

Draft: 27/08/2019

**DRAFT**

**THE GUAM POWER AUTHORITY**

**[PROJECT COMPANY]**

**and**

**[SECURITY AGENT]**

**ECA/LLA DIRECT AGREEMENT:  
180 MW OF NEW GENERATION CAPACITY PROJECT**

*[This document is subject to the Lenders' review and comments]*

## TABLE OF CONTENTS

1	INTERPRETATION.....	3
2	CONSENT.....	6
3	ACKNOWLEDGMENT OF UNDERTAKINGS OF THE BORROWER.....	8
4	CONFIDENTIALITY.....	8
5	NO ACTION WITHOUT NOTICE.....	9
6	RELEVANT LIABILITIES.....	9
7	STEP-IN RIGHTS.....	10
8	STEP-IN PERIOD.....	11
9	STEP-OUT.....	12
10	NOVATION.....	12
11	TRANSFERS BY PARTIES.....	14
12	MISCELLANEOUS.....	14
13	REPRESENTATIONS AND WARRANTIES.....	15
14	INDEMNITY.....	15
15	SEVERABILITY.....	15
16	NOTICES.....	15
17	GOVERNING LAW.....	16
18	MEDIATION [Based on agreement on ECA language and mediation language].....	16
19	NOT USED.....	16
20	APPENDIX 1 - FORM OF NOVATION NOTICE.....	18
21	APPENDIX 2 - FORM OF ACCESSION AGREEMENT.....	20

Draft: 27/08/2019

THIS DIRECT AGREEMENT is made on [.....]

**BETWEEN:**

- (1) THE GUAM POWER AUTHORITY (the *Buyer*);
- (2) [PROJECT COMPANY], a company organized and existing under the laws of Guam (the *Borrower*); and
- (3) [SECURITY AGENT] (in its capacity as the Security Agent under the Financing Documents) (the *Security Agent*).

each, a *Party*.

**WHEREAS:**

- (A) the Borrower and the Buyer have entered into (i) an Energy Conversion Agreement dated [.....] for the sale and purchase of electric power capacity and output generated by the Facility (the *Energy Conversion Agreement*) and (ii) a Lease Agreement dated [.....] providing the Borrower with a site on which to build, operate, and maintain the Facility (the *Lease Agreement* and, together with the Energy Conversion Agreement, the *Assigned Agreements*);
- (B) the Lenders have agreed to make certain financing available to the Project; and
- (C) it is a condition precedent to the financing of the Project by the Lenders that the Buyer enter into a direct agreement with the Security Agent,

IT IS HEREBY AGREED as follows:

**1 INTERPRETATION**

- (a) Capitalized terms not otherwise defined herein shall have the meaning given to them in the Energy Conversion Agreement.
- (b) In this Agreement:

**Additional Obligor** means any of (a) the Security Agent; (b) any liquidator, receiver or similar official appointed under the security documents; (c) a company Controlled by any of the Lenders and authorized to do business in Guam; or (d) an Eligible Person that assumes the Borrower's rights under the Assigned Agreements and undertakes to discharge the Assumed Liabilities pursuant to Clause 7(a) provided that the Borrower shall not be an Additional Obligor;

**Affiliate** means, in respect of a person, any person which Controls (directly or indirectly) that person and any other person Controlled (directly or indirectly) by such first mentioned person, including, where a person is a company, the ultimate holding company of such person and any holding company of such person and any subsidiary (direct or indirect) of such holding company;

**Agreement** means this Direct Agreement, including the preamble and all schedules hereto;

Draft: 27/08/2019

**Assigned Agreements** has the meaning given to it in Recital (A);

**Assumed Liabilities** means, in relation to the Assigned Agreements, the aggregate of:

- (i) the Relevant Liabilities; and
- (ii) those liabilities and obligations of the Borrower under the Assigned Agreements which arise between the Step-In Date and the Step-Out Date;

**Borrower** has the meaning given to it in the Preamble;

**Business Day** means any day (including partial days) on which banks are authorized or required by law to be open for business in Frankfurt, Guam, Tokyo, London, New York, Seoul and Washington D.C.;

**Buyer** has the meaning given to it in the Preamble;

**Controls** means, in respect of a person by another, that other (whether alone or with others and whether directly or indirectly and whether by the ownership of share capital, the possession of voting power, contract or otherwise):

