



LOS ALAMOS

**CONTRACT NO. AGR19-43**

**SOLAR POWER PURCHASE AGREEMENT**

**BETWEEN**

**INCORPORATED COUNTY OF LOS ALAMOS  
(PURCHASER)  
AND**

**LOS ALAMOS SOLAR II, LLC  
(SELLER)**

**SOLAR POWER PURCHASE AGREEMENT  
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**AGR19-43**

**SOLAR POWER PURCHASE AGREEMENT**

This **SOLAR POWER PURCHASE AGREEMENT** (“Agreement”) is entered into by and between the **Incorporated County of Los Alamos**, an incorporated county of the State of New Mexico (“County” or “Purchaser”), and **Los Alamos Solar II, LLC**, a Delaware limited liability company and subsidiary of PNE USA, Inc., hereafter “Seller”, registered to do business within the State of New Mexico, collectively the “Parties”.

**WHEREAS**, the County was created pursuant to the New Mexico Constitution, Article X, Section 5; and

**WHEREAS**, the County is a properly incorporated home rule county and municipal body as provided and authorized in the New Mexico Constitution, Art. X, Section 6; and

**WHEREAS**, the Municipal Electric Generation Act, NMSA 1978, §§ 3-24-11 *et seq.*, authorizes municipal governments to purchase power by long term power purchase agreements for the supply of municipal electricity; and

**WHEREAS**, the County has established a “special fund” to pay its obligations under this Agreement and is, therefore, not subject to the limitations of the Bateman Act, NMSA 1978, §§ 6-6-11 *et seq.*; and

**WHEREAS**, the County intends to increase its solar power generation to meet its future carbon neutral goals; and

**WHEREAS**, the County, on March 18, 2019, advertised through a request for proposals, its desire to receive proposals from vendors for solar power generation through a power purchase agreement; and

**WHEREAS**, the County Purchasing Agent determined in writing that the use of competitive sealed bidding was either not practical or not advantageous to County for procurement of the Services and County issued Request for Proposals No. 19-43 (“RFP”) on March 18, 2019, requesting proposals for a Utility-Scale Photovoltaic System and Power Purchase Agreement; and

**WHEREAS**, Seller timely responded to the RFP by submitting a response dated May 30, 2019 (“Seller’s Proposal”); and

**WHEREAS**, based on the evaluation factors set out in the RFP, Seller was the successful offeror for the products and services listed in the RFP; and

**WHEREAS**, the County’s Board of Public Utilities approved this Agreement at a public meeting held on August 22, 2019 (“CBPU Approval”); and

**WHEREAS**, the County Council approved this Agreement at a public meeting held on August 27, 2019 (“CC Approval” and together with the CBPU Approval, the “Contract Approvals”); and

**WHEREAS**, Seller has agreed to construct, operate, and maintain the Photovoltaic System described in **Annex A** (“System”) and sell solar generated power from the System, as described and at the prices provided below, to County.

**NOW, THEREFORE**, for and in consideration of the mutual promises and covenants contained herein, County and Seller agree as follows:

## **SECTION I. POWER PURCHASE AGREEMENT ESSENTIAL TERMS.**

The purpose of this Power Purchase Agreement (“PPA” or “Agreement”) is for Seller to install, generate, operate, maintain, and deliver 100% of photovoltaic generated electricity (“Power”) and Renewable Energy Credits (“REC”) to the County on land subleased by County to Seller (“Premises”); see also **Annex A**. Seller shall own and maintain all required photovoltaic infrastructure and shall be solely responsible for the work to place, operate, and maintain the photovoltaic power generating system (“Project” or “System”). County shall pay to Seller the agreed upon per kilowatt/hour fee, as provided below, during the term of this Agreement. Additionally, the following terms and conditions apply to the Parties:

### **A. Purchase and Sale of Electricity.**

County shall purchase from Seller, and Seller shall sell to County, all of the photovoltaic electricity and RECs generated by the System during the Term subject to the terms and conditions set forth herein. All Power generated by the System shall be delivered to County at the Delivery Point as provided below. Title to and risk of loss for the Power and RECs of the System passes to County from Seller at the Delivery Point. County may purchase electricity for the Premises from other sources to the extent County's electricity consumption requirements at the Premises exceed the output of the System. The term "Delivery Point" shall mean the point of interconnection of the System and Seller's Meter to the County's electric distribution system at the low side of the step-up transformer owned by the County.

### **B. Term.**

The term of this Agreement is twenty-five (25) years, beginning on the Commercial Operation Date (as defined herein), hereafter “Term.” Each year of the Term shall be a “Contract Year” and shall commence on the Commercial Operation Date and each subsequent Contract Year shall commence on the anniversary of the Commercial Operation Date.

### **C. Effective Date.**

The effective date of this Agreement is the date of last signatures and receipt of the Contract Approvals, hereafter “Effective Date.” The Parties may agree in writing to extend the Term of this Agreement for a period and at a Contract Price to be agreed upon as provided herein in writing.

### **D. Contract Price; Assumption and Limitations.**

1. **Purchased Power Cost.** The County shall purchase the Power from the Seller's photovoltaic System, including all RECs, at **\$0.0585 per kilowatt hour (\$/kWh)** fixed with no escalation (“Contract Price”) over the Term of the Agreement. Seller shall, pursuant to the terms and conditions herein, deliver the amount of Power to Purchaser during each Contract Year of the Term as provided in **Annex B**.
2. **Contract Price Exclusions.** Seller shall provide any and all necessary labor, equipment, supplies, and services to deliver, install, and operate the System, except the following which shall be the responsibility of the County:
  - a. Pre-Project Premises clearing, cleaning, and removal of existing dirt piles.
  - b. County installation of transformers, switchgear, distribution lines, and main distribution panels after the Seller's Delivery Point and Meter (as defined herein) necessary to connect the Project and deliver Seller's Power to the County's electrical utility system.
  - c. Transformers for interconnection or voltage step-down panels or equipment and connection to the local utility grid (which connection is not required or contemplated by the Parties).

- d. Federal permitting including any and all costs related to the federal agencies responsible for the landfill assessments, including, but not limited to federal National Environmental Policy Act ("NEPA") studies, surveys, or assessments.
- e. Cathodic protection, snow melt, and heat trace.
- f. Erosion control at the Premises.
- g. Security Cameras and Sensors at the Premises.
- h. Fencing and/or any visual screening materials, decorative enhancements to solar support structures including: painting, paint matching, masonry/stone work, and any lighting not required to meet the minimum code compliance.
- i. Structural upgrades to the existing County infrastructure, buildings, and improvements located on the Premises ("Improvements").
- j. Any and all costs associated with any environmental condition existing on the Premises prior to the Effective Date or any environmental condition that County is responsible for or contributes to after the Effective Date (each a "County Condition"). Seller shall be responsible for any environmental condition it causes or contributes to after the Effective Date.
- k. Costs associated with the sublease or license to be granted by County to Seller with respect to the System pursuant to the Lease Agreement, Lease No. DERP-M1NA27945, dated November 1, 2011, by and between County and the U.S. Department of Energy ("DOE Lease").
- l. Interconnection costs for the interconnection of the System to the County's electric distribution system in excess of Twenty Thousand Dollars (\$20,000.00) in the aggregate.

**E. Unauthorized charges, fees, and expenses.**

Seller must obtain written authorization from the Purchaser prior to incurring any unauthorized cost or expense. It is specifically understood and agreed that unauthorized charges, fees, and costs will not be reimbursed unless approved in writing by the authorized agent of the County and Seller, prior to incurring the cost or expense. County shall be directly and solely responsible for the costs associated with or arising from any County Condition.

**F. Conditions Precedent.**

Except as set forth herein, the obligations of Seller under this Agreement shall not be effective unless and until the conditions precedent set forth below have been satisfied:

- 1. The agreement of the Parties on the final version of the Sublease for the area identified in **Annex C** and execution of the Sublease; and
- 2. The receipt of an approval of the Sublease by the U.S. Department of Energy ("DOE") pursuant to the DOE Lease in form and substance reasonably acceptable to Seller ("DOE Approval"); and
- 3. The receipt of the Contract Approvals.

