICING IN THE RFP?

A. As mentioned, PacifiCorp's retail tariff language will likely drive up the cost of projects that are bid into the RFP, making PacifiCorp's self-build option more competitive. A guaranty obligation raises prices in proportion to the rigor of the obligation. If a developer has hard contract performance requirements, as intended by PacifiCorp's proposed language, then a developer must charge more, build in contingencies and protections, at a significant price. The same issues apply and the same RFP process and PPA terms generally apply. Our experience with VRET off-takers is an expectation that the PPA will conform to the same as the RFP, as per the utility's discretion.

Q. WILL PACIFICORP'S NON-STANDARD PPA LANGUAGE IMPACT FINANCING OF RESOURCES THAT MAY BE BID INTO THE RFP?

A. Lenders are concerned about risk. For renewable energy projects, lenders not only review the project, project documents and financial projections, lenders will also look closely at a PPA and the events of default and termination provisions because they directly affect the ability of the developer to repay the lender. Because of this, lenders often require notice of any default, certain minimum cure periods, and step-in rights to cure defaults directly to avoid termination. PacifiCorp's proposed default and termination provisions will make it more difficult or even impossible to finance projects, as lenders will not take the risk of PacifiCorp's mandatory termination for any default without notice or the opportunity to cure. Everything comes down to third-party debt and tax equity financing, and the cost and availability thereof. Adverse impacts flow directly through to bid pricing, or can cause binary impacts of non-availability. Lenders and tax equity have plenty of options; they don't have to do deals they don't like.

Q. DO YOU BELEIVE THAT THE VRET TARIFF PROPOSED IN THE CONTEXT OF A GENERAL RATE REVISION IS THE MOST APPROPRIATE PLACE TO VET POTENTIAL RFP RESOURCE SELECTION CRITERIA?

A. No. The RFP design and approval process is the most appropriate venue to vet potential RFP resource selection criteria. It is my understanding that a general rate revision is generally designed to review and vet utility capital costs and expenses appropriate for inclusion and recovery in cost-of-service customer rates, whereas the Commission process for RFP design and approval is intended to establish a fair, objective, and transparent competitive bidding process. I understand that in past RFP dockets, interested stakeholders are given the opportunity to comment on the resource selection criteria and terms and conditions of any

proposed PPA. I further understand that the Commission will in that process, sometimes direct the utility to change certain aspects of its RFP design, selection criteria, or proposed terms. Given the differing nature of a general rate revision, this docket does not necessarily have all of the interested stakeholders present and is not designed to establish a fair, objective, and transparent competitive bidding process. As such, I do not believe it an appropriate venue to vet potential RFP resource selection criteria.

This approach by PacifiCorp essentially comprises an end-run around the competitive process protections the Commission has so painstakingly implemented, and which unfold over multi-month, multi-step process with numerous stakeholder and staff and commissioner input points and associated steps of review and scrutiny and inquiry and public process. This subverts that and is inappropriate. Further, many stakeholders are not paying attention to RFP related consequences here in the rate case, because this is a "rate case docket" not a "RFP" docket, never mind the cost and broad ranging scopes of rate case issues and participation, which is ultimately burdensome and discouraging for many stakeholders to participate in, even if directly interested, much less if not expecting issues like this to be involved, much less backdoored through a presumably unrelated docket, or outside of the appropriate docket.

Q. HOW REAL IS THE CONCERN THAT THE PROPOSED VRET LANGUAGE WILL FEED INTO RFP RESOURCE SELECTION?

A. Very real. In PacifiCorp's ongoing RFP, PacifiCorp proposed to require that PPA resources meet a 90% performance guarantee. Industry stakeholder groups including the Northwest & Intermountain Power Producers Coalition and Renewable Northwest objected to that provision noting that it would impact a project's ability to obtain financing and instead requesting that the Commission require PacifiCorp to use a minimum availability guarantee in its pro forma

PPA instead. In that docket, the Commission correctly acknowledged that such a provision imposed on PPA resources but not on utility-owned resources (which can later request recovery of actual costs of performance) could mean that customers bear more risk of utility asset underperformance than PPA asset underperformance and therefore a potential advantage for owned resources in RFP selection.[2] The Commission ultimately declined to require use of a minimum availability guarantee, but allowed that term to be negotiated among the parties and directed the independent evaluator to examine and report on whether PacifiCorp's insistence on this provision resulted in a potential advantage for owned resources. I have serious concerns that PacifiCorp will point to the VRET language proposed here during RFP PPA negotiations to insist on its preferred performance guarantee, default, and termination language, and that this will drive up the cost of PPA resources, allowing PacifiCorp's own more expensive resources to become the lower cost option.

Q. ARE THE NON-STANDARD DEFAULTS AND TERMINATION RIGHTS MANDATED BY SCHEDULE 273 NECESSARY TO PROTECT PARTICIPATING CUSTOMERS?

A. No. The revised Schedule 273 may at first glance appear to be protective of participating customers by mandating that VRET Resources agree to a *de facto* "performance guarantee." Upon examination, however, the proposed language is at best superfluous, and will likely be harmful to participating customers. The language is superfluous because PacifiCorp will still have all of the rights and remedies reflected in negotiated PPA terms regardless of whether those PPA terms are dictated by its retail tariff. But by insisting on terminating and replacing a

[2] See Docket No. UM 2193, Order No. 22-130 at 9-10 (Apr. 28, 2022).

PPA for any event of default—specifically including for non-delivery of power—PacifiCorp may actually be harming its participating customers by subjecting them to higher cost replacements VRET Resources over which they have no control.

Indeed, customers probably benefit from seeing prices unburdened by excessive terms and conditions, which would likely increase competition and lower prices.

This is even more true in the context of an *entirely voluntary program for which there is no real consequence for underdelivery of RECs.* Never mind the variable nature of renewable resources. Penalties merely increase costs.

Q. IS IT IN A PARTICIPATING CUSTOMER'S BEST INTEREST FOR PACIFICORP TO TERMINATE A PPA FOR NON-DELIVERY?

A. In most cases no. Depending on the level of underperformance, it may be in the best interest of the customer for PacifiCorp to exercise industry-standard contract remedies, such as cover damages for the cost of replacement power alternative. It may even be most advantageous to the customer for PacifiCorp to *waive* a default altogether. Mandatory termination of an *entire resource*, especially coupled with a last-minute replacement of the *entire resource* outside of any competitive processes by PacifiCorp at its sole discretion, would likely result in the *most* expensive and risky solution for the customer. By baking non-standard wholesale contract terms into Schedule 273, PacifiCorp is actually exposing its customers to unilateral resource procurement decisions made by PacifiCorp without transparency, cost-regulation, or off-ramps.