- (i) has the power to appoint and/or remove all or the majority of the members of the board of directors or other governing body of that person or of any other person which controls that person;
- (ii) controls or has the power to control the affairs and policies of that person or of any other person which controls that person;
- (iii) is the parent undertaking of that person or of any other person which controls that person; or
- (iv) possesses or is, or will at a future date be, entitled to acquire:
  - (A) fifty-one per cent (51%) or more of the share capital or issued share capital of, or of the voting power in, that person or any other person which controls that person; or
  - (B) such part of the issued share capital of that person or any other person which controls that person as would, if the whole of the income of such person were in fact distributed, entitle him to receive fifty-one per cent (51%) or more of the amount so distributed; or
  - (C) such rights as would, in the event of the result of that person or any other person which controls that person or in any other circumstances, entitle him to receive fifty-one per cent (51%) or more of the assets of such person which would then be available for distribution, and, for those purposes, there shall be attributed to any person the rights or powers of any nominee of his and the rights and powers of any one or more persons which he, or he and associates of his, controls and of any one or more associates of his, and **Control** and **Controlled** shall be construed accordingly.

Draft: 27/08/2019

**Dispute** means any dispute or disagreement of any kind whatsoever between Buyer and Borrower in connection with or arising out of this Agreement or either Assigned Agreement;

**Eligible Person** means any person to whom the Buyer has consented, provided that the only criteria which the Buyer will be entitled to use in deciding whether to withhold consent are that persons (A) legal capacity; (B) financial standing and resources shall in no event be less than that of Borrower, or in the event of any guarantee being offered in support, the financial standing and resources of any guarantor to perform the Borrower's obligations under the Assigned Agreements, and (C) technical qualification and experience to perform the Borrower's obligations under the Assigned Agreements;

**Event of Default** shall have the meaning given to it in the LLA and ECA;

**Event of Default Notice** means a notice from the Security Agent to the Buyer certifying that an Event of Default has occurred (such certification to be treated (as between the Security Agent and the Buyer) as conclusive evidence of the occurrence of an Event of Default);

**Financing Documents** means the common terms agreement, the loan agreements and all other related agreements dated on or about the date of this Agreement between, amongst others, the Borrower, the Security Agent and the Lenders in relation to the financing of the Project or any loan agreements, notes, bonds, hedging agreements and other documents relating to the financing (including refinancing) of the Project;

**Guam** means the unincorporated and organized territory of the United States of America known as Guam;

**Lenders** means the banks and other financial institutions that are parties to the Financing Documents from time to time and 'Lender' means any one of them;

**Novation Notice** means a notice given by the Security Agent to the Buyer under Clause 10(b);

**Energy Conversion Agreement** has the meaning given to it in Recital (A);

**Pre-Novation Liabilities** means, in relation to the Assigned Agreements, each of the liabilities and obligations of the Borrower notified to the Security Agent in accordance with Clause 10(d);

**Pre-Novation Payment Obligations** means, in relation to the Energy Conversion Agreement, the amounts due and payable by the Borrower to the Buyer under the Energy Conversion Agreement notified to the Security Agent in accordance with Clauses 10(d)(i) and 10(d)(ii);

**Protected Assets** has the meaning given to it in Clause 19;

**Relevant Liabilities** means each of the liabilities and obligations of the Borrower notified to the Security Agent in accordance with Clause 6 (*Relevant Liabilities*);

**Security Agent** has the meaning given to it in the Preamble;

Draft: 27/08/2019

**Step-In Date** means the date on which the Security Agent takes any action under Clause 7(a);

**Step-In Notice** has the meaning given to it in Clause 7(b);

**Step-In Period** means the period from the Step-In Date up to and including the earlier of

- (i) the corresponding Step-Out Date;
- (ii) the date of any transfer under Clause 10 (*Novation*); and

the date of termination of the Energy Conversion Agreement by the Buyer in accordance with this Agreement and the Energy Conversion Agreement;

**Step-Out Date** means the date of release and cancellation under Clause 9 (*Step-Out*);

**Substitute** means an Eligible Person who will take novation of the Assigned Agreements, as notified by the Security Agent pursuant to Clause 10(a);

**Suspension Period** has the meaning given to it in Clause 5(b);

**Termination Action** has the meaning given to it in Clause 5(b); and

**Termination Notice** has the meaning given to it in Clause 5(b).

(c) Unless the context of this Agreement otherwise requires:

- (i) the headings of Clauses to this Agreement are for convenience only and shall be ignored in construing this Agreement;
- (ii) the singular includes the plural and vice versa;
- (iii) words of any gender include each other gender;
- (iv) references to Clauses and Schedules are references to Clauses and Schedules of this Agreement;
- (v) all periods of time and dates shall be based on, and computed according to, the Gregorian calendar;
- (vi) "person" includes a corporation or other legal entity; and
- (vii) the terms "hereof", "herein", "hereunder" and similar words refer to this entire Agreement and not to any particular Clause, Appendix or any other subdivision of this Agreement.