The Parties shall negotiate the terms of the Sublease in good faith and seek to mutually agree on the final version and execute such Sublease by November 30, 2019; provided that each Party shall not be obligated to execute the Sublease accept on terms acceptable to each such Party in its sole discretion. County shall use commercially reasonable efforts to obtain DOE Approval by November 30, 2019 to allow the execution of the Sublease. If the foregoing conditions precedent are not satisfied or waived by Seller in writing by November 30, 2019 (as such date may be extended by Seller in its sole discretion), either Party shall be entitled to terminate this Agreement by delivery of written notice to the other. Each Party shall be responsible for any failure to perform its obligations hereunder prior to such termination.

## **SECTION II. SYSTEM DESCRIPTION, DELIVERY POINT AND PREMISES AND GENERAL TERMS AND CONDITIONS.**

### **A. Billing, Payment and Taxes.**

1. **Monthly Charges.** County shall pay, at the Contract Price, to Seller all properly invoiced charges for the Power generated by the System and delivered to the County at the Delivery Point. The monthly payment for such energy will be equal to the applicable \$/kWh rate multiplied by the number of kWh of Power generated during the applicable month, as measured by the Meter. For purposes of billing and invoicing, prior to the Commercial Operation Date, the Parties will designate in writing, the proper person and entity for addressing payments and invoices.
2. **Monthly Invoicing.** Seller shall invoice County monthly for Power delivered as measured by the Seller's Meter. All invoices shall include: (i) the amount of Power produced by the System and delivered to the Delivery Point; (ii) the Contract Price applicable to and charges incurred by County under this Agreement; and (iii) the total amount due from County.
3. **Payment Terms.** All amounts due under this Agreement are due and payable thirty (30) days following receipt of invoice. Any undisputed portion of the invoice amount not paid within the thirty (30) day period shall accrue interest at the annual rate of two and one-half percent (2.5%) above the Prime Rate, but shall not to exceed the maximum rate permitted by law. All reference to payments, fees, costs shall be in and payable only with U.S. Dollars.
4. **Seller's Taxes.** Seller is solely responsible for: (1) payment of all income taxes or similar taxes imposed on Seller's revenues due to the sale of Power under this Agreement; and (2) all personal property taxes imposed on the Seller's System ("Seller's Taxes"). Seller is solely responsible for all applicable taxes but shall be entitled to charge and collect from the Purchaser any gross receipts tax, sales tax, property tax, other tax levied by the county, or other similar tax which may apply to the sale of Power under this Agreement.

### **B. RECs and Incentives.**

1. **RECs.** County is entitled to the benefit of and will retain all interests in the RECs associated with the electricity generated by the system and sold to the County. Seller shall not make any filing or statements inconsistent with County's ownership interests in the RECs. "REC" means a renewable energy credit or certificate under any state renewable portfolio, standard or federal renewable energy standard, voluntary renewable energy credit certified by a non-governmental organization, pollution allowance, carbon credit and any similar environmental allowance or credit and green tag or other reporting right under Section 1605(b) of the Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program, in each case relating to the production of energy from the System, provided that RECs shall not include Incentives.
2. **Incentives.** Seller is entitled to the benefit of and will retain all interests in the Incentives associated with the System. "Incentives" means (i) a payment paid by a state or local Governmental Authority based in whole or in part on the cost or size of the System such as a rebate, (ii) a performance-based incentive paid as a stream of periodic payments by a state or Governmental Authority based on the production of the System, and (iii) investment tax credits, production tax credits, and similar tax credits, grants or other tax benefits under federal, state or local law, including depreciation.

### **C. Measurement of Delivered Power.**

1. **Meter and Metering.** The System's electricity output during the Term shall be measured by

Seller's meter, which shall be a revenue grade meter that meets ANSI-C12.20 standards for accuracy ("Meter") installed at the Point of Delivery. County shall have access to the metered energy output data via the System monitoring equipment and programs installed and maintained by Seller as part of the System.

2. **Meter Calibration.** Seller shall calibrate and maintain the Meter in accordance with manufacturer's recommendations and specifications. Notwithstanding the foregoing, County may install, or cause to be installed, its own revenue-grade meter at the same location as the Meter. If there is a discrepancy between the data from County's meter and the data from the Meter of greater than two percent (2%) over the course of a Contract Year, then County may request that Seller calibrate the Meter at Seller's cost.

**D. Deliverables and use of documents.**

All deliverables required under this Agreement, including material, products, reports, policies, procedures, software improvements, databases, and any other products and processes, whether in written or electronic form, shall remain the exclusive property of and shall inure to the benefit of County as works for hire; Seller shall not use, sell, disclose, or obtain any other compensation for such works for hire. In addition, Seller may not, with regard to all work, work product, deliverables or works for hire required by this Agreement, apply for, in its name or otherwise, any copyright, patent or other property right and acknowledges that any such property right created or developed remains the exclusive right of County. Seller shall not use deliverables in any manner for any other purpose without the express written consent of the County.

**E. Project Schedule, Installation, Operation and Maintenance.**

1. **Seller Guaranty.** Seller shall deliver to County a guaranty of the obligations of Seller under this Agreement in the form attached as **Annex F** by an Acceptable Guarantor within ten (10) days of the Commencement of Installation and shall maintain such guaranty during the Term of the Agreement; provided that Seller may deliver a substitute guaranty from an Acceptable Guarantor substantially in the form of **Annex F** in which case the guaranty being replaced shall be deemed released in full. "Acceptable Guarantor" means (i) PNE USA, Inc., (ii) a person or entity with experience in the ownership and operation of at least five (5) megawatts of solar electric generation facilities with a net worth of at least five million dollars (\$5,000,000) or (iii) other Guarantor reasonably acceptable to County.
2. **Commencement of System Installation.** Seller shall exercise commercially reasonable efforts to achieve Commencement of Installation of the System within one hundred and twenty (120) days after the Effective Date. "Commencement of Installation" occurs upon County's receipt from Seller of written notice of commencement of material procurement or installation of the Project and System on the Premises.
3. **Project Development and Completion.** Seller shall diligently pursue the development and installation of the System, as provided herein,
  - a. Permits and Approvals.
  - b. Seller shall use commercially reasonable efforts to obtain the following at its sole cost and expense ("Approval"):
    - i. any zoning, land use and building permits required for Seller to construct, install and operate the System; and
    - ii. any agreements and approvals from the County necessary in order to interconnect the System to the County's electric distribution system.
    - iii. County shall cooperate with Seller's reasonable requests to assist Seller in obtaining such Approvals and any other permits or approvals, including, without limitation the execution of documents required to be provided and or required by the County's various departments or as may be required by applicable law and the

additional approvals set forth in **Annex D**. Seller shall have no responsibility for any permit, approval or other requirement associated with any environmental condition existing on the Premises or any permit held by the County in connection with the Premises.

4. **Access Rights.** Access rights of the Seller and its agents and contractors, shall be those provided in the Sublease. Seller additionally has a temporary exclusive license to a staging area for construction as contemplated below and a non-exclusive license to cross any County DOE Leased land for the purposes of performing all of Seller's obligations and enforcing all of Seller's rights set forth in this Agreement and otherwise as required by Seller in order to effectuate the purposes of this Agreement. Seller and its employees, agents and contractors must comply with County's site safety and security requirements when on the Premises (other than in respect to the area governed by the Sublease) pursuant to the foregoing license provided Seller receives notice of such site safety and security requirements in writing. During the term of the Sublease and the Term, County shall preserve Seller's rights under the Sublease and License and Seller's access to the Premises and shall not interfere or permit any third parties under County's control to interfere with such rights or access. County shall reasonably maintain the existing fencing around the Premises.
5. **Seller Staging of Equipment and Supplies.** As provided in the included by reference Seller Proposal, Seller shall be allowed to place, upon approval of County, shipping containers and other equipment necessary for the Project, in a staging area for construction as identified in **Annex G** which is near the area which shall be the subject of the Sublease as reflected in Annex C. Seller shall store only heavy or medium equipment required for the Project. Seller shall be responsible for any fuel spill or leaks from Seller's fueling operations. Seller shall install, with County approval, safety fencing and worker portable toilets as required or needed. Seller shall maintain the area in a clean and safe manner, including pursuant to applicable State and federal OSHA requirements. Seller shall remove any equipment or supplies and return the Premises to the pre-Project condition, as provided herein, within 15 days from the completion of the System Installation.