Q. WHAT SHOULD HAPPEN IF A VRET RESOURCE UNDER PERFORMS?

A. It depends on the reasons for the underperformance. For short-term underperformance, short term market purchases of replacement power may be appropriate. For longer term performance issues, the PPA will have remedies available to the non-defaulting party. But

termination of the PPA is the most extreme remedy and would rarely be in the best interest of the parties. For example, if a 100 MW VRET Resource only produces 80 MW in a given year, or even every year, the purchase of incremental power to make up the difference would almost certainly be preferrable to terminating the PPA in its entirety and purchasing all 100 MW of replacement power at a higher cost, especially if under pressurized or non-competitive procurement (i.e. if sole-sourced from the utility developed resources or bottom of the bucket). And customers may not prefer those resources or want the price premiums; they may also have resource type preferences, as relates geography (near their facilities) or technology (a preference for solar, for example).

Q. IS IT ALWAYS IN A PARTICIPATING CUSTOMER'S BEST INTEREST TO TERMINATE A PPA FOR OTHER EVENTS OF DEFAULT?

A. Not necessarily. The termination of a PPA is a dramatic event and is almost never in the interest of any of the parties. Ideally, a PPA should be structured to encourage the parties to cooperate and maintain and sustain the contractual relationship. The language now included in Schedule 273 is incredibly broad language covering a wide range of contractual possibilities and circumstances. PacifiCorp's language conflates ALL defaults regardless of the type of default. Not all PPA defaults are cause for termination. PPAs typically have different levels and types of defaults, some which allow for termination and some that require notice and an opportunity to cure. For example, a default for failure to strictly provide notice under certain circumstances typically are not grounds to terminate an PPA. PacifiCorp's language appears to be intentionally vague and would allow it to terminate a PPA for any default, minor or major, in its sole discretion.

Q. IF PACIFICORP TERMINATES A PPA WITH A VRET RESOURCE, WHAT PROCESS WILL PACIFICORP FOLLOW TO ACQUIRE A REPLACEMENT PPA OR VRET RESOURCE?

A. Schedule 273 does not describe any process that PacifiCorp is required to follow in order to obtain a replacement PPA or replacement VRET Resources. Presumably this means that PacifiCorp's discretion with respect to such replacement purchase is unfettered. PacifiCorp would, for example, be perfectly free to terminate a PPA with third-party supplier and replace it with a higher cost PacifiCorp-owned resource.

Q. WHAT PROTECTIONS DO PARTICIPATING CUSTOMERS HAVE WITH RESPECT TO PACIFICORP'S ACQUISITION OF REPLACEMENT RESOURCES?

A. None. On its face, Schedule 273 gives PacifiCorp a blank check to acquire replacement VRET Resources at the expense of Participating Customers—even if there is a direct conflict of interest between PacifiCorp and the Participating Customer.

Q. WOULD THE PPA TERMINATION RISK APPLY EQUALLY TO PACIFICORP AND THIRD-PARTY PROJECTS?

A. Most likely not. PacifiCorp-owned resources are not subject to the PPA terms described in the tariff. PacifiCorp would not terminate its own underperforming resource, whereas this language gives PacifiCorp the ability to eliminate its competitors during operation and replace it with a PacifiCorp-owned resource. This is anti-competitive and subjects the customer to potentially higher costs.

Q. WILL THE DEFAULT AND TERMINATION PROVISIONS IN SCHEDULE 273 LEAD TO A SUCESSFUL VRET PROGRAM?

A. In my opinion, no. They likely undermine it. They likely also undermine the achievability of best cost outcomes for all ratepayers as well, by distorting the RFP process and its terms and conditions, driving up prices and driving down competitive participation. Potential wholesale power suppliers under the VRET will be forced to accept non-standard default and termination provisions in order to participate in PacifiCorp's procurement of wholesale resources. Imposing such non-standard wholesale contract terms in PPAs will reduce the pool of eligible competitive wholesale suppliers and resources. For those third-party bidders who are still able to bid, the financial implications of the commercial terms and risks unnecessarily and inappropriately imposed on the RFP through Schedule 273 will inflate the cost of bids. The net result will be to stifle competition among resource suppliers and favor PacifiCorp's self-build alternatives. What PacifiCorp seeks to require is equivalent to a performance guarantee for an intermittent resource with a termination right. These provisions are inconsistent with industry standards and jeopardize the integrity of the VRET program. There are significant abuse issues here, which are completely unnecessary and unjustifiable relative to the risks, which should be immediately terminated and protections put in place.

Q. DOES THIS CONCLUDE YOUR OPENING TESTIMONY?

A. Yes.

21. LIABILITY AND DAMAGES:

21.1 This Agreement contains express remedies and measures of damages in Sections 21.3 and 22 for non-performance or default. This Agreement also contains additional remedies to enforce payment of monies due and to enforce terms of the Agreement and applicable Confirmations in Section 21.2.

ALL OTHER DAMAGES OR REMEDIES ARE HEREBY WAIVED. Therefore, except as provided in Sections 21.3 and 22, no Party or its directors, members of its governing bodies, officers or employees shall be liable to any other Party or Parties for any loss or damage to property, loss of earnings, or revenues, personal injury, or any other direct, indirect, or consequential damages or injury, or punitive damages, which may occur or result from the performance or non-performance of this Agreement (including any applicable Confirmation), including any negligence arising hereunder. Any liability or damages incurred by an officer or employee of a Federal agency or by that agency that would result from the operation of this provision shall not be inconsistent with Federal law.

21.2 Any Party due monies under this Agreement, the amounts of which are not in dispute or if disputed have been the subject of a decision awarding monies, (i) shall have the right to seek payment of such monies in any forum having competent jurisdiction and (ii) shall possess the right to seek relief directly from that forum without first utilizing the mediation or arbitration provisions of this Agreement and without exercising termination and liquidation rights under Section 22.

In addition, each Party shall possess the right to seek specific performance (injunctive relief) of the non-delivery related terms of this Agreement and any

Confirmation in any forum having competent jurisdiction. In seeking to enforce the terms of this Agreement, however, consistent with Section 21.1, no Party is entitled to receive or recover monetary damages except as provided in Sections 21.3 and 22.

21.3 The following damages provision shall apply to all transactions under this Agreement. For transactions under Service Schedule A, however, this damages provision or some other damages provision will apply only if such a damages provision is agreed to through a Confirmation. The damages under this Section 21.3 apply to a Party's failure to deliver or receive (or make available in the case of capacity) capacity and/or energy in violation of the terms of the Agreement and any Confirmation. The Contract Quantity and Contract Price referred to in this Section 21.3 are part of the agreement between the Parties for which damages are being calculated under this Section.

(a) If either Party fails to deliver or receive (or make available in the case of capacity), as the case may be, the quantities of capacity and/or energy due under the Agreement and any Confirmation (thereby becoming a "Non-Performing Party" for the purposes of this Section 21.3), the other party (the "Performing Party") shall be entitled to receive from the Non-Performing Party an amount calculated as follows (unless performance is excused by Uncontrollable Forces as provided in Section 10, the applicable Service Schedule, or by the Performing Party):

(1) If the amount the Purchaser scheduled or received in any hour is less than the applicable hourly Contract Quantity, then the Purchaser

shall be liable for (a) the product of the amount (whether positive or negative), if any, by which the Contract Price differed from the Resale Price (Contract Price - Resale Price) and the amount by which the quantity provided to the Purchaser was less than the hourly Contract Quantity; plus (b) the amount of transmission charge(s), if any, for firm transmission service upstream of the delivery point, which the Seller incurred to achieve the Resale Price, less the reduction, if any, in transmission charge(s) achieved as a result of the reduction in the Purchaser's schedule or receipt of electric energy (based on Seller's reasonable commercial efforts to achieve such reduction). If the total amounts for all hours calculated under this paragraph (1) are negative, then neither the Purchaser nor the Seller shall pay any amount under this Section 21.3(a)(1).

(2) If the amount the Seller scheduled or delivered (or made available in the case of capacity) in any hour is less than the applicable hourly Contract Quantity, then the Seller shall be liable for (a) the product of the amount (whether positive or negative), if any, by which the Replacement Price differed from the Contract Price (Replacement Price - Contract Price) and the amount by which the quantity provided by the Seller was less than the hourly Contract Quantity; plus (b) the amount of transmission charge(s), if any, for firm transmission service downstream of the delivery point, which the Purchaser incurred to achieve the Replacement Price, less the

reduction, if any, in transmission charge(s) achieved as a result of the reduction in the Seller's schedule or delivery (based on Purchaser's reasonable commercial effort to achieve such reduction). If the total amounts for all hours calculated under this paragraph (2) are negative, then neither the Purchaser nor the Seller shall pay any amount under this Section 21.3(a)(2).

(3) The Non-Performing Party also shall reimburse the Performing Party for any charges imposed on the Performing Party under open access transmission or FERC accepted or approved tariffs for regional organizations due to the non-performance.

(4) The Non-Performing Party shall pay any amount due from it under this section within the billing period as specified in Section 9 of this Agreement or agreed to in the applicable Confirmation if the Parties agreed to revise the billing period in Section 9.

(5) In the event (a) two Parties entered into two or more Confirmations in which the same Party is the Purchaser and the other Party is the Seller, (b) deliveries under two or more of such Confirmations are to occur, in whole or in part, on the same date and hour, and at the same delivery point, and (c) as to such date, hour, and delivery point, and with respect to one or more of such Confirmations, a Party is a Non-Performing Party (for purposes of this Section 21.3(a)(5), each such instance of non-performance, a "non-performed transaction"), then, as set out in this Section 21.3(a)(5), each non-performed

transaction shall be identified to a Confirmation, and the Contract Price of the Confirmation to which the non-performed transaction is identified, and the Contract Quantity of the non-performed transaction, shall be applied to the calculation of amounts due under Section 21.3(a)(1) through (3), as applicable.

The Parties in good faith shall seek to agree to the identification of each non-performed transaction to a Confirmation.

Each non-performed transaction not identified to a Confirmation by agreement, and any megawatt hours that are not fully accounted for by such identification, shall be identified to Confirmation(s) as follows:

(i) The Performing Party in good faith shall determine whether each Confirmation is real-time, day-ahead, or forward; all Confirmations that are not real-time or day-ahead shall be deemed forward Confirmations.

(ii) The Performing Party in good faith shall determine whether each non-performed transaction is real-time, day-ahead, or forward; all non-performed transactions that are not real-time or day-ahead shall be deemed forward non-performed transactions.

(iii) The Performing Party shall:

(x) identify real-time non-performed transactions to real-time Confirmations, provided, that if the megawatt hours of real-time non-performed transactions exceed the

megawatt hours of real-time Confirmations, then such excess megawatt hours shall be identified to day-ahead Confirmations and any excess megawatt hours remaining after such identification to day-ahead Confirmations shall be identified to forward Confirmations.

(y) identify day-ahead non-performed transactions to day-ahead Confirmations, provided, that if the megawatt hours of day-ahead non-performed transactions exceed the megawatt hours of day-ahead Confirmations, then such excess megawatt hours shall be identified to forward Confirmations.

(z) identify all remaining non-performed transactions to forward Confirmations.

The Performing Party, in its billing for amounts due under Section 21.3(a)(1) through (3), shall set out a detailed explanation of each applicable determination under parts (i), (ii), and (iii) of this Section 21.3(a)(5), and state the resulting Contract Quantity and Contract Price, and any amounts associated with each such determination under Section 21.3(a)(3).

(b) The Parties agree that the amounts recoverable under this Section 21.3 are a reasonable estimate of loss and not a penalty, and represent the sole and exclusive remedy for the Performing Party. Such amounts are payable for the loss of bargain and the loss of protection against future risks.

(c) Each Party agrees that it has a duty to mitigate damages in a commercially reasonable manner to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

(d) In the event the Non-Performing Party disputes the calculation of the damages under this Section 21.3, the Non-Performing Party shall pay the full amount of the damages as required by Section 9 of this Agreement to the Performing Party. After informal dispute resolution as required by Section 34.1, any remaining dispute involving the calculation of the damages shall be referred to binding dispute resolution as provided by Section 34.2 of this Agreement. If resolution or agreement results in refunds or the need for refunds to the Non-Performing Party, such refunds shall be calculated in accordance with Section 9.4 of this Agreement.

(e) In the event non-performance of a transaction is accounted for by means of a Damages Settlement Transaction and the Damages Settlement Transaction is performed, then no damages shall be calculated or due under § 21.3(a) with respect to the non-performed transaction. Neither Party shall be required to enter into a Damages Settlement Transaction.

22. DEFAULT OF TRANSACTIONS UNDER THIS AGREEMENT AND CONFIRMATIONS:

22.1 EVENTS OF DEFAULT

An "Event of Default" shall mean with respect to a Party ("Defaulting Party"):

(a) the failure by the Defaulting Party to make, when due, any payment required pursuant to this Agreement or Confirmation if such failure is not remedied within two (2) Business Days after written notice of such failure is given to the Defaulting Party by the other Party ("the Non-Defaulting Party"). The Non-Defaulting Party shall provide the notice by facsimile to the designated contact person for the Defaulting Party and also shall send the notice by overnight delivery to such contact person; or

(b) the failure by the Defaulting Party to provide clear and good title as required by Section 33.3, or to have made accurate representations and warranties as required by Section 37 and such failure is not cured within five (5) Business Days after written notice thereof to the Defaulting Party; or

(c) The institution, with respect to the Defaulting Party, by the Defaulting Party or by another person or entity of a bankruptcy, reorganization, moratorium, liquidation or similar insolvency proceeding or other relief under any bankruptcy or insolvency law affecting creditor's rights or a petition is presented or instituted for its winding-up or liquidation; or

(d) The failure by the Defaulting Party to provide adequate assurances of its ability to perform all of its outstanding material obligations to the Non-Defaulting Party under the Agreement or any Confirmation pursuant to

Section 27 of this Agreement or any substitute or modified provision in any Confirmation.

(e) With respect to its Guarantor, if any:

(i) if a material representation or warranty made by a Guarantor in connection with this Agreement, or any transaction entered into hereunder, is false or misleading in any material respect when made or when deemed made or repeated; or

(ii) the failure of a Guarantor to make any payment required or to perform any other material covenant or obligation in any guarantee made in connection with this Agreement, including any transaction entered into hereunder, and such failure shall not be remedied within three (3) Business Days after written notice; or

(iii) the institution, with respect to the Guarantor, by the Guarantor or by another person or entity of a bankruptcy, reorganization, moratorium, liquidation or similar insolvency proceeding or other relief under any bankruptcy or insolvency law affecting creditor's rights or a petition is presented or instituted for its winding-up or liquidation; or

(iv) the failure, without written consent of the other Party, of a Guarantor's guarantee to be in full force and effect for purposes of this Agreement (other than in accordance with its terms) prior to the satisfaction of all obligations of such Party under each transaction to which such guarantee shall relate; or

(v) a Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of, any guarantee.

22.2 REMEDIES FOR EVENTS OF DEFAULT

22.2(a) If an Event of Default shall have occurred and be continuing, the Non-Defaulting Party, upon written notice to the Defaulting Party, shall have the right (i) to suspend performance of transactions under this Agreement; provided, however, (i) in no event shall any such suspension continue for longer than ten (10) Business Days; (ii) such suspension must include all transactions under this Agreement in effect as of the date of the suspension between the Defaulting Party and the Non-Defaulting Party; and (iii) such suspension is available only once for each default. This ten (10) day suspension period shall not affect in any way the thirty (30) day period for exercising a right of termination under Section 22.2(b). The Non-Defaulting Party shall have the unilateral right to exercise its rights under this Agreement including its termination rights at any time within the suspension period. The Defaulting Party shall have no suspension rights. In no event shall the suspension continue beyond the cure of or waiver by the Non-Defaulting Party of the applicable Event of Default. If the Non-Defaulting Party seeks to terminate the suspension period such that the suspension shall be terminated prior to the end of the ten (10) Business Day period specified above, it may do so only by providing at least twenty-four (24) hours written notice to the Defaulting Party before the suspension may be terminated.

22.2(b) If an Event of Default occurs, the Non-Defaulting Party shall possess the right to terminate all transactions between the Parties under this Agreement upon written notice (by facsimile or other reasonable means) to the Defaulting Party, such notice of termination to be effective immediately upon receipt. If the Non-Defaulting Party fails to exercise this right of termination within thirty (30) days following the time when the Event of Default becomes known (or more than thirty days if the Non-Defaulting and Defaulting Parties agree to an extension), then such right of termination shall no longer be available to the Non-Defaulting Party as a remedy for the Event(s) of Default; provided, however, this thirty day requirement for exercising termination rights shall not apply to defaults pursuant to Sections 22.1(c) and 22.1(e)(iii). The Non-Defaulting Party terminating transaction(s) under this Section 22.2 may do so without making a filing at FERC.

If the Non-Defaulting Party elects to terminate under this Section, it shall be required to terminate all transactions between the Parties under the Agreement at the same time. Upon termination, the Non-Defaulting Party shall liquidate all transactions as soon as practicable, provided that in no event will the Non-Defaulting Party be allowed to liquidate Service Schedule A transactions. The payment associated with termination ("Termination Payment") shall be calculated in accordance with this Section 22.2 and Section 22.3. The Termination Payment shall be the sole and exclusive remedy for the Non-Defaulting Party for each terminated

transaction ("Terminated Transaction") for the time period beginning at the time notice of termination under this Section 22 is received. Prior to receipt of such notice of termination by the Defaulting Party, the Non-Defaulting Party may exercise any remedies available to it under Section 21.3 of this Agreement or Confirmation(s), and any other remedies available to it at law or otherwise.

Upon termination, the Non-Defaulting Party may withhold any payments it owes the Defaulting Party for any obligations incurred prior to termination under this Agreement or Confirmation(s) until the Defaulting Party pays the Termination Payment to the Non-Defaulting Party. The Non-Defaulting Party shall possess the right to set-off the amount due it under this Section 22 by any such payments due the Defaulting Party as provided in Section 22.3(d).

22.3 LIQUIDATION CALCULATION OPTIONS

The Non-Defaulting Party shall calculate the Termination Payment as follows:

(a) The Gains and Losses shall be determined by comparing the value of the remaining term, transaction quantities, and transaction prices under each Terminated Transaction had it not been terminated to the equivalent quantities and relevant market prices for the remaining term either quoted by a bona fide third-party offer or which are reasonably expected to be available in the market under a replacement contract for each Terminated Transaction. To ascertain the market prices of a replacement contract, the Non-Defaulting Party may consider, among other valuations, quotations

from Dealers in energy contracts, any or all of the settlement prices of the NYMEX power futures contracts (or NYMEX power options contracts in the case of Physically-Settled Options) and other bona fide third party offers, all adjusted for the length of the remaining term and differences in transmission. It is expressly agreed that the Non-Defaulting Party shall not be required to enter into replacement transactions in order to determine the Termination Payment.

(b) The Gains and Losses calculated under paragraph (a) shall be discounted to present value using the Present Value Rate as of the time of termination (to take account to the period between the time notice of termination was effective and when such amount would have otherwise been due pursuant to the relevant transaction). The "Present Value Rate" shall mean the sum of 0.50% plus the yield reported on page "USD" of the Bloomberg Financial Markets Services Screen (or, if not available, any other nationally recognized trading screen reporting on-line intraday trading in United States government securities) at 11:00 a.m. (New York City, New York time) for the United States government securities having a maturity that matches the average remaining term of the Terminated Transactions; and

(c) The Non-Defaulting Party shall set off or aggregate, as appropriate, the Gains and Losses (as calculated in Section 22.3(a)) and Costs and notify the Defaulting Party. If the Non-Defaulting Party's aggregate Losses and Costs exceed its aggregate Gains, the Defaulting Party shall, within three (3) Business Days of receipt of such notice, pay the Termination Payment to

the Non-Defaulting Party, which amount shall bear interest at the Present Value rate from the time notice of termination was received until paid. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, the Non-Defaulting Party, after any set-off as provided in paragraph (d), shall pay the remaining amount to the Defaulting Party within three (3) Business Days of the date notice of termination was received including interest at the Present Value from the time notice of termination was received until the Defaulting Party receives payment.

(d) The Non-Defaulting Party shall aggregate or set off, as appropriate, at its election, any or all other amounts owing between the Parties (discounted at the Present Value Rate) under this Agreement and any Confirmation against the Termination Payment so that all such amounts are aggregated and/or netted to a single liquidated amount. The net amount due from any such liquidation shall be paid within three (3) Business Days following the date notice of termination is received.

(e) (i) If the Non-Defaulting Party owes the Defaulting Party monies under this Section 22.3, then notwithstanding the three Business Day payment requirement detailed above, the Non-Defaulting Party may elect to pay the Defaulting Party the monies owed under this Section 22.3 over the remaining life of the contract(s) being terminated. The Non-Defaulting Party may make this election by providing written notice to the Defaulting Party within three Business Days of the notice being provided to terminate and liquidate under this Section

22.3. The Non-Defaulting Party shall provide the Defaulting Party with the details on the method for recovering the monies owed over the remaining life of the contract(s). That method shall ensure that the Defaulting Party receives a payment each month through the end of the term of each contract which allows it to receive the monies which would have been due it under Sections 22.3(c) and (d) in total (to be recovered over the term of the contract(s) to replicate as closely as possible the payment streams under such contract(s)) provided that the discounting using the Present Value Rate referenced in Section 22.3 (b) shall not be reflected in determining the amounts to be recovered under this provision. Any disputes as to the methodology shall be resolved pursuant to the dispute resolution procedures in Section 34, with binding arbitration pursuant to Section 34.2 required for disputes as to the methodology if mediation is unsuccessful.

(ii) This Section 22.3(e) and the rights and obligations under it shall survive termination of any applicable transactions or agreements.

(iii) The Party owed monies under this Section 22.3(e) shall have the right to request credit assurances consistent with Section 27 even after termination of any contract or transaction.

(iv) If the Party owing money defaults on its payment obligations consistent with Section 22.1(a) or defaults with regard to providing credit assurances consistent with Section 22.1(d), then the other

Party shall have the right (by written notice) at any time after the Party owing money defaults to require that Party to pay all monies owed under all of the contracts subject to this Section 22.3(e) within three Business Days of receipt of the written notice. The monies to be paid under this accelerated payment provision shall be the remaining amounts to be paid under the contract(s) reflecting a discount using the Present Value Rate from the date of the written notice.

(f) If the Defaulting Party disagrees with the calculation of the Termination Payment and the Parties cannot otherwise resolve their differences, the calculation issue shall be submitted to informal dispute resolution as provided in Section 34.1 of this Agreement and thereafter binding dispute resolution pursuant to Section 34.2 if the informal dispute resolution does not succeed in resolving the dispute. Pending resolution of the dispute, the Defaulting Party shall pay the full amount of the Termination Payment calculated by the Non-Defaulting Party within three (3) Business Days (except if the option under 22.3(e) has been invoked in which case the payment times in that provision would apply) of receipt of notice as set forth in Sections 22.3(c) and (d) subject to the Non-Defaulting Party refunding, with interest, pursuant to Section 9.4, any amounts determined to have been overpaid.

(g) For purposes of this Section 22.3:

(i) "Gains" means the economic benefit (exclusive of Costs), if any, resulting from the termination of the Terminated Transactions, determined in a commercially reasonable manner as calculated in accordance with this Section 22.3;

(ii) "Losses" means the economic loss (exclusive of Costs), if any, resulting from the termination of the Terminated Transactions, determined in a commercially reasonable manner as calculated in accordance with this Section 22.3;

(iii) "Costs" means brokerage fees, commissions and other similar transaction costs and expenses reasonably incurred in terminating any specifically related arrangements which replace a Terminated Transaction, transmission and ancillary service costs associated with Terminated Transactions, and reasonable attorneys' fees, if any, incurred in connection with the Non-Defaulting Party enforcing its rights with regard to the Terminated Transactions. The Non-Defaulting Party shall use reasonable efforts to mitigate or eliminate these Costs.

(iv) In no event, however, shall a Party's Gains, Losses or Costs include any penalties or similar charges imposed by the Non-Defaulting Party.

22A. DEFAULT IN PAYMENT OF WSPP OPERATING COSTS:

22A.1 A Party shall be deemed to be in default in payment of its share of WSPP operating costs pursuant to Section 7 of this Agreement, if any, when payment is not received within ten (10) days after receipt of written notice. A default by any Party in such payment obligations shall be cured by payment of all overdue amounts together with interest accrued at the rate of one percent (1%) per month, or the maximum interest rate permitted by law, if any, whichever is less, prorated by days from the due date to the date the payment curing the default is made unless and until the Executive Committee shall determine another rate.

22A.2 A defaulting Party, which is in default under Section 22.A1, shall be liable for all costs, including costs of collection and reasonable attorney fees, plus interest as provided in Section 22.A1 hereof.

22A.3 The rights under this Agreement of a Party which is in default of its obligation to pay operating costs under this Agreement for a period of three (3) months or more may be revoked by a vote of the non-defaulting Parties' representatives on the Executive Committee consistent with Section 8.3. The defaulting Party's rights shall not be revoked, however, unless said Party has received at least thirty (30) days written notice of the non-defaulting Parties' intent to revoke such rights. Said notice shall state the date on which the revocation of rights shall become effective if the default is not cured and shall state all actions which must be taken or amounts which must be paid to cure the default. This provision allowing the non-defaulting Parties to revoke such rights is in addition to any other remedies provided in this Agreement or at law and shall in no way limit the non-defaulting Parties' ability to

with its Transmission Providers, as specified by the Parties in the Transaction, or in the absence thereof, in accordance with the practice of the Transmission Providers, to deliver the Product to the Delivery Point. Buyer shall arrange and be responsible for transmission service at and from the Delivery Point and shall Schedule or arrange for Scheduling services with its Transmission Providers to receive the Product at the Delivery Point.

3.3 Force Majeure. To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under the Transaction and such Party (the "Claiming Party") gives notice and details of the Force Majeure to the other Party as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to such Transaction (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall remedy the Force Majeure with all reasonable dispatch. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

ARTICLE FOUR: REMEDIES FOR FAILURE TO DELIVER/RECEIVE

4.1 Seller Failure. If Seller fails to schedule and/or deliver all or part of the Product pursuant to a Transaction, and such failure is not excused under the terms of the Product or by Buyer's failure to perform, then Seller shall pay Buyer, on the date payment would otherwise be due in respect of the month in which the failure occurred or, if "Accelerated Payment of Damages" is specified on the Cover Sheet, within five (5) Business Days of invoice receipt, an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Contract Price from the Replacement Price. The invoice for such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

4.2 Buyer Failure. If Buyer fails to schedule and/or receive all or part of the Product pursuant to a Transaction and such failure is not excused under the terms of the Product or by Seller's failure to perform, then Buyer shall pay Seller, on the date payment would otherwise be due in respect of the month in which the failure occurred or, if "Accelerated Payment of Damages" is specified on the Cover Sheet, within five (5) Business Days of invoice receipt, an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Sales Price from the Contract Price. The invoice for such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

ARTICLE FIVE: EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default. An "Event of Default" shall mean, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

(a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within three (3) Business Days after written notice;

(b) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated;

(c) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default, and except for such Party's obligations to deliver or receive the Product, the exclusive remedy for which is provided in Article Four) if such failure is not remedied within three (3) Business Days after written notice;

(d) such Party becomes Bankrupt;

(e) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article Eight hereof;

(f) such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party;

(g) if the applicable cross default section in the Cover Sheet is indicated for such Party, the occurrence and continuation of (i) a default, event of default or other similar condition or event in respect of such Party or any other party specified in the Cover Sheet for such Party under one or more agreements or instruments, individually or collectively, relating to indebtedness for borrowed money in an aggregate amount of not less than the applicable Cross Default Amount (as specified in the Cover Sheet), which results in such indebtedness becoming, or becoming capable at such time of being declared, immediately due and payable or (ii) a default by such Party or any other party specified in the Cover Sheet for such Party in making on the due date therefor one or more payments, individually or collectively, in an aggregate amount of not less than the applicable Cross Default Amount (as specified in the Cover Sheet);

(h) with respect to such Party's Guarantor, if any:

(i) if any representation or warranty made by a Guarantor in connection with this Agreement is false or misleading in any material respect when made or when deemed made or repeated;

(ii) the failure of a Guarantor to make any payment required or to perform any other material covenant or obligation in any guaranty made in connection with this Agreement and such failure shall not be remedied within three (3) Business Days after written notice;

(iii) a Guarantor becomes Bankrupt;

(iv) the failure of a Guarantor's guaranty to be in full force and effect for purposes of this Agreement (other than in accordance with its terms) prior to the satisfaction of all obligations of such Party under each Transaction to which such guaranty shall relate without the written consent of the other Party; or

(v) a Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of any guaranty.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts. If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right (i) to designate a day, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to liquidate and terminate all, but not less than all, Transactions (each referred to as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement and (iii) suspend performance. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for each such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transactions are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable).

5.3 Net Out of Settlement Amounts. The Non-Defaulting Party shall aggregate all Settlement Amounts into a single amount by: netting out (a) all Settlement Amounts that are due to the Defaulting Party, plus, at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article Eight, plus any or all other amounts due to the Defaulting Party under this Agreement against (b) all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one Party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

5.4 Notice of Payment of Termination Payment. As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within two (2) Business Days after such notice is effective.

5.5 Disputes With Respect to Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within two (2) Business Days of receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written

explanation of the basis for such dispute; provided, however, that if the Termination Payment is due from the Defaulting Party, the Defaulting Party shall first transfer Performance Assurance to the Non-Defaulting Party in an amount equal to the Termination Payment.

5.6 Closeout Setoffs.

Option A: After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Transactions are not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

Option B: After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party or any of its Affiliates to the Non-Defaulting Party or any of its Affiliates under any other agreements, instruments or undertakings between the Defaulting Party or any of its Affiliates and the Non-Defaulting Party or any of its Affiliates and/or (ii) to the extent the Transactions are not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

Option C: Neither Option A nor B shall apply.

5.7 Suspension of Performance. Notwithstanding any other provision of this Master Agreement, if (a) an Event of Default or (b) a Potential Event of Default shall have occurred and be continuing, the Non-Defaulting Party, upon written notice to the Defaulting Party, shall have the right (i) to suspend performance under any or all Transactions; provided, however, in no event shall any such suspension continue for longer than ten (10) NERC Business Days with respect to any single Transaction unless an early Termination Date shall have been declared and notice thereof pursuant to Section 5.2 given, and (ii) to the extent an Event of Default shall have occurred and be continuing to exercise any remedy available at law or in equity.

ARTICLE SIX: PAYMENT AND NETTING

6.1 Billing Period. Unless otherwise specifically agreed upon by the Parties in a Transaction, the calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments and, if "Accelerated Payment of Damages" is specified by the Parties in the Cover Sheet, payments pursuant to Section 4.1 or 4.2 and Option premium payments pursuant to Section 6.7). As soon as practicable after the end of each month,

Part [6]. Physically Settled Power Transactions

(a) **Power Transactions under this Agreement; Credit Support Documents**

(i) ***Power Transactions***. The provisions of this Part [6] shall apply solely to transactions between the parties for the purchase or sale of a Product (as defined below) on a spot or forward basis or as an option to purchase, sell or transfer a Product (collectively, "Power Transactions"). All Power Transactions will be deemed to have been entered into in accordance with the terms of this Agreement and shall be Transactions for the purposes hereof. A subsequent agreement between the parties to settle a Power Transaction without involving a physical delivery of a Product shall not affect such Power Transaction's status as a Power Transaction under this Part [6]. In the event of any inconsistency among or between the other provisions of this Agreement and this Part [6], this Part [6] will govern with respect to Power Transactions.

(ii) ***Applicability to Outstanding Power Transactions***. If elected under clause (j) as being applicable: upon the effectiveness of this Part [6], all Power Transactions then outstanding ("Outstanding Power Transactions") shall be Transactions for purposes of this Agreement and shall be governed by and subject to the terms and conditions of, this Agreement. All confirmations evidencing such Outstanding Power Transactions shall constitute "Confirmations" within the meaning of this Agreement that supplement, form part of and are subject to this Agreement. If any Confirmation issued or entered into in respect of one or more Outstanding Power Transactions was issued or entered into pursuant to the terms of a master agreement or in a form that contains non-economic substantive provisions such as those relating to default and termination rights (such master agreement or the portion of such Confirmations containing such non-economic terms being referred to herein as the "Prior Master Agreement"), then the terms of the Schedule and the pre-printed form of this Agreement shall automatically supersede such Prior Master Agreement effective upon the execution of this Part [6].

(iii) ***Credit Support Documents***. If elected under clause (j) as being applicable:

(A) *Outstanding Credit Support.* The parties agree that to the extent any collateral, margin, performance assurance or other similar form of credit support (such credit support, excluding guarantees, being referred to herein as "Outstanding Credit Support") is held by a party in connection with the obligations of the other party under Outstanding Power Transactions, such Outstanding Credit Support shall be deemed to have been delivered in respect of the obligations of the other party under Outstanding Power Transactions.

The parties further agree that with respect to any Outstanding Credit Support that (x) if the parties have entered into a Credit Support Document in connection with this Agreement that governs the provision of collateral, margin, performance assurance or other similar form of credit support (such Credit Support Document, an "Existing ISDA® Credit Support Document") then the Outstanding Credit Support shall be deemed to constitute credit support provided under such Existing ISDA Credit Support Document and such Existing ISDA Credit Support Document shall automatically supercede any agreement between the parties pursuant to which the Outstanding Credit Support was provided (the "Outstanding Credit Support Document") effective upon the execution of this Part [6] and (y) if the parties have not entered into an Existing ISDA Credit Support Document, then the Outstanding Credit Support Document constitutes a Credit Support Document with respect to the party that provided such credit support.

(B) *Amendments/Guaranties.* The parties agree that they will enter into such amendments to any Outstanding Credit Support Document as may be necessary to give effect to the terms of this clause (a)(iii). To the extent that a guaranty was delivered in connection with a party's obligations under Outstanding Power Transactions or a Prior Master Agreement, that party represents and warrants that any amendments necessary to ensure that the guaranty would extend to Transactions subject to this Agreement have been made prior to the effectiveness of this Part [6] and agrees (x) that such guaranty constitutes a Credit Support Document with respect to the obligations of such party and (y) the guarantor under such guaranty constitutes a Credit Support Provider with respect to the obligations of such party.

(b) **Obligations and Deliveries**

(i) ***Seller's and Buyer's Obligations.*** With respect to each Power Transaction, Seller shall sell and deliver, or cause to be delivered, the Quantity of the Product to the Delivery Point. Buyer shall purchase and receive, or cause to be received, the Quantity of the Product at the Delivery Point and shall pay Seller the Contract Price. However, with respect to options, the obligations set forth in the preceding two sentences shall only arise if the option is exercised in accordance with its terms. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the Delivery Point. Buyer shall be responsible for any costs or charges imposed on or associated with the Product or its receipt at and from the Delivery Point.

(ii) ***Transmission and Scheduling.*** Seller shall arrange and be responsible for transmission service to the Delivery Point and shall Schedule or arrange for Scheduling services with its Transmission Providers, as specified by the parties in the Power Transactions, or in the absence thereof, in accordance with the practice of Transmission Providers, to deliver the Product to the Delivery Point. Buyer shall arrange and be responsible for transmission service at and from the Delivery Point and shall Schedule or arrange for Scheduling services with its Transmission Providers to receive the Product at the Delivery Point.

(iii) ***Force Majeure.*** To the extent either party is prevented by Force Majeure from carrying out, in whole or part, its obligations under any Power Transaction and such party (the "Claiming Party") gives notice and details of the Force Majeure to the other party (the "non-Claiming Party") as soon as practicable, then, unless the terms of the Product specify otherwise, the Claiming Party shall be excused from the performance of its obligations with respect to such Power Transaction (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure). The Claiming Party shall remedy the Force Majeure with all reasonable dispatch. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure. If the pre-printed form portion of this Agreement is the 2002 ISDA Master Agreement form, Section 5(b)(ii) of this Agreement shall not apply to any Power Transaction.

(c) **Remedies for Failure to Deliver or Receive; Limitation on Condition Precedent**

(i) ***Seller Failure.*** If Seller fails to Schedule and/or deliver all or part of the Product pursuant to a Power Transaction, and such failure is not excused under the terms of the Product or by Buyer's failure to perform, then Seller shall pay Buyer on the date payment would otherwise be due in respect of the month in which the failure occurred or, if "Accelerated Payment of Damages" is specified in clause (j), within five (5) Local Business Days of invoice receipt, an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the

Contract Price from the Replacement Price (as defined below). The invoice for such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

(ii) ***Buyer Failure.*** If Buyer fails to Schedule and/or receive all or part of the Product pursuant to a Power Transaction and such failure is not excused under the terms of the Product or by Seller's failure to perform, then Buyer shall pay Seller on the date payment would otherwise be due in respect of the month in which the failure occurred or, if "Accelerated Payment of Damages" is specified in clause (j), within five (5) Local Business Days of invoice receipt, an amount for such deficiency equal to the positive difference, if any, obtained by subtracting the Sales Price (as defined below) from the Contract Price. The invoice for such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

(iii) ***Limitation on Condition Precedent.*** Section 2(a)(iii) of this Agreement is hereby amended by adding the following phrase at the end of clause (1) immediately before the last comma of such phrase:

"(provided, however, that in relation to any Transaction that is a Power Transaction, if an Event of Default or a Potential Event of Default has occurred and is continuing for longer than ten (10) NERC Business Days without an Early Termination Date being designated, then the condition specified in this clause (1) shall cease to be a condition precedent to the obligations under Section 2(a)(i))."

(d) **Payment**

(i) ***Billing Period.*** Unless otherwise specifically agreed upon by the parties, the calendar month shall be the standard period for all payments pursuant to any Power Transaction under this Agreement (other than (x) payments due as a result of the designation of an Early Termination Date; (y) any option premium payments; or (z) if "Accelerated Payment of Damages" is specified as being applicable, payments due pursuant to clauses (c)(i) and (c)(ii)). As soon as practicable after the end of each month, each party will render to the other party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

(ii) ***Timeliness of Payment.*** The parties shall designate which of the following two options shall apply with respect to the timing of when payment obligations are due in relation to Power Transactions:

Option A: Unless otherwise agreed by the parties, all invoices for payment pursuant to a Power Transaction shall be due and payable in accordance with each party's invoice instructions on or before the later of the fifth (5^{th}) Local Business Day of each month, or the second (2^{nd}) Local Business Day after receipt of the invoice.

Option B: Unless otherwise agreed by the parties, all invoices for payment pursuant to a Power Transaction shall be due and payable in accordance with each party's invoice instructions on or before the later of the twentieth (20th) day of each month, or the tenth (10th) day after receipt of the invoice or, if such day is not a Local Business Day, then on the next Local Business Day.

Each party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Default Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

(iii) ***Payment for Options.*** The premium amount for the purchase of an option shall be paid within two (2) Local Business Days of receipt of an invoice from the option seller. Upon exercise of an option, payment for the Product underlying such option shall be due in accordance with the applicable provisions of clauses (d)(i) and (d)(ii).

(iv) ***Power Transaction Netting.*** If the parties enter into one or more Power Transactions, which in conjunction with one or more other outstanding Power Transactions, constitute Offsetting Power Transactions, then all such Offsetting Power Transactions may, by agreement of the parties, be netted into a single Power Transaction under which:

(A) the party obligated to deliver the greater amount of Product will deliver the difference between the total amount it is obligated to deliver and the total amount to be delivered to it under the Offsetting Power Transactions, and

(B) the party owing the greater aggregate payment will pay the net difference owed between the parties.

Each single Power Transaction resulting under this clause shall be deemed part of the single, indivisible contractual arrangement between the parties, and once such resulting Power Transaction occurs, outstanding obligations under the Offsetting Power Transactions which are satisfied by such offset shall terminate. For the purposes of this Part [6], "Offsetting Power Transaction" shall mean any two or more Power Transactions having the same or overlapping Delivery Period(s) (as specified in the Power Transaction), Delivery Point and payment date, where under one or more of such Power Transactions, one party is the Seller and under the other such Power Transaction(s) the same party is the Buyer.

(e) **Limitation of Liability**

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS CLAUSE (E), THE FOLLOWING PROVISION SHALL APPLY SOLELY TO POWER TRANSACTIONS, AND NOTHING IN THIS PROVISION SHALL AFFECT THE ENFORCEABILITY OF SECTION 6 OF THIS AGREEMENT WITH RESPECT TO POWER TRANSACTIONS OR OTHERWISE.

THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN OR IN A POWER TRANSACTION, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES

CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS. NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE IS SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE.

(f) **Taxes**

(i) ***Cooperation***. Each party shall use reasonable effort to implement the provisions of and to administer this Agreement insofar as it applies to Power Transactions in accordance with the intent of the parties to minimize all Taxes, so long as neither party is materially adversely affected by such efforts.

(ii) ***Taxes***. Notwithstanding Section 2(d) of this Agreement, Seller shall pay or cause to be paid all Taxes imposed by any government authority on or with respect to the Product or a Power Transaction arising prior to the Delivery Point. Buyer shall pay or cause to be paid all Taxes on or with respect to the Product or a Power Transaction at and from the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay Taxes which are Buyer's responsibility hereunder, Buyer shall promptly reimburse Seller for such Taxes. If Buyer is required by law or regulation to remit or pay Taxes which are Seller's responsibility hereunder, Buyer may deduct the amount of any such Taxes from the sums due to Seller under this Agreement. Nothing shall obligate or cause a party to pay or be liable to pay any Taxes for which it is exempt under the law.

(g) **Title, Risk of Loss and Indemnity**

(i) ***Title and Risk of Loss***. Title to and risk of loss related to the Product shall transfer from Seller to Buyer at the Delivery Point. Seller warrants that it will deliver to Buyer the Quantity of the Product free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point.

(ii) ***Indemnity***. Each party shall indemnify, defend and hold harmless the other party from and against any Claims arising from or out of any event, circumstance, act or incident first occurring or existing during the period when control and title to Product is vested in such party as provided for herein. Each party shall indemnify, defend and hold harmless the other party against any Taxes for which such party is responsible.

(h) **Miscellaneous**

(i) ***Tariff.*** Seller agrees to provide service to Buyer, and Buyer agrees to pay Seller for such service, in accordance with Seller's Tariff, if any, and the terms of this Agreement. Each party agrees that if it seeks to amend any Tariff during the term of this Agreement, such amendment will not in any way affect outstanding Power Transactions under this Agreement without the prior written consent of the other party. Each party further agrees that it will not assert, or defend itself, on the basis that any applicable Tariff is inconsistent with this Agreement. For the purposes of this Part [6] "FERC" shall mean the Federal Energy Regulatory Commission. Each of the Party A FERC Electric Tariff and the Party B FERC Electric Tariff is referred to

herein as a "Tariff" and collectively as the "Tariffs", which Tariffs, to the extent applicable as set forth in clause (j), are incorporated herein.

(ii) ***Severability.*** If elected under clause (j) as being applicable with respect to Power Transactions only, any provision of this Agreement declared or rendered unlawful by any applicable court or law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events being referred to herein as a "Regulatory Event") will not otherwise affect the remaining lawful obligations that arise under this Agreement. The parties agree that if a Regulatory Event occurs, they will use their best efforts to reform this Agreement with respect to Power Transactions only to give effect to the original intention of the parties; provided, however, that nothing in this provision shall affect the enforceability of Sections 5 or 6 of this Agreement with respect to Power Transactions or otherwise.

(iii) ***FERC Standard of Review; Certain Covenants and Waivers.*** If elected under clause (j) as being applicable:

(A) Absent the agreement of all parties to the proposed change, the standard of review for changes to any provision of this Agreement (including all Power Transactions and/or Confirmations) specifying the rate(s) or other material economic terms and conditions agreed to by the parties herein, whether proposed by a party, a non-party or FERC acting *sua sponte*, shall be the "public interest" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956)(the "Mobile-Sierra" doctrine).

(B) The parties, for themselves and their successors and assigns, (y) agree that this "public interest" standard of review shall apply to any proposed changes in any other documents, instruments or other agreements executed or entered into by the parties in connection with this Agreement and (z) hereby expressly and irrevocably waive any rights they can or may have to the application of any other standard of review, including the "just and reasonable" standard, provided that this standard of review and the other provisions of this clause (h)(iii) shall only apply to proceedings before the FERC or appeals thereof.

(C) In addition, and notwithstanding the foregoing clauses (h)(iii)(A) and (B), to the fullest extent permitted by applicable law, each party, for itself and its successors and assigns, hereby expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205 and/or 206 of the Federal Power Act or otherwise, to seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any provision of this Agreement (including any applicable Power Transactions and/or Confirmations) specifying the rate(s) or other material economic terms and conditions agreed to by the parties, it being the express intent of the parties that, to the fullest extent permitted by applicable law, the "sanctity of contract" principles acknowledged by FERC in its Notice of Proposed Policy Statement (issued August 1, 2002) in Docket No. PL02-7-000, Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities ("NPPS") shall prevail and neither of them shall unilaterally seek to obtain from FERC any relief changing the rate(s) and/or other material economic terms and conditions of their agreement(s), as set forth in this Agreement and in any Power Transactions or Confirmations, notwithstanding any subsequent changes in applicable law or market conditions that may occur. In the event it were to be determined that applicable law precludes the parties from waiving their rights to seek changes from FERC to their market-based power sales contracts (including entering into covenants not to do so) then this clause (h)(iii) shall not apply, provided