## 2 CONSENT

- (a) The Borrower hereby gives notice of, and the Buyer hereby acknowledges notice of, and consents to, the assignment by way of security of the Borrower's rights under the Assigned Agreements in favor of the Security Agent acting on behalf of each of the

Draft: 27/08/2019

Lenders, as principals, under the Financing Documents.

- (b) The Buyer confirms that it has not received notice of any other assignment of the Borrower's rights under the Assigned Agreements.
- (c) The Buyer agrees that, unless and until it receives notice to the contrary from the Security Agent, and notwithstanding any request or direction from the Borrower to the contrary, all amounts payable to the Borrower under or in connection with the Assigned Agreements will be paid in to the relevant Borrower's bank account which is notified by the Security Agent to the Buyer from time to time. Payments by the Buyer shall be free and clear of, and without any deduction for or on account of, any set-off or any counterclaim save only where the right of set-off or counterclaim is made pursuant to the terms of the Energy Conversion Agreement or (as the case may be) the Lease Agreement.
- (d) The Buyer acknowledges and agrees that, in addition to an assignment by way of security of the Borrower's rights under the Assigned Agreements, the Financing Documents shall provide for the creation of security over the other interests and assets of the Borrower in the Project in favor of the Lenders, including assignments by way of security over the Project Agreements and a pledge of shares in the Borrower.
- (e) The Buyer undertakes to observe and perform the obligations expressed to be assumed by it in the Assigned Agreements in accordance with the terms thereof.
- (f) The Buyer undertakes, after the giving of an Event of Default Notice, to accept as valid any notices or demands given or made by the Security Agent under or pursuant to the Assigned Agreements in place of the Borrower.
- (g) After the giving of an Event of Default Notice, the Buyer undertakes to accept in accordance with the terms of this Agreement performance of any of the obligations of the Borrower under the Assigned Agreements, which is procured by or on behalf of the Security Agent as performance by the Borrower.
- (h) The Buyer undertakes not to seek to claim that any Notice of Intent to Terminate given or other action taken by the Borrower or the Security Agent under a Project Agreement is invalid merely by virtue of the insolvency or bankruptcy of the Borrower.
- (i) The Buyer agrees and accepts that, subject to the terms of this Agreement, none of the Security Agent or the Lenders shall have any obligations under the Project Agreements.
- (j) The Buyer hereby consents pursuant to Article 23.11 of the Energy Conversion Agreement and Article [ 10] of the Lease Agreement to the assignment by way of security of all of the Borrower's rights, title and interest in such agreements in favor of the Security Agent acting on behalf of each of the Lenders, as principals, under the Financing Documents.
- (k) Nothing in this Agreement or the arrangements contemplated thereby shall (i) increase the liabilities of the Buyer under the Assigned Agreements or, (ii) except to the extent expressly provided herein, affect the rights of the Buyer under the Assigned Agreements.

Draft: 27/08/2019

### **3 ACKNOWLEDGMENT OF UNDERTAKINGS OF THE BORROWER**

The Buyer acknowledges that the Borrower has agreed, pursuant to the Financing Documents, that the Borrower shall not, without the prior consent of the Security Agent, agree to:

- (a) any material amendment to; or
- (b) the termination, cancellation, replacement or abandonment of,

either Assigned Agreement. In furtherance of the foregoing, the Buyer shall not agree to any material amendment, termination or cancellation of either Assigned Agreement proposed by the Borrower unless the Security Agent shall have notified the Buyer of the Security Agent's prior written consent to such amendment, termination or cancellation.

### **4 CONFIDENTIALITY**

4.1 Each Party shall treat as confidential and shall not, without obtaining the prior written approval of the other Parties, disclose to any person the provisions of this Agreement or any information supplied or made available for examination or otherwise disclosed hereunder to such Party by any other Party.

4.2 Notwithstanding the provisions of Clause 4.1, information may be disclosed without the other Parties consent:

- (a) by a Party to its directors, officers, employees, agents and technical and professional advisors and any Affiliate of such Party who reasonably require such information in the course of their duties and responsibilities in relation to this Agreement;
- (b) to the extent required by law or by any applicable governmental or other regulatory authority or by policies affecting public institutions;
- (c) for the purposes of dispute resolution or the enforcement of rights and obligations under this Agreement;
- (d) to the extent such information has become generally available to the public other than as a result of a breach by the disclosing Party of its obligations under this Clause 4 or under the Assigned Agreements;
- (e) by the Security Agent or a Lender to any person with whom it is proposing to enter, or has entered into, any kind of transfer or participation in relation to the financing of the Project as contemplated in the Financing Documents; and
- (f) to any proposed Additional Obligor or Substitute,

in each such case, provided that, other than in regard to paragraphs (b), (c) and (d) above, the person to whom such disclosure is made agrees to keep the information confidential and restrict its use in terms of this Clause 4.