#### **F. Commercial Operation.**

Seller shall notify County in writing when it has achieved Commercial Operation (the "Commercial Operation Date"). "Commercial Operation" means the System is mechanically complete and capable of providing Power to the Delivery Point at the nameplate capacity specified herein, including all required permissions to operate from the relevant Governmental Authority. Seller shall provide County with reasonable documentation to evidence that the System is ready to begin Commercial Operation. If the System achieves Commercial Operation as defined above as to less than 100% of the expected nameplate capacity but at least 90% of the expected nameplate capacity, then (i) Seller shall be entitled to notify the County that Commercial Operation has occurred, in which case any obligation to complete the remaining 10% (or less) of nameplate capacity shall be deemed waived hereunder; and (ii) Seller shall be entitled to declare a revised nameplate capacity and apply a pro rata reduction to the estimated amounts of electricity to be delivered set forth in **Annex B**. Seller shall deliver a copy of any revised version of **Annex B**, as provided here, in writing to the County.

#### **G. Seller's General Obligations Regarding the System.**

Subject to the terms and conditions of this Agreement, Seller shall design, engineer, install, commission, monitor, operate and maintain the System, in each case in a good and workmanlike manner and in accordance with all applicable laws, regulations, policies and prudent solar industry practices in New Mexico during the Term of this Agreement or as may be extended. The System shall comply with all applicable rules, regulation and local building codes. The delivery of Power shall be contingent upon County continuing to permit the interconnection of the System which is

Seller's sole means of delivering Power generated by the System.

**H. Deliverables shall include:**

Seller shall provide the following documents and records to the County:

1. Initial Design Package;
2. Final Design Package; and
3. As-builts and equipment specifications.

**I. Records:**

Seller shall maintain, throughout the term of this Agreement and for a period of six (6) years after the completion of the Project, all records that indicate the date, time, and nature of the services rendered. Seller shall make available, for inspection by County, all records, books of account, memoranda, and other documents pertaining to County at any reasonable time upon request. Seller specifically understands that the County and contractors to the County, as a local public body, is subject to the New Mexico Inspection of Public Records Act ("IPRA"), NMSA 1978, 14-2-1 *et seq.* Seller agrees to provide within 3 days any records or documents requested under IPRA. Seller shall be individually responsible for taking any action for documents or records which Seller claims are privileged, confidential or otherwise exempt from IPRA, however Seller shall provide the document, in unredacted form to County.

**J. Force Majeure.**

Neither County nor Seller shall be liable for any delay in the performance of this Agreement arising from uncontrollable forces such as fire, theft, storm, war, or any other force majeure event that could not have been reasonably avoided by the exercise of due diligence ("Force Majeure Event").

1. **Force Majeure Event.** If either Party is unable to timely perform any of its obligations (other than payment obligations) under this Agreement in whole or in part due to a Force Majeure Event, that Party will be excused from performing such obligations for the duration of the time that such Party remains affected by the Force Majeure Event; provided, that such Party uses commercially reasonable efforts to mitigate the impact of the Force Majeure Event and resumes performance of its affected obligations as soon as reasonably practical. The Party affected by the Force Majeure Event shall notify the other Party as soon as reasonably practical after the affected Party becomes aware that it is or will be affected by a Force Majeure Event. If the Force Majeure Event occurs during the Term and impacts the ability of the System to deliver electricity to the Delivery Point, the Term will be extended day for day for each day delivery is suspended due to the Force Majeure Event.
2. **Extension of Time.** If Seller is delayed in achieving Commencement of Installation due to a Force Majeure Event, the time for achievement of Commencement of Installation will be automatically extended to account for the impact of the delay.
3. **Extended Force Majeure.** If a Force Majeure Event properly noticed by either Party under paragraph (1) above continues for a consecutive period of one hundred eighty (180) days ("Extended Force Majeure Event"), then the non-affected Party may terminate this Agreement pursuant to the Termination provisions herein. If the Extended Force Majeure Event can be corrected through repair or restoration of the System or other actions by Seller prior to expiration of the initial one hundred eighty (180)-day period and Seller provides written evidence to County that it is diligently pursuing such actions, the Parties may mutually agree, in writing, to an extension of the above period consent to which shall not be unreasonably withheld, conditioned or delayed by County.

**K. System Repair and Maintenance.**

Seller shall be responsible for all System Operations, Repair, and Maintenance as follows:

1. Seller may suspend delivery of electricity from the System to the Delivery Point for the purpose of maintaining and repairing the System; provided that Seller shall use commercially reasonable efforts to (i) minimize any interruption in service to the County, and (ii) limit any

such suspension of service to weekend or off-peak hours. Scheduled and unscheduled maintenance and repairs shall be undertaken at Seller's sole cost and expense. County shall reimburse Seller for the reasonable cost of any repairs or maintenance resulting from damage caused by County, its agents, employees, or contractors.

2. Annual System Repair and Maintenance includes, but is not limited to,
  - a. routine review of performance, and provision of information to County of any outage, production issues, or system faults.
  - b. Monitoring and repair/maintenance data shall be shared annually with County and shall include: a) complete system inspection; b) inspection of power and control wiring; c) Mechanical inspection of power and control wiring; d) verify torque of electrical connections and cycle all circuit breakers; e) clean interior and exterior of electrical equipment of debris and dust; f) clean/replace vent filters and/or any applicable inverter maintenance as required to maintain warranty of the equipment; g) verify voltages and record meter readings at electrical equipment; h) verify inverter modes of operation; i) review annual data readings and performance reports; and j) weed and vector control and abatement.

**L. Maintenance of Premises.**

1. **Premises Maintenance.** County shall, at its sole cost and expense, maintain the Premises and Improvements, excluding the Subleased area, in good condition and repair.
2. **Safeguarding the Premises.** County shall reasonably maintain the physical security of the Premises and Improvements in a manner to be expected of a reasonable and prudent owner or lessee of premises and improvements similar to the Premises and Improvements in nature and location. County shall not conduct or permit activities on, in or about the Premises or the Improvements that have a reasonable likelihood of causing damage, impairment or otherwise adversely affecting the Seller's System.
3. **Insolation.** County acknowledges that unobstructed access to sunlight ("Insolation") is essential to Seller's performance of its obligations and a material term of this Agreement. County shall not, to the extent within its reasonable control, cause or permit any interference with the System's Insolation, and shall ensure that vegetation on the Premises adjacent to the System is regularly pruned or otherwise maintained to prevent interference with the System's Insolation. If County discovers any activity or condition that could diminish the Insolation of the System, County shall immediately notify Seller and cooperate with Seller in preserving and restoring the System's Insolation levels as they existed on the Effective Date.
4. **Alterations to Premises.** Not less than thirty (30) days prior to making any alterations or repairs to the Premises (except for emergency repairs) or any Improvement which may adversely affect the construction, operation or maintenance of the System, County shall inform Seller in writing and, thereafter, shall use commercially reasonable efforts to conduct such repairs, alterations or Improvements in compliance with any reasonable request made by Seller within ten (10 ) days after having received such written request to mitigate any adverse effect. If any repair, alteration or Improvement results in an adverse effect on the System, such action by County shall be deemed to be a request for relocation of the System. To the extent that temporary disconnection or removal of the System is necessary to perform such alterations or repairs, Seller shall perform such work, and any re-connection or re-installation of the System, at County's cost, or as provided herein. Seller shall make any alterations and repairs in a good and workmanlike manner, in compliance with all applicable laws, codes and permits.

**M. System Outages; Costs/Fees.**

1. **County Requested Outages.** Upon County's written request, Seller shall take the System off-line for no more than forty- eight (48) daylight hours (as defined by the United States National Weather Service in the area where the System is located) during each Contract Year ("Outage"). All Outages during any one Contract Year shall be cumulative. Except for

emergencies, the County request shall be delivered to Seller at least forty-eight (48) hours in advance ("Outage Allowance"). County is not obligated to accept or pay for electricity from the System for Outages up to the annual Outage Allowance. If the aggregate hours for Outages requested by the County exceed the Outage Allowance in a given Contract Year, then the County shall pay Seller for the below fee for each additional hour of suspension to compensate Seller for the electricity that would have been generated and delivered during such period in excess of the Outage Allowance. Compensation for outage hours in excess of the Outage Allowance in each Contract Year shall be in accordance with per hour fee in **Annex E**.