4.3 Any information disclosed in accordance with this Clause 4 shall only be used for a purpose or purposes incidental to or arising out of this Agreement, and not for any other purpose.



Draft: 27/08/2019

## 5 NO ACTION WITHOUT NOTICE

- (a) The Buyer shall notify the Security Agent of a default by the Borrower under either of the Assigned Agreements where such default entitles the Buyer to terminate or exercise any other remedy under either Assigned Agreement.
- (b) The Buyer undertakes that it will not, without the prior consent of the Security Agent, terminate, cancel, suspend performance or treat as repudiated either Assigned Agreement or take any action to instigate a liquidation, receivership or administration of the Borrower or exercise any other remedy under either Assigned Agreement (each a **Termination Action**) without giving to the Security Agent at least [ninety (90)] days' prior notice (and in the case of a failure to achieve Commercial Operation Date by the Required Commercial Operation Date (a **Delayed COD**), [two hundred and ten (210)] days' prior notice) from the date of the notice given pursuant to Article 5.5 of the Energy Conversion Agreement (a **Termination Notice**) stating:
  - (i) the intended date of the Termination Action; and
  - (ii) the grounds for the Termination Action,

Such [90]-day notice period (or [210-day] notice period in the case of a Delayed COD), together with any such extended period under Clauses (c) and (d) below, is referred to herein as the **Suspension Period**,

- (c) If the Security Agent, any Additional Obligor, any Eligible Person or any Substitute, is prohibited by any court order or bankruptcy or insolvency proceedings from curing the unperformed obligations of the Borrower that are the subject of the Termination Notice or from commencing or prosecuting foreclosure proceedings, such Suspension Period shall be extended by the period of such prohibition.
- (d) For any default that cannot by its nature be cured by the payment of money, the Buyer undertakes that it will not, without the prior consent of the Security Agent, take any Termination Action if, and for so long as the Security Agent, any Additional Obligor, any Eligible Person or any Substitute, shall have commenced to remedy the breach or default within [60] days (or [180] days in the case of a Delayed COD) of the Termination Notice and is using all [reasonable endeavours] (including implementation of any remedial program) to remedy such breach or default so long as such breach or default is cured within a period of [120] days (or [360] days in the case of a Delayed COD) from the date of the Termination Notice.
- (e) Unless the Security Agent gives to the Buyer the Security Agent's consent to a Termination Action in respect of which a Termination Notice has been given pursuant to Clause 5(b), the Security Agent shall be deemed to have not consented to such Termination Action and the Suspension Period shall continue until its expiry.
- (f) During a Suspension Period, the right of the Buyer under either of the Assigned Agreements to take any Termination Action shall be suspended and the Buyer shall comply with the terms and conditions set forth in the Assigned Agreements.

## 6 RELEVANT LIABILITIES

- (a) The Buyer shall, within twenty-one (21) days after the date of any Termination Notice or the

Draft: 27/08/2019

date of receipt of any Event of Default Notice, submit to the Security Agent a statement in conformity with the requirements of Clause 10(d) and, subject to Clause 6(b), only such liabilities and obligations as referenced in Clause 10(d) shall be considered Relevant Liabilities.

- (b) No Additional Obligor or Substitute shall be liable for any additional sum, monetary claim, or breach relating to the period prior to the statement unless specified in the statement.

## 7 STEP-IN RIGHTS

- (a) At any time:

- (i) following the giving of an Event of Default Notice; or
- (ii) during the Suspension Period,

the Security Agent may procure that an Additional Obligor, jointly and severally with the Borrower:

- (A) assumes all of the Borrower's rights under the Assigned Agreements; and
- (B) assumes all Assumed Liabilities.

- (b) The Security Agent shall give the Buyer at least twelve (12) days' notice (a Step-In Notice) of any proposed step-in under Clause 7(a) provided that the delivery of the notice on any of the final twelve (12) days of the Suspension Period shall delay the termination of the Suspension Period until the expiration of the twelve (12) day notice period, together with details of the identity of the proposed Additional Obligor. The Security Agent shall provide the Buyer with information as necessary to establish that the proposed Additional Obligor is an Eligible Person,
- (c) If the Buyer does not consent to a proposed Additional Obligor pursuant to its right under Clause (c) of the definition of Eligible Person:
  - (i) the Buyer shall notify the Security Agent setting out its reasons;
  - (ii) any such failure to consent will be without prejudice to the right of the Security Agent to serve a further Step-In Notice or Step-In Notices; and
  - (iii) the Suspension Period shall be extended by a number of days equal to the number of days from and including the date of the Step-In Notice, up to and including the date on which the Buyer notifies the Security Agent of its reasons in reasonable detail for not consenting to that Additional Obligor.
- (d) If the Buyer fails to give notice to the Security Agent of the reasons that it does not consent to an Additional Obligor under Clause 7(c) within sixteen (16) days from the date of receipt by the Buyer of the Step-In Notice, it shall be deemed to have consented to the Additional Obligor on the expiry of that 16 day period.
- (e) Following the issuance of a Termination Notice, the Security Agent may provide notification that the grounds for such Termination Notice are cured if those grounds have

Draft: 27/08/2019

been cured, remedied, or otherwise redressed to the reasonable satisfaction of the Buyer within the Suspension Period, after which the Buyer shall not proceed with any Termination Action based on those grounds.

## 8 STEP-IN PERIOD

(a) Without prejudice to Clause 5 (No Action Without Notice), the Buyer shall not take any Termination Action during the Step-In Period on the grounds:

(i) that the Security Agent has taken any action under Clause 7 (Step-In Rights); or  
(ii) specified in the relevant Termination Notice unless the relevant breach of the applicable Assigned Agreement has not been cured or remedied:

(A) [in respect of any outstanding amount due and payable by the Borrower to GPA prior to the Step-In Date];

(B) in respect of any other breach, within the [sixty (60)] days following the Step-In Date,

provided that:

(x) if the Security Agent, any Additional Obligor, any Eligible Person or any Substitute, is prohibited by any court order or bankruptcy or insolvency proceedings from curing the unperformed obligations of the Borrower that are the subject of the Termination Notice, or from commencing or prosecuting foreclosure proceedings, the Buyer undertakes that it will not, without the prior consent of the Security Agent, take any Termination Action during the period of such prohibition; or

(y) for any default that cannot by its nature be cured by the payment of money, the Buyer undertakes that it will not, without the prior consent of the Security Agent, take any Termination Action if, and for so long as the Security Agent, any Additional Obligor, any Eligible Person or any Substitute, shall have commenced to remedy the breach or default within [60] days (or [180] days in the case of a Delayed COD) of the Termination Notice and is using all reasonable endeavors (including implementation of any remedial program) to remedy such breach or default so long as such breach or default is cured within a period of 120-days (or [360] days in the case of a Delayed COD) from the Termination Notice.

(b) During the Step-In Period, the Buyer shall deal in all matters concerning the Assigned Agreements with the Additional Obligor and not the Borrower, provided that any notices shall be sent to both the Borrower and the Additional Obligor.

(c) During any Step-In Period:

(i) any failure by an Additional Obligor to discharge the Assumed Liabilities under the Assigned Agreements shall be deemed to be a failure by the Borrower to discharge such liabilities for the purposes of the Assigned Agreements; and

(ii) any reference in the Assigned Agreements to a "Project Company Event of Default" by the Borrower shall be construed as including any act or omission of, or

Draft: 27/08/2019

circumstance affecting, the Additional Obligor which would have been such a "Project Company Event of Default" had such act, omission or circumstance been done or omitted to be done by, or affected, the Borrower.

## 9 STEP-OUT

- (a) The Security Agent shall give not less than fourteen (14) days' and not more than twenty-eight (28) days' prior notice of the Step-Out Date to the Borrower and the Buyer.
- (b) Subject to Clauses 9(c) and 10(c)(i), from and after the Step-Out Date, the Additional Obligor shall be released from any obligations to the Buyer under or in connection with the Assigned Agreements and the rights of the Additional Obligor against the Buyer shall be cancelled.
- (c) The Borrower shall remain liable for all of its obligations under the Assigned Agreements notwithstanding the occurrence of the Step-Out Date.