2. Seller shall be entitled to conduct regular maintenance of the System which may require temporary shut-down of the System. Seller shall deliver an annual schedule for expected maintenance which Seller shall be entitled to revise from time-to-time with reasonable advance notice to the County. Seller shall use reasonable efforts to limit maintenance outages to non-peak periods. County shall not be responsible to pay for or compensate Seller for Power not generated due to Seller's expected maintenance activity.

**N. Miscellaneous Rights and Obligations of the Parties.**

1. **OSHA Compliance.** Each Party shall comply with all Occupational Safety and Health Act ("OSHA") requirements and other similar local, State, and federal laws and regulations with respect to each Party's performance under this Agreement.
2. **Use and Payment of Contractors and Subcontractors.** Seller shall use suitably qualified, experienced and licensed contractors and subcontractors to perform its obligations under this Agreement. However, Seller shall be responsible for the quality of the work performed by its contractors and subcontractors. Seller shall pay when due all valid charges from all contractors, subcontractors and suppliers supplying goods or services to Seller under this Agreement. Seller shall be solely responsible for payment of wages, salary or benefits to any and all employees or contractors retained by Seller in the performance of the Services. Seller agrees to indemnify, defend and hold harmless County for any and all claims that may arise from Seller's relationship to its employees and subcontractors.
3. **Non-Discrimination.** During the term of this Agreement, Seller shall not discriminate against any employee or applicant for an employment position to be used in the performance of the obligations of Seller under this Agreement, with regard to race, color, religion, sex, age, ethnicity, national origin, sexual orientation or gender identity, disability or veteran status.

**O. Liens.**

Seller shall not directly or indirectly cause, create, incur, assume or allow to exist any Lien on or with respect to the Premises or the Improvements, other than (i) those Liens which Seller is permitted by law to place on the Premises due to non-payment by County of amounts due under this Agreement, and (ii) those Liens solely on Seller's property and rights hereunder (and, for the avoidance of doubt, excluding any property or rights held by the County) granted to financing parties as contemplated in Section 16(a)(ii)(2) below. The Seller shall immediately notify the County in writing of the existence of any Lien not permitted hereunder following discovery of same and shall promptly (and in all events within thirty (30) days) cause the same to be discharged and released of record without cost to the County.

**P. Relocation of System.**

If, during the Term, County ceases to conduct business operations at the Premises or vacates the Premises; the Premises have been destroyed; or the County is otherwise unable to continue to host the System or accept the electricity delivered by the System for any other reason (other than a Default Event by Seller), County may propose in writing the relocation of the System, at County's cost, in lieu of termination of the Agreement by Seller for a Default Event by County. If such proposal is practically feasible and preserves the economic value of the agreement for Seller as reasonably determined by Seller, then the Parties shall seek to negotiate in good faith an agreement for the relocation of the System. If the Parties are unable to reach agreement on

relocation of the System within sixty (60) days after the date of receipt of County's proposal, Seller may terminate this Agreement pursuant to the provisions herein.

**Q. Termination.**

1. **Termination Due to Contract Price Adjustments or Lack of Project Viability.** If, at any time after the Effective Date and prior to Seller's provision of written notice of commencement of material procurement or installation of the Project and System (upon County's receipt of such notice, "Commencement of Installation"), circumstances arise which Seller excluded or was unable to reasonably predict from Contract Price calculations or Seller determines that the installation of the System will not be technically or economically viable, Seller may terminate this Agreement by providing ten (10) days' prior written notice to the County. Neither Party shall be liable for any damages in connection with such termination. After Commencement of Installation, the Contract Price shall not be subject to further adjustment unless as otherwise provided herein.
2. **Termination by County for Delay.** If Commencement of Installation has not occurred one hundred and twenty (120) days after the Effective Date (extended for any Force Majeure Event or Buyer Delay), County may terminate this Agreement by providing thirty (30) days' prior written notice to Seller; provided that this Agreement will not terminate pursuant to this paragraph if Seller achieves Commencement of Installation on or before the end of such thirty (30) day notice period. County shall not be liable for any damages or costs in connection with such termination. The term "Buyer Delay" shall mean any delay resulting from (1) County's failure to perform under this Agreement, (2) County's failure to obtain the DOE Approval by November 30, 2019, (3) County's failure to obtain the Contract Approvals within thirty (30) days of the date of execution of this Agreement, or (4) the failure of the Parties to execute the Sublease or license by November 30, 2019.

**R. Default, Remedies and Damages.**

1. **Default.** Any Party that fails to perform its responsibilities herein as provided below, or experiences any of the circumstances listed below ("Default Event") is deemed a "Defaulting Party", the other Party is the "Non-Defaulting Party":
  - a. Failure of a Party to pay any amount due and payable under this Agreement, other than an amount that is subject to a good faith dispute, within ten (10) days following receipt of written notice from the Non-Defaulting Party of such failure to pay ("Payment Default"); or
  - b. Failure of a Party to perform any material obligation under this Agreement not addressed elsewhere in this section within thirty (30) days following receipt of written notice from the Non-Defaulting Party demanding such cure; provided, that if the Default Event cannot reasonably be cured within thirty (30) days and the Defaulting Party has demonstrated prior to the end of that period that it is diligently pursuing such cure, the cure period will be extended for a further reasonable period of time, not to exceed ninety (90) days; or
  - c. A Party becomes insolvent or is a party to a bankruptcy, reorganization, insolvency, liquidation, receivership, dissolution, winding-up or relief of debtors, or any general assignment for the benefit of creditors or other similar arrangement or any event occurs or proceedings are taken in any jurisdiction with respect to the Party which has a similar effect (or, if any such actions are initiated by a third party, such action(s) is(are) not dismissed within sixty (60) days; or
  - d. If Seller fails to deliver at least eighty percent (80%) of the expected annual electricity set forth in **Annex B** for each Contract Year in any two (2) consecutive Contract Years excluding any failure resulting from a failure or default of the County hereunder or a Force Majeure Event.

## 2. Remedies.

- a. Suspension. Upon the occurrence and during the continuation of a Default Event by the Non-Defaulting party, including a Payment Default, the Non-Defaulting Party may suspend performance of its obligations under this Agreement until the earlier to occur of the date (a) the Non-Defaulting Party cures the Default Event in full, or (b) the non-defaulting party may terminate the Agreement pursuant to the Notice requirements herein.
- b. Termination. In addition to the other Termination rights provided herein, upon the occurrence and during the continuation of a Default Event, the Non-Defaulting Party may terminate this Agreement, by providing ten (10) days prior written notice to the Defaulting Party.
- c. Reservation of Rights. Nothing in this section limits either Party's right to pursue any remedy under this Agreement, at law or in equity, including with respect to the pursuit of an action for damages by reason of a breach or Default Event under this Agreement.

## 3. Obligations following Termination.

- a. If a Party terminates this Agreement as provided herein, then following such termination, Seller shall remove the equipment constituting the System in compliance with the above at the sole cost and expense of the Defaulting Party.

## S. Removal of System upon Termination or Expiration.

Upon the expiration or earlier termination of this Agreement, provided County does not exercise its purchase option, Seller, or its agents, shall, at its expense (unless expressly provided otherwise in this Agreement), remove all of the tangible property comprising the System from the Premises with a targeted completion date that is no later than ninety (90) days after the expiration of the Term. The portion of the Premises where the System is located shall be returned to substantially its original condition (excluding ordinary wear and tear), including the removal of System mounting pads or other support structures. If Seller fails to remove or commence substantial efforts to remove the System by such agreed upon date, County may, at its option, remove the System and restore the Premises to its original condition (other than ordinary wear and tear) at Seller's cost.

## T. Representations and Warranties.

1. **General Representations and Warranties.** Seller represents and warrants to the County the following:
  - a. Seller is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation; the execution, delivery and performance by Seller of this Agreement has been duly authorized by all necessary corporate, partnership or limited liability company action, as applicable, and do not and will not violate any law; and this Agreement is the valid obligation of Seller, enforceable against Seller in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally).
  - b. Seller shall maintain all required licenses including, without limitation, all necessary professional and business licenses, throughout the term of this Agreement. Seller shall require and shall assure that all of Seller's employees, contractors and subcontractors maintain all required licenses including, without limitation, all necessary professional and business licenses.
2. **County's Representations and Warranties.** County represents and warrants to Seller the following:
  - a. The County is an incorporated county under the laws of state of New Mexico; the execution, delivery and performance by the County of this Agreement has been duly authorized by all necessary action under applicable law, as applicable, and does not

and will not violate any law.