## 10 NOVATION

- (a) Subject to Clause 10(e) at any time:
  - (i) following the giving of an Event of Default Notice and provided that the relevant Event of Default is continuing at such time (as to which notice by the Security Agent that such Event of Default is continuing will be sufficient evidence);
  - (ii) during any Suspension Period; or
  - (iii) during any Step-In Period,

the Security Agent may, on not less than twenty-eight (28) days' prior notice to the Buyer, specifying the proposed date of transfer, procure the transfer of the Borrower's and the Additional Obligor's rights, obligations and liabilities under the Assigned Agreements pursuant to Clause 10(b) to a Substitute.
- (b) The transfer of the Borrower's and any Additional Obligor's rights, obligations and liabilities under the Assigned Agreements to a Substitute, in accordance with Clause 10(a) of this Agreement, shall be effected by a novation notice substantially in the form set out in Appendix I (a Novation Notice). The Borrower hereby appoints the Security Agent irrevocably and by way of security as its attorney for the purposes of executing the Novation Notice.
- (c) Subject to paragraphs (e) and (f) of this Clause 10 (Novation), if a novation and transfer is effected pursuant to Clause 10(b) then, with effect from such novation and transfer:
  - (i) the Security Agent, any Additional Obligor and the Borrower shall be released from all obligations and liabilities under or in connection with the Assigned Agreements, whether arising before, on or after the date of transfer including, without limitation, any Assumed Liabilities accruing prior to the Step-Out Date that have not been discharged; and
  - (ii) any right of the Buyer to terminate that may have arisen prior to the date of transfer

Draft: 27/08/2019

under either of the Assigned Agreements or otherwise will be extinguished and of no further effect.

- (d) The Buyer shall within twenty-one (21) days after the date of any Novation Notice, submit to the Security Agent a statement of:
- (i) all amounts due and payable by the Borrower to the Buyer under the Assigned Agreements which are unpaid as of the date of the statement;
  - (ii) the nature and (where capable of being quantified) amount of any sum which will become due and payable by the Borrower to the Buyer under the Assigned Agreements during the period from the date of the statement up to the proposed date of transfer specified in the Novation Notice;
  - (iii) all other existing breaches by the Borrower of the Borrower's obligations under the Assigned Agreements (other than those referred to in paragraph (i) of this Clause 10(d)) as at the date of the statement; and
  - (iv) all obligations of the Borrower under the Assigned Agreements (other than those referred to in sub-clause (ii) above) which will be required under the terms of the Assigned Agreements to be performed during the period from the date of the statement to the proposed date of transfer specified in the Novation Notice.
- (e) The Substitute shall have up to the [sixty] [(60)] days (or [one hundred eighty (180)] days in the case of a Delay in COD) from the date of the agreement effecting the novation pursuant to Clause 10(a), during which period it must remedy all acts of default by the Borrower in respect of Pre-Novation Liabilities remaining unremedied or uncured, provided that:
- (i) if the Security Agent, any Additional Obligor, any Eligible Person or any Substitute, is prohibited by any court order or bankruptcy or insolvency proceedings from remedying all acts of default (other than a payment default) by the Borrower in respect of Pre-Novation Liabilities, or from commencing or prosecuting foreclosure proceedings, such [60]-day period shall be extended by the period of such prohibition; or
  - (ii) for any acts of default (other than a payment default) by the Borrower in respect of Pre-Novation Liabilities that cannot by their nature be cured by the payment of money, and for so long as the Security Agent, any Additional Obligor, any Eligible Person or any Substitute, shall have commenced to remedy the breach or default within [sixty (60)] days from the date of the agreement effecting the novation pursuant to Clause 10(a), such [60]-day period shall be extended for an additional period of [60] days (or [180] days in the case of a Delayed COD) so long as the Security Agent, any Eligible Person or any Substitute is using all [reasonable endeavors] (including implementation of any remedial program) to remedy such breach or default,

failing which the Buyer shall be entitled to take Termination Action in respect of Pre-Novation Liabilities.

## 11 TRANSFERS BY PARTIES

- (a) The Buyer undertakes that it will not assign, transfer, novate or dispose of any of its rights and/or obligations, or any interest therein, under the Assigned Agreements or this Agreement to any person unless:
  - (i) the Security Agent agrees in writing to such assignment, transfer, novation or disposal; and
  - (ii) such person accedes to this Agreement in place of the Buyer.
- (b) If a successor to the Security Agent is to be appointed (whether as a result of resignation or replacement or otherwise) under the terms of the Financing Documents, the Security Agent shall give to the Buyer at least fourteen (14) days' notice of such appointment taking effect and the new or replacement Security Agent will execute an accession agreement in substantially in the form set out in Appendix 2, agreeing to be bound by the terms of this Agreement.

## 12 MISCELLANEOUS

- (a) The Buyer and the Borrower shall, at the Borrower's expense, take whatever action the Security Agent, an Additional Obligor, an Eligible Person or Substitute taking a transfer in accordance with Clause 10(a), may require for perfecting any transfer or release under Clauses 7 (Step-In Rights), 9 (Step-Out) and 10 (Novation) including, without limitation, the execution of any transfer or assignment and the giving of any notice, order or direction and the making of any registration that, in each case, the Security Agent, Additional Obligor or Eligible Person may request.
- (b) This Agreement shall be binding on the parties, their respective successors and any permitted assignee or transferee of all or some of a party's rights and obligations under this Agreement.
- (c) This Agreement may be executed in any number of counterparts, and by the different parties on separate counterparts, each of which when executed and delivered shall be an original but all of which together constitute one and the same instrument.
- (d) Nothing in this Agreement or the arrangements contemplated hereby shall prejudice the rights of any of the Lenders under the Financing Documents.
- (e) [This Agreement shall terminate (without prejudice to any outstanding obligations or liabilities as at the date of termination) on the date upon which the Borrower's obligations and liabilities to the Lenders under the Financing Documents have been finally discharged and the Lenders have no commitment to lend, which such date as of the date of this Agreement is anticipated to be [ ] years after the date of Financial Closing as determined under the Financing Documents.]
- (f) This Agreement embodies the entire agreement between the Parties relating to the subject matter hereof and supersedes all prior commitments, agreements, representations, and understandings, whether oral or written, relating to the subject matter hereof; and may not be contradicted or varied by evidence of prior, contemporaneous, or subsequent oral agreements or discussions of the Parties hereto.

Draft: 27/08/2019

### **13 REPRESENTATIONS AND WARRANTIES**

The Buyer makes the following representations and warranties:

- (a) it has the right, power and authority to enter into this Agreement and to perform all material obligations hereunder;
- (b) the execution, delivery and performance of this Agreement by the Buyer will have been duly authorized by all necessary action of the Buyer;
- (c) that (i) each of the Assigned Agreements is in full force and effect and has not been amended or varied as of the date hereof (ii) the Buyer's obligations under the Assigned Agreements and under this Agreement are legal, valid and binding and enforceable in accordance with their terms, and (iii) there are no outstanding breaches or defaults by the Buyer under any Assigned Agreement;
- (d) that the rights under the Assigned Agreements are assignable by way of security and that this Agreement constitutes all approvals and consents necessary for such assignments; and
- (e) that this Agreement constitutes all approvals and consents necessary for such assignments referred to under Clause 2(j).

### **14 INDEMNITY**

For so long as this Agreement shall remain in effect, the Buyer shall indemnify the Lenders, the Security Agent, any Additional Obligor and any Substitute, and the Lenders' and any Additional Obligor's or Substitute's officers, directors, shareholders and employees in the same manner, and to the same extent it indemnifies the Borrower and the Borrower's officers, directors, shareholders and employees under Article 16 of the Energy Conversion Agreement or Article [ ] of the Lease Agreement.

### **15 SEVERABILITY**

If, at any time, any provision of this Agreement is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect:

- (a) the legality, validity or enforceability in that jurisdiction of any other provision of this Agreement; or
- (b) the legality, validity or enforceability in other jurisdictions of that or any other provision of this Agreement.

### **16 NOTICES**

#### **16.1 Giving of notices**

All notices or other communications under or in connection with this Agreement must be given in writing and, unless otherwise stated may be made by letter or facsimile. Any such notice will be deemed to be given as follows:

- (a) if by letter, when delivered personally or on actual receipt;

Draft: 27/08/2019

- (b) if by facsimile, when received in legible form.

However, a notice given in accordance with the above but received on a day other than a Business Day or after business hours in the place of receipt will only be deemed to be given on the next Business Day in that place.

## 16.2 Addresses for notices

- (a) The address, and facsimile number of each Party for all notices under or in connection with this Agreement are as set out below:

The Buyer:

Address:

Facsimile #:

For the attention of:

The Borrower:

Address:

Facsimile number:

For the attention of:

The Security Agent:

Address:

Facsimile number:

For the attention of:

or such other address or facsimile number as a Party may notify to the other Parties by not less than seven (7) days' notice.

- (b) All notices from or to the Borrower pursuant to this Agreement must at the same time be copied to the Security Agent and all notices from or to the Buyer in relation to this Agreement or either Assigned Agreement must at the same time be copied to the Borrower and the Security Agent.

## 17 GOVERNING LAW

This Agreement and the rights and obligations hereunder shall be interpreted, construed and governed by the laws of Guam.