- b. This Agreement is the valid obligation of the County, enforceable against Seller in accordance with its terms (except as may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other similar laws now or hereafter in effect relating to creditors' rights generally), entered into by the County pursuant to and in accordance with each of NMSA 1978, § 4-37-1, § 3-18-1(B), § 4-46-1 and § 37-1-23.
  - c. No approval or consent is required by law or under contract for the execution and performance by the County of this Agreement except the Contract Approvals,
  - d. Licenses. (a) County has title to or a leasehold or other valid property interest in the Premises such that County has the full right, power and authority to grant the Licenses in paragraph 7(a), (b) such grant of the License(s) does not violate any law, ordinance, rule or other governmental restriction applicable to County or the Premises and is not inconsistent with and will not result in a breach or default under any agreement by which County is bound or that affects the Premises, and (c) if County does not own the Premises or any Improvement on which the System is to be installed, County has obtained all required consents from the owner of the Premises and/or Improvements, as the case may be, to grant the Licenses to Seller so that Seller may perform its obligations under this Agreement.
  - e. Accuracy of Information. All information provided by County to Seller, as it pertains to (a) the Premises, (b) the Improvements on which the System is to be installed, if applicable, (c) County's planned use of the Premises and any applicable Improvements, and (d) County's estimated electricity requirements, is accurate in all material respects to the best information and belief of the County.
  - f. County Status. County is not subject to regulation as a public utility or a public utility holding company as defined by the State of New Mexico.
  - g. Sufficient funds have been appropriated to allow the County to perform its payment obligations under this Agreement during the entire Term and/or in connection with any termination of this Agreement and the County has taken all steps necessary to establish a "special fund" to perform such obligations under this Agreement and is, therefore, not subject to the limitations of the Bateman Act, NMSA 1978, §§ 6-6-11 *et seq.*
3. Seller's Warranties.

If Seller damages any part of the Premises or any Improvements on the Premises, Seller shall repair or reimburse County for such damage, as agreed by the Parties.

#### **U. Ownership; Option to Purchase.**

1. **Ownership of System.** Throughout the Term, Seller shall be the legal and beneficial owner of the System, and all RECs and Incentives, and the System will remain the personal property of Seller and will not attach to or be deemed a part of, or fixture to, the Premises or any Improvement on which the System is installed. The Seller and County agree that the Seller is the tax owner of the System and all tax filings and reports shall be filed in a manner consistent with this Agreement. The System will at all times retain the legal status of personal property as defined in Article 9 of the New Mexico Uniform Commercial Code, NMSA 1978, Chapter 55.
2. **Subordination and Non-Disturbance Agreement.** County shall provide to Seller a subordination and non-disturbance agreement in a form mutually acceptable to Seller, County, and the provider of the subordination and non-disturbance agreement from the holder of any mortgage on the Premises and other Persons holding a similar interest in the Premises. Such authorization shall not be unreasonably withheld by County, however Seller shall at all times be responsible for the Services and Work provided herein.
3. **Option to Purchase.**

- a. **Exercise of Option.** At the end of the sixth (6<sup>th</sup>), tenth (10<sup>th</sup>), fifteenth (15<sup>th</sup>) or twentieth (20<sup>th</sup>) Contract Years and at the end of the Term, so long as neither party is in default under this Agreement (“Option to Purchase”). County may purchase the System from Seller on any such date for a price which is mutually agreed by the Parties. County shall notify Seller of its intent to purchase at least ninety (90) days and not more than one hundred eighty (180) days prior to the end of the applicable Contract Year, as applicable, and the purchase shall be completed prior to the end of the applicable Contract Year subject only to the agreement of the Parties on the price and other terms and the receipt of any required consents or approvals under contract or applicable law. The purchase price shall never be less than the total obligations owed to the Financing Parties at the time of the purchase and as a result of such early repayment.
- b. **Title Transfer; Warranties; Manuals.** Seller shall transfer valid title to the System to County upon Seller’s receipt of the purchase price and execution by the Parties of a written instrument or agreement in form and substance acceptable to Seller and the Financing Parties to effect such sale. The System will be sold “as is, where is, with all faults”. Seller will assign to County any manufacturer’s warranties that are in effect as of the date of purchase and which are then assignable pursuant to their terms, but Seller otherwise disclaims all warranties of any kind, express or implied, concerning the System (other than as to title). Seller shall also provide County all System operation and maintenance manuals which are then assignable and logs in Seller’s possession and provide County basic training on the operation and maintenance of the System upon County’s reasonable request. Upon purchase of the System, County shall assume complete responsibility for the operation and maintenance of the System and liability for the performance of (and risk of loss for) the System, and, except for any Seller obligations that survive termination, Seller will have no further liabilities or obligations hereunder for the System.

**V. Indemnification and Limitations of Liability.**

**1. Indemnity Obligations.**

- a. **General Indemnity.** Seller shall indemnify, hold harmless and defend County, its Council members, employees, agents and representatives (“County Indemnified Parties”), from and against all liabilities, damages, claims, demands, actions (legal or equitable), and costs and expenses, including without limitation attorneys’ fees, of any kind or nature (“Liabilities”), arising from Seller’s performance hereunder or breach hereof and the performance of Seller’s employees, agents, representatives and subcontractors.
- b. **Environmental Indemnity.** Seller shall indemnify, defend and hold harmless all of County’s Indemnified Parties from and against all Liabilities arising out of or relating to the existence at, on, above, below or near the Premises of any Hazardous Substance (as defined in Section 14(c)(iii)) to the extent deposited, spilled or otherwise caused by Seller or any of its contractors, agents or employees. Each Party shall promptly notify the other Party if it becomes aware of any Hazardous Substance on or about the Premises generally or any deposit, spill or release of any Hazardous Substance. “Hazardous Substance” means any chemical, waste or other substance (a) which now or hereafter becomes defined as or included in the definition of “hazardous substances,” “hazardous wastes,” “hazardous materials,” “extremely hazardous wastes,” “restricted hazardous wastes,” “toxic substances,” “toxic pollutants,” “pollution,” “pollutants,” “regulated substances,” or words of similar import under any laws pertaining to the environment, health, safety or welfare, (b) which is declared to be hazardous, toxic, or polluting by any Governmental Authority, (c) exposure to which is now or hereafter prohibited, limited or regulated by any Governmental Authority, (d) the storage, use, handling, disposal or release of which is restricted or regulated by any Governmental Authority, or (e) for which remediation or cleanup is required by any Governmental Authority

**W. Notice.**

4. All notices under this Agreement shall be in writing and delivered by hand, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and will be deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices must be sent to the person identified below at the addresses set forth in this Agreement or such other address as either Party may specify in writing:

|   |   |
|---|---|
| County:   | LOS ALAMOS SOLAR II, LLC                                      |
| Deputy Utility Manager, EP<br>1000 Central Avenue, Suite<br>140<br>Los Alamos, NM 87544 | 150 N. Michigan Avenue, Suite 1500<br>Chicago, Illinois 60601 |
| Telephone: (505) 662-8131   | Telephone: 312-873-0004                                       |
| Email:  | Email:  |

5. **Electronic Signatures.** The parties agree that pursuant to the New Mexico Uniform Electronic Transactions Act, NMSA 1978, 14-16-1 *et seq.*, applies to the extent permitted by law.
6. **Change of Contact.** Any change of the above contacts shall be provided as soon as reasonably practical to the other parties.

**X. Change in Law.**

1. **Impacts of Change in Law.** If Seller determines that a Change in Law has occurred or will occur that has or will have a material adverse effect on Seller's rights, entitlement, obligations or costs under this Agreement, then Seller may so notify the County in writing of such Change in Law. Within thirty (30) days following receipt by the County of such notice, the Parties shall meet and attempt in good faith to negotiate such amendments to this Agreement as are reasonably necessary to preserve the economic value of this Agreement to both Parties. If the Parties are unable to agree upon such amendments within such thirty (30) day period, then Seller may terminate this Agreement and remove the System and restore the Premises in accordance with this Section without either Party having further liability under this Agreement except with respect to liabilities accrued prior to the date of termination or in connection with removal and restoration.
2. **Illegality or Impossibility.** If a Change in Law renders this Agreement, or the Parties performance of this Agreement, either illegal or impossible, then the Parties may terminate this Agreement immediately upon notice to County without either Party having further liability under this Agreement.
3. **"Change in Law"** means any of the following (excluding any change by the County or any agency, division or other arm thereof) (i) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any applicable law or regulation, or (ii) the imposition of any material conditions on the issuance or renewal of any applicable permit after the Effective Date (notwithstanding the general requirements contained in any applicable permit at the time of application or issue to comply with future laws, ordinances, codes, rules, regulations or similar legislation).

**Y. Assignment and Financing.**

1. **Assignment.** Restrictions on Assignment. This Agreement may not be assigned in whole or in part by either Party without the prior written consent of the other Party, which consent may not be unreasonably withheld or delayed. Notwithstanding the foregoing, County acknowledges that Seller may grant a lien on its right, title and interest in this Agreement pursuant to a financing in favor of a Financing Party.

2. **Financing.** The Parties acknowledge that Seller may obtain one or more of debt, equity or tax equity financing or other credit support from lenders, investors or other third parties (each a “**Financing Party**”) in connection with the installation, construction, ownership, operation and maintenance of the System. In furtherance of Seller’s financing arrangements and in addition to any other rights or entitlements of Seller under this Agreement, County shall timely execute any consents to assignment (which may include notice, cure, attornment and step-in rights) or estoppels (“**Financing Consent**”) and negotiate any amendments to this Agreement that may be reasonably requested by Seller or a Financing Party; provided, that such Financing Consent or amendments do not alter the fundamental economic terms of this Agreement.
3. **Confidential Information.** To the maximum extent permitted by applicable law, if either Party provides confidential information (“**Confidential Information**”) to the other or, if in the course of performing under this Agreement or negotiating this Agreement a Party learns Confidential Information of the other Party, the receiving or learning Party shall (i) protect the Confidential Information from disclosure to third parties with the same degree of care accorded its own confidential and proprietary information, and (ii) refrain from using such Confidential Information, except in the negotiation, performance, enforcement and, in the case of Seller, financing, of this Agreement. It is understood by Seller that the County, as a public body, is subject to the New Mexico Inspection of Public Records Act, NMSA 1978, 14-2-1 et seq. As such, Seller will cooperate with County in producing for inspection any and all requested records, unless exempt under the Act. If Seller claims any exemption, it shall be the duty and responsibility of the Seller to take any necessary action to prevent the County from disclosing the records, including but not limited to injunctions, orders of protection, etc.

## **Z. Definitions and Interpretation.**

Unless otherwise defined or required by the context in which any term appears: (i) the singular includes the plural and vice versa, (ii) the words “herein,” “hereof” and “hereunder” refer to this Agreement as a whole and not to any particular section or subsection of this Agreement, (iii) references to any agreement, document or instrument mean such agreement, document or instrument as amended, restated, modified, supplemented or replaced from time to time, and (iv) the words “include,” “includes” and “including” mean include, includes and including “without limitation.” The captions or headings in this Agreement are strictly for convenience and will not be considered in interpreting this Agreement. As used in this Agreement, “dollar” and the “\$” sign refer to United States dollars.

### **AA. Forum and Venue of Law.**

In any lawsuit or legal dispute arising from the operation of this Agreement, Seller agrees that the laws of the State of New Mexico shall govern. Venue shall be in the First Judicial District Court of New Mexico in Los Alamos County, New Mexico. Any claim under federal law shall be in the Federal Judicial District Court of New Mexico.

### **BB. Survival.**

Provisions of this Agreement that should reasonably be considered to survive termination of this Agreement, including, without limitation provisions related to billing and payment and indemnification, will survive termination of this Agreement.

### **CC. Further Assurances.**

Each Party shall provide such information, execute, and deliver any instruments and documents and to take such other actions as may be reasonably requested by the other Party to give full effect to this Agreement and to carry out the intent of this Agreement.

**DD. Waivers.**

No provision or right or entitlement under this Agreement may be waived or varied except in writing signed by the authorized agent of the Party to be bound, its governing body. Waiver of any of one provision will constitute a waiver of any other provision, nor will such waiver constitute a continuing waiver unless otherwise expressly provided.

**EE.No Partnership.**

No provision of this Agreement may be construed or represented as creating a partnership, trust, joint venture, fiduciary or any similar relationship between the Parties. No Party is authorized to act on behalf of the other Party, and neither may be considered the agent of the other.

**FF.Entire Agreement, Modification, Invalidity, Captions.**

This Agreement constitutes the entire agreement of the Parties regarding its subject matter and supersedes all prior proposals, agreements, or other communications between the Parties, oral or written. This Agreement may be modified only by a writing signed by both Parties. If any provision of this Agreement is found unenforceable or invalid, such provision shall not be read to render this Agreement unenforceable or invalid as a whole. In such event, such provision shall be rectified or interpreted so as to best accomplish its objectives within the limits of applicable law. As each party are duly formed corporations, and all parties are or have had the chance to be legally represented, it is mutually agreed that contract interpretation shall not be read against the drafter.

**GG. No Third-Party Beneficiaries.**

Except as otherwise expressly provided herein, this Agreement and all rights hereunder are intended for the sole benefit of the Parties hereto, and the Financing Parties to the extent provided herein or in any other agreement between a Financing Party and Seller or County, and do not imply or create any rights on the part of, or obligations to, any other Person or Persons.

**HH. Counterparts.**

This Agreement may be executed in any number of separate counterparts and each counterpart will be considered an original and together comprise the same Agreement.

**II. Standard of Performance:**

Seller agrees and represents that it has and will maintain the personnel, experience and knowledge necessary to qualify it for the particular duties to be performed under this Agreement. Seller shall perform the Services described herein in accordance with a standard that exceeds the industry standard of care for performance of the Services.

**JJ. Insurance:**

Seller shall obtain and maintain insurance of the types and in the amounts set out below throughout the term of this Agreement with an insurer acceptable to County. Seller shall assure that all subcontractors maintain like insurance. Compliance with the terms and conditions of this Section is a condition precedent to County's obligation to pay compensation for the Services and Seller shall not provide any Services under this Agreement unless and until Seller has met and maintains the requirements of this Section. County requires Certificates of Insurance or other evidence acceptable to County that Seller has met its obligation to obtain and maintain insurance and to assure that subcontractors maintain like insurance. Should any of the policies described below be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions. General Liability Insurance and Automobile Liability Insurance shall name County as an additional insured, and these policies shall be endorsed with a waiver of subrogation in favor of the County.

1. **General Liability Insurance:** ONE MILLION DOLLARS (\$1,000,000.00) per occurrence; TWO MILLION DOLLARS (\$2,000,000.00) aggregate.
2. **Workers' Compensation:** In an amount as may be required by law. County may immediately terminate this Agreement if Seller fails to comply with the Worker's Compensation Act and applicable rules when required to do so.
3. **Automobile Liability Insurance:** ONE MILLION DOLLARS (\$1,000,000.00) combined single

limit per occurrence; TWO MILLION DOLLARS (\$2,000,000.00) aggregate on any owned, and/or non- owned motor vehicles used in performing Services under this Agreement.

**KK. Non-Discrimination.**

During the term of this Agreement, Seller shall not discriminate against any employee or applicant for an employment position to be used in the performance of the obligations of Seller under this Agreement, with regard to race, color, religion, sex, age, ethnicity, national origin, sexual orientation or gender identity, disability or veteran status.

**LL. Prohibited Interests.**

Seller agrees that it presently has no interest and shall not acquire any interest in any other project or business, direct or indirect, which would result in a conflict of interest in any manner or degree with the performance of its services hereunder. Seller further agrees that it will not employ any person having such an interest to perform services under this Agreement. No County Council member or other elected official of County, or manager or employee of County shall solicit, demand, accept or agree to accept a gratuity or offer of employment contrary to Section 31-282 of the Los Alamos County Code of Ordinances.

**IN WITNESS WHEREOF**, the parties have executed this Agreement on the date(s) set forth opposite the signatures of their authorized representatives to be effective for all purposes on the date first written above.

**PURCHASER:**

**INCORPORATED COUNTY OF LOS ALAMOS, NM**

\_\_\_\_\_  
By: Philo Shelton, III, P.E.  
Utility Manager

\_\_\_\_\_  
Date

ATTEST:

\_\_\_\_\_  
Naomi D. Maestas  
County Clerk

\_\_\_\_\_  
Date

Approved to Form:

\_\_\_\_\_  
J. Alvin Leaphart, Esq.  
County Attorney

\_\_\_\_\_  
Date

**SELLER:**

**LOS ALAMOS SOLAR II, LLC**

\_\_\_\_\_  
Ron Flax-Davidson  
President

\_\_\_\_\_  
Date

## **ANNEX A. PROJECT DESCRIPTION**

A solar generation facility the nameplate capacity of which shall be 1.32 MW DC utilizing PV modules mounted on a ballasted racking system. See *a/so* **Annex C**.

## ANNEX B. ELECTRICITY PRODUCTION

| Year                  | Annual Production (kWh) |
|-----------------------|-------------------------|
| 2020                  | 2,402,604               |
| 2021                  | 2,389,390               |
| 2022                  | 2,376,248               |
| 2023                  | 2,363,179               |
| 2024                  | 2,350,181               |
| 2025                  | 2,337,255               |
| 2026                  | 2,324,400               |
| 2027                  | 2,311,616               |
| 2028                  | 2,298,902               |
| 2029                  | 2,286,258               |
| 2030                  | 2,273,684               |
| 2031                  | 2,261,179               |
| 2032                  | 2,248,742               |
| 2033                  | 2,236,374               |
| 2034                  | 2,224,074               |
| 2035                  | 2,211,842               |
| 2036                  | 2,199,677               |
| 2037                  | 2,187,578               |
| 2038                  | 2,175,547               |
| 2039                  | 2,163,581               |
| 2040                  | 2,151,681               |
| 2041                  | 2,139,847               |
| 2042                  | 2,128,078               |
| 2043                  | 2,116,374               |
| 2044                  | 2,104,734               |
| 25 Year<br>Production | 56,263,025              |

This table is subject to modification pursuant to Section II.F.

## ANNEX C. PREMISES AND PROJECT AREA

From Seller Proposal, page 8.



The area highlighted in blue shall be the proposed Project area and Subleased property.

## ANNEX D. APPROVALS

- Permitting requirements:
  - Federal-
    - No FONSI necessary due to Categorical Exclusion for landfill site
    - Soil Disturbance Plan- County is researching with DOE contacts to determine if necessary or not
  - State-
    - CID (Construction Industries Division) permit (electrical and mechanical inspections)
    - NM Environment Department review and approval of final system design
  - County-
    - Development permit
    - Storm Water Pollution Prevention Plan
- Agreements needed (per RFP):
  - Sublease
  - Access Agreement
  - Sublease or license with County (DOE approval required)
  - Interconnection Agreement

**ANNEX E. ANNUAL COUNTY OUTAGE EXCEEDANCE COSTS**

| Month  | Monthly System kWh Production | \$ Per Each Additional Outage Day | 7am   | 8am   | 9am   | 10am  | 11am  | Noon  | 1pm   | 2pm   | 3pm   | 4pm   |
|--------|-------------------------------|-----------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Jan    | 183,813                       | 346.87                            | 14.67 | 28.77 | 39.42 | 46.47 | 48.90 | 46.29 | 42.85 | 36.23 | 27.75 | 15.52 |
| Feb    | 177,537                       | 370.93                            | 15.69 | 30.77 | 42.15 | 49.69 | 52.29 | 49.50 | 45.82 | 38.74 | 29.67 | 16.60 |
| March  | 196,887                       | 371.54                            | 15.72 | 30.82 | 42.22 | 49.77 | 52.38 | 49.58 | 45.90 | 38.81 | 29.72 | 16.63 |
| April  | 232,289                       | 452.96                            | 19.16 | 37.57 | 51.47 | 60.68 | 63.86 | 60.44 | 55.95 | 47.31 | 36.24 | 20.27 |
| May    | 227,705                       | 429.70                            | 18.18 | 35.64 | 48.83 | 57.56 | 60.58 | 57.34 | 53.08 | 44.88 | 34.38 | 19.23 |
| June   | 224,667                       | 438.10                            | 18.53 | 36.34 | 49.78 | 58.69 | 61.76 | 58.46 | 54.12 | 45.76 | 35.05 | 19.61 |
| July   | 205,105                       | 387.05                            | 16.37 | 32.11 | 43.98 | 51.85 | 54.57 | 51.65 | 47.81 | 40.43 | 30.96 | 17.32 |
| August | 195,860                       | 369.61                            | 15.64 | 30.66 | 42.00 | 49.51 | 52.11 | 49.32 | 45.66 | 38.61 | 29.57 | 16.54 |
| Sept   | 194,844                       | 379.95                            | 16.07 | 31.52 | 43.17 | 50.90 | 53.57 | 50.70 | 46.93 | 39.69 | 30.39 | 17.00 |
| Oct    | 207,502                       | 391.58                            | 16.57 | 32.48 | 44.50 | 52.45 | 55.21 | 52.25 | 48.37 | 40.90 | 31.33 | 17.53 |
| Nov    | 185,999                       | 362.70                            | 15.34 | 30.09 | 41.21 | 48.59 | 51.13 | 48.40 | 44.80 | 37.88 | 29.02 | 16.23 |
| Dec    | 170,396                       | 321.55                            | 13.60 | 26.67 | 36.54 | 43.07 | 45.33 | 42.91 | 39.72 | 33.59 | 25.72 | 14.39 |

**ANNEX F. FORM OF GUARANTY**

## GUARANTY

This Guaranty, dated as of August \_\_, 2019 (this "**Guaranty**"), is made by PNE USA Inc. (the "**Guarantor**"), in favor The Incorporated County of Los Alamos ("**CLA**") pursuant to that certain Solar Power Purchase Agreement Contract No. AGR 19-43, dated as of August \_\_, 2019 (the "**PPA**"), between CLA and Los Alamos Solar II, LLC (the "**Project Company**"). Capitalized terms used but not defined herein have the meanings ascribed to them in the PPA.

1. Guaranty. To induce the CLA to enter into the PPA, the Guarantor hereby absolutely, unconditionally and irrevocably guarantees to the CLA, on the terms and conditions set forth herein, the due and punctual payment of the obligations of the Project Company pursuant to the PPA if and when due in accordance with the PPA (the "**Guaranteed Obligations**"); *provided, however*, that the maximum amount payable by the Guarantor hereunder, together with any amounts paid by the Project Company, shall not exceed the Cap (as defined below), it being understood that the CLA will not seek to enforce this Guaranty for an amount in excess of the Cap. The term "**Cap**" shall mean an amount equal to One Hundred and Forty Thousand Dollars (\$140,000). If the Project Company shall fail to punctually and fully to pay the Guaranteed Obligations in accordance with the PPA, the Guarantor shall pay such amounts to the CLA sufficient to satisfy the Guaranteed Obligations in full within ten (10) business days following a demand therefor by the CLA subject to the Cap. For the avoidance of doubt, this Guaranty and the Cap shall by no means be understood or construed in a way to increase or circumvent any limitations of liability set forth in the PPA and the CLA shall not be entitled to duplicate remedies under this Guaranty and the PPA. The CLA hereby agrees that in no event shall the Guarantor be required to pay any amount to the CLA under, in respect of, or in connection with this Guaranty, the PPA or the transactions contemplated hereby, together with any amounts paid by the Project Company, exceeding the Cap. All payments hereunder shall be made in lawful money of the United States, in immediately available funds.

2. Representations and Warranties. The Guarantor hereby represents and warrants that:

(a) the Guarantor is a duly organized and validly existing corporation under the laws of the State of Delaware;

(b) the execution, delivery and performance of this Guaranty have been duly authorized by all necessary action and do not contravene any provision of the Guarantor's charter or similar organizational documents or any applicable law binding on the Guarantor or any of its property or assets;

(c) all consents, approvals, authorizations, permits of, filings with and notifications to, any Governmental Authority necessary for the due execution, delivery and performance of this Guaranty by the Guarantor have been obtained or made and all conditions thereof have been duly complied with, and no other action by, and no notice to or filing with, any Governmental Authority is required in connection with the execution, delivery or performance of this Guaranty;

(d) this Guaranty constitutes a legal, valid and binding obligation of the Guarantor, enforceable against the Guarantor in accordance with its terms, except as may be limited by bankruptcy, insolvency,

reorganization, moratorium, and other similar laws of general applicability relating to or affecting creditors' rights or general equity principles (regardless of whether considered at law or in equity); and

(e) the Guarantor has the financial capacity to pay and perform its obligations under this Guaranty.

3. Successors and Assigns. Neither the Guarantor nor the CLA may assign its rights, interests or obligations hereunder to any other Person (except by operation of law) without the prior written consent of the counterparty hereto.

4. Continuing Guaranty; Termination. Unless terminated pursuant to this Section 4, this Guaranty may not be revoked or terminated and shall remain in full force and effect and binding on the Guarantor, its successors and permitted assigns until the satisfaction in full of the Guaranteed Obligations, subject to the Cap. Notwithstanding the foregoing, this Guaranty shall terminate and the Guarantor shall have no further obligations under this Guaranty as of the earliest to occur of:

(i) the date of termination of the PPA in accordance with its terms, under circumstances in which any of the Guaranteed Obligations are payable unless the CLA has made a claim under this Guaranty prior to such date, in which case the relevant termination date shall be the date that such claim is finally settled or otherwise resolved either in a final judicial determination or by agreement of the CLA and the Guarantor (or its permitted assignee) and the Guaranteed Obligations finally determined or agreed to be owed by the Guarantor are satisfied in full; and

(ii) termination of the PPA in accordance with its terms under circumstances in which none of the Guaranteed Obligations are payable; and

(iii) the time at which Guaranteed Obligations equal to the Cap have been paid in the aggregate in full.

5. No Recourse. Notwithstanding anything that may be expressed or implied in this Guaranty or any document or instrument delivered contemporaneously herewith, and notwithstanding the fact that the Guarantor may be a partnership or limited liability company, by its acceptance of the benefits of this Guaranty, the CLA acknowledges and agrees that (i) no Person other than the Guarantor has any obligations hereunder and (ii) it has no remedy, recourse or right of recovery against, and no personal liability shall attach to, any former, current or future director, officer, employee, agent, attorney, direct or indirect equity holder, controlling person, general or limited partner, manager, member, stockholder, Affiliate or assignee of the Guarantor (including those of the Project Company) or any former, current or future director, officer, employee, agent, attorney, direct or indirect equity holder, controlling person, general or limited partner, manager, member, stockholder, Affiliate or assignee of any of the foregoing (each, a "**Related Party**"), whether by or through attempted piercing of the corporate (or limited liability company or limited partnership) veil, by the enforcement of any assessment or by any legal or equitable proceeding, by virtue of any Applicable Law or otherwise, except for claims by the CLA against the Project Company and the Guarantor (but not any Related Party) under and to the extent provided in the PPA and in this Guaranty to the fullest extent such claims are available under the PPA and subject to the Cap and other limitations described

herein ("**Retained Guaranty Claims**"). The CLA hereby covenants and agrees that it shall not institute, and shall cause each of its Affiliates and their respective representatives not to institute, directly or indirectly, any Action or bring any other claim arising under, or in connection with, this Guaranty, the PPA, or the transactions contemplated thereby, against the Guarantor or any Related Party except for Retained Guaranty Claims brought by the CLA against the Guarantor. Recourse against the Guarantor with respect to the Retained Guaranty Claims shall be the sole and exclusive remedy of the CLA and all of its Affiliates against the Guarantor and all Related Parties in respect of any liabilities or obligations arising under, or in connection with, the PPA or any of the other agreements contemplated thereby, or the transactions contemplated thereby, and such recourse shall be subject to the limitations described herein and therein.

6. Waivers and Consents. Guarantor hereby waives (i) notice of acceptance of this Guaranty, notice of the creation or existence of any of the Guaranteed Obligations, notice of any action by the CLA in reliance hereon or in connection therewith, or notice of the entry into the PPA and any amendments, supplements or modifications thereto; (ii) presentment and demand concerning the liabilities of Guarantor; and (iii) any right to require that any action or proceeding be brought against Project Company or any other person, or to require that CLA seek enforcement of any performance against Project Company or any other person, prior to any action against Guarantor under the terms hereof, provided that for the purposes of (i), (ii) and (iii) above, CLA agrees that in the event of any Claim pursuant to the PPA, as a condition to making such Claim against the Guarantor hereunder, it will provide concurrent notice of such Claim to each of Guarantor and Project Company. No delay by CLA in the exercise of (or failure by CLA to exercise) any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).

7. Notices. Any and all notices or other communications required or permitted to be given under any of the provisions of this Guaranty shall be in writing and shall be deemed duly given (a) when delivered personally or by prepaid overnight courier, with a record of receipt, (b) the fourth day after mailing if mailed by certified mail, return receipt requested, or (c) the day of transmission if before close of business for the recipient on a Business Day or otherwise the Business Day thereafter, if sent by facsimile with confirmation of transmission by the transmitting equipment, in each case addressed to the Parties at the addresses set forth below (or at such other address as either Party may specify by notice to the other Party given as aforesaid).

If to the CLA, to:

County of Los Alamos  
Deputy Utility Manager, EP  
1000 Central Avenue, Suite 140  
Los Alamos, NM 87544

If to the Guarantor, to:

PNE USA Inc.  
150 N. Michigan Avenue, Suite 1500  
Chicago, Illinois 60601

8. Governing Law. THIS AGREEMENT SHALL BE GOVERNED IN ALL RESPECTS BY THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO THE CONFLICTS OF LAWS PRINCIPLES THEREOF.

9. Consent to Jurisdiction; Waiver of Jury Trial. Each of the Parties consents and submits itself and its property in any action or proceeding to the non-exclusive jurisdiction of the State and Federal Courts located within the State of New York in the event any dispute arises out of this Guaranty or the transactions contemplated by this Guaranty, or for recognition and enforcement of any judgment in respect thereof. THE PARTIES HEREBY EXPRESSLY AGREE THAT ALL DISPUTES, CLAIMS, AND COUNTERCLAIMS RELATING TO THIS AGREEMENT AND THE PROJECT SHALL BE LITIGATED, ADJUDICATED, OR OTHERWISE RESOLVED WITHOUT A JURY. THE PARTIES EXPRESSLY, VOLUNTARILY, AND UNEQUIVOCALLY WAIVE ANY RIGHT THEY MAY HAVE TO A JURY TRIAL IN CONNECTION WITH ALL DISPUTES, CLAIMS AND COUNTERCLAIMS RELATING TO THIS AGREEMENT.

10. Confidentiality. This Guaranty shall be treated as confidential and is being provided to the undersigned solely in connection with the PPA. This Guaranty may not be used, circulated, quoted or otherwise referred to in any document, except with the written consent of the Guarantor and the CLA. The foregoing notwithstanding, this Guaranty shall be provided to the CLA and the CLA or the undersigned may disclose the existence of this Guaranty to (a) its Related Parties; (b) prospective lenders, investors and third-party advisors in respect of the Project; and (b) to the extent required by Applicable Law.

11. No Third-party Beneficiaries. Except for the provisions of this Guaranty that reference Related Parties (each of which shall be for the benefit of and enforceable by each Related Party), the parties hereto hereby agree that their respective representations, warranties and covenants as set forth herein are solely for the benefit of the other parties hereto, in accordance with and subject to the terms of this Guaranty, and this Guaranty is not intended to, and does not, confer upon any Person other than the parties hereto and any Related Party any rights or remedies hereunder, including the right to rely upon the representations and warranties set forth herein.

12. Severability. Any term or provision of this Guaranty found to be invalid, illegal or unenforceable in any jurisdiction shall be, as to such jurisdiction, ineffective solely to the extent of such prohibition or unenforceability and shall not affect any other term or provision of this Guaranty or invalidate or render unenforceable such term or provision in any other jurisdiction; *provided, however*, that this Guaranty may not be enforced without giving effect to the Cap. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Guaranty so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible, it being understood that the transactions contemplated hereby cannot be consummated as originally contemplated without giving effect to the Cap.

14. Counterparts. This Guaranty may be executed by original, electronic or facsimile signatures in several counterparts that together shall constitute but one and the same agreement, binding on the Parties notwithstanding that the Parties have not signed the same counterpart.

15. Amendment. This Guaranty may be amended, supplemented or modified only by a written instrument duly executed by or on behalf of the Guarantor and the CLA.

IN WITNESS WHEREOF, the Parties have duly executed this Guaranty as of the day and year first above written.

PNE USA INC.

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

THE INCORPORATED COUNTY OF LOS  
ALAMOS

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

**ANNEX G. CONSTRUCTION STAGING AREA**

[County to propose reasonable construction staging area]