## 18 MEDIATION [Based on agreement on ECA language and mediation language]

## 19 NOT USED



Draft: 27/08/2019

**IN WITNESS WHEREOF** this Agreement has been executed and delivered on the date which first appears on the first page hereof and, as agreed by the parties hereto, shall be effective on such date upon the countersignature of the Security Agent.

**EXECUTED** by the Guam Power Authority

acting by:

In the presence of:

Witness signature:

Name:

Address:

**EXECUTED** by [PROJECT COMPANY]

acting by:

In the presence of:

Witness signature:

Name:

Address:

**EXECUTED** by [SECURITY AGENT]

acting by:

In the presence of

Witness signature:

Name:

Address:

Draft: 27/08/2019

## 20 APPENDIX 1 - FORM OF NOVATION NOTICE

TO: Guam Power Authority

### NOVATION NOTICE

Relating to the [Energy Conversion Agreement] [Lease Agreement] between the Guam Power Authority (the **Buyer**) and [Project Company] (the **Borrower**), dated as of [ ] (the **[Energy Conversion Agreement] [Lease Agreement]**).

Terms defined in the Direct Agreement dated [.....] between the Buyer, the Borrower and the Security Agent (the **Direct Agreement**) shall, subject to any contrary indication, have the same meaning herein.

The Security Agent requests that the Buyer accept and procure the transfer to the Substitute of all of the rights, title and interest of and all of the obligations of the Borrower under the [Energy Conversion Agreement] [Lease Agreement] and the Direct Agreement by countersigning and delivering this Novation Notice to the Borrower at its address for the service of notices specified in the Direct Agreement.

This Novation Notice is delivered to the Buyer pursuant to and for the purposes of Clause 10 (*Novation*) of the Direct Agreement so as to take effect in accordance with the terms thereof on the day after delivery of the Novation Notice to the Borrower or on such later date as may be determined in accordance with the terms thereof.

The Substitute warrants that it is has received a copy of the [Energy Conversion Agreement] [Lease Agreement], together with such information as it has required in connection with this transaction and that it has not relied and will not hereafter rely on the Security Agent to check or enquire on its behalf into the legality, validity, effectiveness, adequacy, accuracy or completeness of any such information and further agrees that it has not relied and will not rely on the Security Agent in relation to its entering into this Novation Notice and the [Energy Conversion Agreement] [Lease Agreement].

The Substitute hereby undertakes with the Buyer that it will perform in accordance with the terms thereof all obligations of the Borrower which by the terms of the [Energy Conversion Agreement] [Lease Agreement] and the Direct Agreement will be assumed by it after delivery of this Novation Notice to the Borrower.

The Security Agent makes no representation or warranty and assumes no responsibility with respect to the legality, validity, effectiveness, adequacy or enforceability of the [Energy Conversion Agreement] [Lease Agreement] or any document relating thereto and assumes no responsibility for the performance and observance by any party of any of its obligations under the [Energy Conversion Agreement] [Lease Agreement] or any document relating thereto and any and all such conditions and warranties whether expressed or implied by law or otherwise are

Draft: 27/08/2019  
hereby excluded.

The Novation Notice and the rights and obligations of the parties hereunder shall be governed by and construed in accordance with the laws of Guam.

By:

For and on behalf of the Security Agent

Date:

*[SUBSTITUTE]*

By:

Date:

Draft: 27/08/2019

## 21 APPENDIX 2 - FORM OF ACCESSION AGREEMENT

**THIS AGREEMENT** is made and entered into as of [ ] and is supplemental to, and should be read and construed as one document with, the Direct Agreement (the **Direct Agreement**), dated [.....] between [ ] and [ ] as the same may from time to time be amended, novated, restated or supplemented.

Words and expressions used in the Direct Agreement have the same meaning when used herein,

Pursuant to Clause 11(b) of the Direct Agreement, due notice having been given to the Buyer by [ ] in its capacity as Security Agent, the undersigned [name] of [address] (the **Replacement Security Agent**) hereby agrees with each other person (including but not limited to the Buyer) who is or may become a party to the Direct Agreement that with effect from the date hereof the Replacement Security Agent will become a party to, and be bound by, and benefit from and be subject to, the Direct Agreement, and that all references to the Security Agent in the Direct Agreement shall be and be intended as a reference to the Replacement Security Agent.

The address for notices to the Replacement Security Agent for the purpose of Clause 16 (**Notices**) of the Direct Agreement is:

Address:

Fax No.:

For the attention of [...]

This Agreement shall be governed by and construed in accordance with the laws of Guam,

**SIGNED** on behalf of the Replacement Security Agent the [ ] day of [ ].

By: