

## TCSA ELECTRICITY CONTRACT – TERMS AND CONDITIONS

\_\_\_\_\_, (“Supplier”), a \_\_\_\_\_ and \_\_\_\_\_ (“Customer”), an \_\_\_\_\_, by their representatives’ signatures below, agree to be bound by this TCSA ELECTRICITY CONTRACT – TERMS AND CONDITIONS, all Electric Supply Confirmations, Supplier’s response to Request for Proposal and any other attachments, exhibits or appendices (collectively, “Agreement”). Supplier and Customer may be referred to individually as “Party” or collectively as “Parties”. Once signed by both Parties, the Agreement becomes a binding contract. In consideration of the promises and representations made in this Agreement, the Parties agree as follows:

### SECTION 1: ENERGY SALES AND SERVICES

**1.1 Purchase and Sale.** Subject to the terms and conditions set forth herein, during the Service Term Supplier shall sell and deliver and Customer shall purchase and receive Customer's full requirements for electricity on a firm basis for the Electric Service Identifier (“ESI ID(s)”) listed in each Electric Supply Confirmation entered into between the Parties from time to time (“Customer's Energy Requirements”) on the terms and conditions specified in this Agreement, including the Electric Supply Confirmations. Any conflict between the terms and conditions of this Agreement and the terms and conditions in an applicable Electric Supply Confirmation shall be resolved in favor of the Electric Supply Confirmation. Customer appoints Supplier as its Electricity Supplier (“ESP”) for the ESI IDs listed in any Electric Supply Confirmation(s) entered into by the Parties at the time of or subsequent to the execution of this Agreement. Supplier also agrees to invoice Customer as detailed in this Agreement. Further, as Customer’s ESP, Supplier is authorized to obtain information relating to Customer’s electrical usage.

**1.2 Delivery Obligations.** Supplier shall (a) sell, schedule, and deliver, or cause to be delivered, Customer’s Energy Requirements to Customer at the Delivery Points for the Service Term; (b) prepare and send to Customer for each ESI ID for each month an invoice via electronic transmission as requested by Customer, or the other mutually acceptable form upon Customer’s request; (c) promptly notify Customer of all notices, alerts, orders, or other communications from the ISO or the TDSP relating to possible interruption or curtailment of the energy supply or delivery to each Delivery Point; (d) timely pay all distribution charges, applicable Taxes, fees or other charges owed to the ISO or TDSP; and (e) comply with all relevant provisions in the tariff for retail delivery service of the TDSP. Customer acknowledges and agrees that Supplier exercises no independent control over TDSP’s facilities necessary for the delivery of energy and SUPPLIER WILL HAVE NO LIABILITY OR RESPONSIBILITY TO CUSTOMER FOR THE OPERATIONS OF THE TDSP OR FOR INTERRUPTION, TERMINATION, OR DETERIORATION OF TDSP’S TRANSMISSION OR DISTRIBUTION SERVICE. Should Supplier not switch all of the Customer’s ESI IDs as of the [\_\_\_\_\_] 20\_\_ meter read date, then Supplier will be responsible for reimbursing Customer for any cost difference between the price paid to the REP that provided electricity supply to Customer’s ESI ID and the applicable Contract Price in this Agreement until such time that the ESI ID is switched to the Supplier; provided that Supplier shall have no responsibility to reimburse Customer for any delayed switch except to the extent caused by the act or omission of Supplier.

**1.3 Cooperation at End of Service Term.** This Agreement is for the provision of essential services to Customer, the interruption of which would cause significant harm to Customer. Supplier shall therefore cooperate with both Customer and any replacement supplier in every manner possible if Supplier is not selected to continue to supply Customer, in order to effectuate a smooth transition without service interruptions. The cooperation shall include, but not be limited to, supplying in a timely manner requested data relevant to this Agreement and service to Customer.

### SECTION 2: INVOICING AND PAYMENT

**2.1 Invoicing and Payment.** Supplier will invoice Customer for the Actual Usage during the Service Term during each monthly billing cycle of the Service Term, and for any other amounts due from Customer to Supplier hereunder in accordance with the Electric Supply Confirmation(s), including the pricing set forth therein. Supplier agrees to directly bill Customer on a monthly basis for its electric service in accordance with the Agreement, utilizing the TDSP’s billing cycle. As soon as practicable after the end of each billing cycle, Supplier agrees to render to Customer a statement setting forth the total number of kWh (rounded to the nearest whole kWh) delivered to Customer during the most recently completed billing cycle.

Supplier agrees to provide Customer with one invoice per month for each ESI ID included in the Agreement. Supplier will endeavor to generate and deliver each invoice within five (5) Business Days after Customer’s usage information is delivered to Supplier. Should Supplier not receive all of Customer’s usage information for all of the accounts listed in any Electric Supply Confirmation(s) in a timely manner for any reason, then Supplier agrees to wait for up to ten (10) days after the regularly scheduled invoicing date to generate the bill and during that time Supplier will make commercially reasonable efforts to obtain the missing usage information from the TDSP so that Supplier can deliver a complete bill to Customer for that month’s usage. If, after this ten (10) day period, Supplier still has not received all of the data needed to bill all of Customer’s accounts, then Supplier may bill Customer based on estimated usage data for the accounts that are missing data and Supplier shall adjust the invoice in following month to reflect the actual usage data for such accounts.

Supplier agrees to provide Customer with either hard and/or soft copy bills to be delivered in Adobe Acrobat (.PDF) format. and summary statement in CSV (.csv) and/or Excel (.xls) format. The Excel or CSV file must contain the billing elements described in the Request For Qualifications. Supplier agrees to provide ONE invoice per billing cycle with a detailed description of the charges per ESI ID. In addition, invoices must show all detailed TDSP billing charges and/or credits as well as billed and actual demand.

Payment will be due within thirty (30) days of receipt by Customer of Supplier’s statement in accordance with payment instructions set forth in such statement.

If Customer, in good faith, disputes any amount on any statement, Customer will pay to Supplier the undisputed amount and send Supplier a written description of the basis and rationale for such dispute. Supplier promptly will provide supporting documentation and such other information as Customer may reasonably request for purposes of verifying the disputed amount. Any disputed and withheld amounts, if determined to have been

billed properly, will be paid by Customer to Supplier promptly together with interest from the original due date at the rate of \_\_\_\_\_. For the avoidance of doubt, Customer shall have the right to dispute any previously paid invoice.

If Customer notifies Supplier in writing of a justifiable concern regarding the accuracy of an invoice, including whether any cost adjustments included on any invoice due to a change in law as provided in Section 19.2 were permitted, and without regard to whether such invoice has been paid. Supplier will make the records in its possession that are reasonably necessary to verify the accuracy of the bill available to Customer during normal business hours.

**2.2 Appropriations.** The Parties agree that if Customer (i) does not allot or appropriate sufficient funds for Customer's fiscal year(s) that follow the initial fiscal year of the Service Term to continue the purchase of the total quantity of electricity covered by the Agreement, and (ii) otherwise has no legally available funds for the purchase of electricity, this Agreement will terminate, without any liability on the part of either Party arising from such termination. Customer shall not be obligated to make contract payments beyond the amounts appropriated. However if any funds are appropriated for electricity costs for the accounts covered by this Agreement, such funds shall be applied first to the cost of electricity already provided pursuant to the Agreement and that any such funds shall not be used to pay for electric power from any other electric power provider for the accounts covered in the Agreement, and Customer agrees to notify Supplier in writing of such non-appropriation at the earliest practicable time subsequent to the failure to appropriate. As of the termination date under this Section, Supplier shall have no further duty to supply electricity to Customer and shall be able to request that Customer's accounts be disconnected unless not switched to another ESP before the termination date. Nothing in this Section shall relieve Customer of its obligation to pay for any electricity delivered pursuant to this Agreement prior to any termination pursuant to this Section. Notwithstanding the language in Section 4.1, termination under Section 2.2 is not an Event of Default.

### SECTION 3: CREDIT

**3.1 Supplier Credit.** Supplier has provided a guaranty from \_\_\_\_\_ in the amount of \_\_\_\_\_ ("Guaranty"). If Customer has reasonable grounds to believe that Supplier will not be able to perform under this Agreement (i) due to Customer's good faith concern about the degradation of the Supplier's or its Guarantor's financial condition ("**Downgrade Event**") or (ii) due to Supplier's lack of performance in meeting its payment obligations to the TDSP or maintaining the credit standards required of a REP, Customer may require Alternative Performance Assurance from Supplier to ensure that Supplier will be able to perform under this Agreement. If Alternative Performance Assurance is required from Supplier due to a Downgrade Event and/or due to Supplier's lack of performance as set forth above, and Supplier has not previously been required to post Alternative Performance Assurance, then if Supplier can show that it or its Guarantor has a senior, unsecured credit rating of Standard & Poor's (BBB-) or Moody's (Baa3) or better, or that it has a total net worth of \$25,000,000 or more as shown through independent, third party audited financial statements, then no Alternative Performance Assurance will be required from Supplier for so long as it meets such criteria. If Supplier is ever required to post Alternative Performance Assurance, Supplier shall provide and maintain in favor of Customer until there are no remaining obligations of Supplier to Customer under this Agreement or three (3) months after expiration or termination of this Agreement, whichever occurs first, Alternative Performance Assurance in the amount required by Customer not to exceed: (Current Retail Market Value) minus Contract Value, so long as the Current Retail Market Value is greater than the Contract Value (the "Maximum Required Amount"). Once Alternative Performance Assurance is required hereunder, Customer may require that the amount of Alternative Performance Assurance be increased to an amount not to exceed the Maximum Required Amount and Supplier may require Customer to return any Alternative Performance Assurance posted with Customer to the extent the posted Alternative Performance Assurance exceeds the Maximum Required Amount, in each case no more frequently than any date that the amount of the increase or decrease of the required Alternative Performance Assurance would equal or exceed \$1,000,000 calculated as of such date of determination. Notwithstanding the foregoing, no Alternative Performance Assurance or increase or return thereof shall be required if, at the time of a request therefor, (i) there exists with respect to the requesting Party an Event of Default or any event which, with the giving of notice of the lapse of time or both, would constitute an Event of Default, or (ii) a Party has terminated this Agreement. Any increase or return of Alternative Performance Assurance shall be accomplished in accordance with the commercially reasonable instructions of the requesting Party, and (i) in the case of cash, payment or delivery by wire transfer or ACH into one or more accounts specified by the requesting Party, and (ii) in the case of a letter of credit or guaranty, by the amendment or substitution of same by Supplier to reflect the revised aggregate amount thereof. Alternative Performance Assurance shall mean cash (in lawful currency of the United States), an irrevocable, transferrable, standby letter of credit issued by a U.S. Bank with a credit rating of Standard and Poor's (A-) or better or Moody's (A3) or better, or a parental guarantee (other than the Guaranty) from an entity that has a senior, unsecured credit rating of Standard and Poor's (BBB-) or better or Moody's (Baa3) or better, in each case in form acceptable to the Customer. The value of any Alternative Performance Assurance as of any date, shall be with respect to Alternative Performance Assurance in the form of (i) cash, the amount thereof, (ii) a letter of credit, the amount then available to be unconditionally drawn down by Customer, provided that if twenty (20) or fewer Business Days remain prior to the expiration thereof, the value thereof shall be \$0, and (iii) a guaranty, the maximum stated liability of the applicable guarantor thereunder. If Alternative Performance Assurance is ever required hereunder (including an increase of any previously provided Alternative Performance Assurance), it will be posted with the Customer within five (5) Business Days of the receipt of the request. If Alternative Performance Assurance is ever required to be returned hereunder, it will be returned within five (5) Business Days of the receipt of the request; provided that with respect to the return of any Alternative Performance Assurance in the form of a letter of credit or guaranty, Customer shall have no obligation to return such letter of credit or guaranty until Supplier shall have provided Customer with any required amendments or substitution of the existing letter of credit or guaranty, as applicable (or other Alternative Performance Assurance in the required amount), and Customer shall have had a reasonable opportunity to review the same. Any such Alternative Performance Assurance shall be a replacement of the Guaranty, and upon posting of such Performance Assurance, the Guaranty shall be deemed terminated and Customer shall return the original of the Guaranty to Supplier. Supplier hereby grants to Customer as security for its obligations under this Agreement, a first priority continuing security interest in, lien on and right of set-off against all Alternative Performance assurance and all proceeds thereof ("Collateral"). If at any time an Event of Default with respect to Supplier has occurred and is continuing or an early termination date has occurred or been designated, then Customer may exercise one or more of the following rights and remedies: (i) all rights and remedies available to a secured party under applicable law with respect to Collateral held by Customer; (ii) any other rights and remedies available to Customer under the terms of Alternative Performance Assurance; (iii) the right to set-off any amounts payable by Supplier with respect to any obligations under this Agreement against any Collateral held by Customer; and (iv) the right to liquidate any Collateral held by Customer and to apply the proceeds from the liquidation of the Collateral to any amounts payable by Supplier with

respect to obligations owing to Customer under this Agreement. With respect to any Alternative Performance Assurance in the form of a letter of credit, Customer shall have the right to draw the entire amount of the letter of credit upon the occurrence of an Event of Default with respect to Supplier. Any cash proceeds received by Customer from any such draw may, at the discretion of Customer, be (a) held as cash collateral for the obligations of Supplier to Customer under this Agreement or (b) applied to the obligations of Supplier to Customer under this Agreement.

#### SECTION 4: DEFAULT, EARLY TERMINATION, AND DAMAGES

**4.1 Events of Default.** An Event of Default means: (a) the failure of Customer to make, when due, any undisputed payment required under this Agreement if the payment is not made within fifteen (15) Business Days after receipt of written notice via certified mail to the Customer from Supplier; or (b) any representation or warranty made by a Party or its Guarantor proves to be false or misleading in any material respect when made or ceases to remain true during the Service Term; or (c) the failure of any Party to perform its obligations under this Agreement and the failure is not excused by Force Majeure or cured within five (5) Business Days after written notice to the Defaulting Party (other than any such obligation under this Agreement covered by a separate Event of Default); or (d) the failure of Guarantor's Guaranty to be in full force and effect prior to the satisfaction of all obligations of Supplier under this Agreement; Guarantor shall terminate, repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of its guaranty; Guarantor shall fail to make any payment required or perform any other material covenant in its guaranty; or either Party fails to provide or return any required Alternative Performance Assurance within the time frame specified by Section 3.1 or otherwise comply with Section 3.1; or (e) absent agreement to the contrary the failure of Customer to utilize Supplier as its sole supplier of electric energy for the ESI IDs specified in an applicable Electric Supply Confirmation (absent a failure to perform by Supplier); or (f) a Party or its Guarantor (i) makes an assignment or any general arrangement for the benefit of creditors; or (ii) files a petition or otherwise commences, authorizes or acquiesces to a bankruptcy proceeding or similar proceeding for the protection of creditors, or has the petition filed against it and the petition is not withdrawn or dismissed within twenty (20) Business Days after the filing; or (iii) otherwise becomes insolvent; or (iv) is unable to pay its debts as they fall due; or (v) fails to establish, maintain or extend credit in form and in an amount acceptable to the non-Defaulting Party when required; or (g) the failure of Supplier to comply with Section 21.1. If an Event of Default listed in subsection (f) above occurs, such Event of Default will be deemed to have automatically occurred on the day immediately prior to the event.

**4.2 Remedies upon an Event of Default or Early Termination.** If an Event of Default occurs with respect to a Party (the "**Defaulting Party**"), the other Party (the "**Non-Defaulting Party**") may terminate this Agreement and accelerate all amounts owing between the Parties. If Supplier is the Non-Defaulting Party, on such termination Supplier may allow for the switching of each ESI ID of Customer serviced by Supplier to another authorized provider of electricity if Customer has made arrangements for such a switch. Alternatively if arrangements to switch to another supplier have not been made by Customer, Customer may be served by an authorized Provider of Last Resort ("POLR") and Supplier hereby agrees to switch each Customer Location to an authorized POLR pursuant to PUCT Subst. Rule 25.43. If, upon termination of the Agreement by Supplier, Customer rescinds this authorization for Supplier to switch Customer to POLR, then Supplier may disconnect, or cause to be disconnected, each Customer Location from electric service. Notwithstanding any of the foregoing, **any disconnection by Supplier can only occur if Customer has not made arrangements to switch to alternate supplier or if a switch to POLR is not legally possible.** The Non-Defaulting Party shall in good faith calculate the amounts due under section 4.3 and the applicable Party shall pay those amounts within ten (10) Business Days from the date of receipt of notice thereof (with a written statement explaining in reasonable detail the calculation of such amounts).

**4.3 Early Termination Settlement Amount and Termination Payment:** If this Agreement is terminated in accordance with Section 4.2, Section 9, Section 19.2, or due to an Event of Default the Parties agree, that in addition to all amounts one Party may owe the other with respect to periods prior to the termination, an early termination charge (hereinafter the "**Settlement Amount**") shall be calculated as follows:

Contract Value minus the Current Retail Market Value

In addition, in the case of a termination due to an Event of Default, the Settlement Amount shall be adjusted by (a) if Supplier is the Non-Defaulting Party, adding the Costs of Supplier and (b) if Customer is the Non-Defaulting Party, subtracting the Costs of Customer.

If the Settlement Amount calculation (including the Costs adjustment) results in a negative number then the Settlement Amount will be due to Customer, unless, with respect to a termination due to an Event of Default, Customer is the Defaulting Party (in which case the Settlement Amount will be treated for all purposes as being zero). If the Settlement Amount calculation results in a positive number then the Settlement Amount will be due to Supplier, unless, with respect to a termination due to an Event of Default, Supplier is the Defaulting Party (in which case the Settlement Amount will be treated for all purposes as being zero).

The "**Current Retail Market Value**" shall mean the value calculated using the price that Non-Defaulting Party would reasonably be able to obtain in the retail electricity market from a bona fide third party and the Remaining Anticipated Usage and for the remaining Service Term. The Non-Defaulting Party is not required to enter into a Replacement Contract to determine Current Retail Market Value.

The Non-Defaulting Party (or the party electing to terminate this Agreement in the case of a termination under Section 9 or Section 19.2) shall aggregate the Settlement Amount resulting from the termination of this Agreement and any other outstanding amounts owed between the Parties under this Agreement into a single net amount (the "**Termination Payment**") payable by one Party to the other. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within thirty (30) Business Days after receipt of such notice. Late payment of any Termination Payment owed by the Supplier will accrue interest daily on outstanding amounts from the due date until paid in full at the same rate applicable to Customer for late payments, or the highest rate permitted by law, whichever is less. Late payment of any Termination Payment owed by the Customer will accrue interest as provided in Section 2.1. Notwithstanding the foregoing, in the event of a termination of this Agreement with respect to less than all of the ESI ID locations due to a Force Majeure, this Section shall be applied only with respect to the terminated ESI ID locations and shall not affect the due date of any payments owing with respect to any non-termination ESI ID locations.

SECTION 5: This section has been intentionally deleted.

## SECTION 6: REPRESENTATIONS AND WARRANTIES

**6.1 Representations and Warranties of Supplier.** Supplier warrants and represents that (i) it is duly organized, validly operating and in good standing under the laws of the jurisdiction of its formation; (ii) it is authorized and qualified to do business in the jurisdictions necessary to perform under this Agreement; (iii) the execution, delivery and performance of this Agreement are duly authorized and do not violate any governing documents or any contracts to which it is a party or any laws, rules or regulations applicable to it; (iv) there is no material event(s) or other agreement(s) which would impair its right, authority or ability to execute this Agreement and otherwise consummate the transactions contemplated by this Agreement; (v) it will maintain its status as a certified REP as required by the PUCT; and (vi) all electric energy delivered to Customer under this Agreement is free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person arising prior to the Delivery Point. **SUPPLIER AGREES TO INDEMNIFY AND HOLD HARMLESS CUSTOMER FROM ANY ADVERSE CLAIMS TO THE ELECTRIC ENERGY ARISING PRIOR TO ITS DELIVERY TO CUSTOMER AT THE DELIVERY POINTS.** CUSTOMER ACKNOWLEDGES THAT SUPPLIER DOES NOT OWN, OPERATE, CONTROL, OR MAINTAIN THE FACILITIES DELIVERING ENERGY AT THE DELIVERY POINTS.

**SECTION 7: This section has been intentionally deleted.**

## SECTION 8: ASSIGNMENT

**8.1 By Supplier.** Supplier may, without the consent of Customer, assign, sell, pledge, transfer, or encumber any of its rights and obligations hereunder or the accounts, revenues, or proceeds hereof to: (a) a bank or other financial institution; or (b) any person or entity succeeding to all or substantially all of Supplier's assets; *provided that*, with respect to (b), the succeeding entity assumes Supplier's obligations hereunder, including providing security in accordance with Section 3.1, and has a credit rating, at the time of the Assignment, equal to or better than that of Supplier at the time this Agreement was executed. The assignment or pledge of accounts to a bank or financial institution pursuant to (a) above will not relieve Supplier of any of its obligations or duties arising prior to or after the assignment or expose Customer to interruptions in electric service. All other assignments by Supplier shall require the prior written consent of Customer. Any assignment by Supplier not in accordance with this Section 8.1 shall be void and of no effect.

**8.2 By Customer.** Customer may assign its rights and obligations hereunder as to any one or more of the Delivery Points covered by this Agreement; *provided*, (a) it gives Supplier thirty (30) days written notice of its intent to do so; (b) there is no Event of Default; (c) the assignee satisfies Supplier's credit requirements as stated in this Agreement; and (d) the assignee assumes Customer's obligations hereunder. All other assignments by Customer shall require the prior written consent of Supplier, which consent shall not be unreasonably withheld. If a partial assignment occurs, the applicable Electric Supply Confirmation(s) will be amended to reflect the change and future usage will continue to be governed by this Agreement.

## SECTION 9: FORCE MAJEURE

If a Party is unable to perform its obligations due to a Force Majeure event, completely or in part, then its obligations may be suspended. Provided, however, any such suspension will not: (i) be of any greater scope or duration than required by the Force Majeure event and (ii) affect any obligations to pay for amounts owed for deliveries prior to the Force Majeure event or during the Force Majeure event if partial delivery occurs. The Party claiming Force Majeure must give notice of the Force Majeure event to the other Party as soon as practicable after its occurrence. If the Force Majeure event extends beyond thirty (30) days, the Party not claiming Force Majeure may terminate this Agreement with respect to the ESI IDs locations affected by the Force Majeure immediately upon written notice to the other Party and a Settlement Amount and Termination Payment with respect to the terminated ESI ID locations will be calculated in accordance with Section 4.3. "Force Majeure" means an event or circumstance which prevents one Party from performing its obligations under this Agreement with respect to one or more ESI ID locations, which event or circumstance is not within the reasonable control of, or the result of the negligence of, the Party claiming Force Majeure ("**Claiming Party**"), and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure includes, but is not limited to: acts of God, fire, flood, hurricane, tornado, earthquake, war, and terrorism; a Force Majeure event experienced by any Utility or ISO; or a suspension, curtailment, service interruption or irregularity or declaration of emergency experienced by any Utility, ISO or any other governmental entity that causes delivery of power to Customer to be interrupted. If Supplier claims Force Majeure, then Customer will have the right to contract for temporary replacement supply from alternative sources during the Force Majeure period without any such action being deemed in breach of contract or subject to penalties. Changes in wholesale energy market prices or economic conditions alone will not constitute a Force Majeure event. If power is being delivered to the Delivery Points then Force Majeure cannot be claimed by Supplier.

## SECTION 10: LIMITATION OF REMEDIES, LIABILITY, DAMAGES AND DISCLAIMER OF WARRANTIES

SUBJECT TO THE PROVISIONS IN SECTION 31 HEREIN, FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY IS PROVIDED, THE EXPRESS REMEDY WILL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY WILL BE LIMITED AS SET FORTH IN THE PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY WILL NOT APPLY. IF NO EXPRESS REMEDY IS PROVIDED, THE DEFAULTING PARTY'S LIABILITY WILL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY. THE DIRECT ACTUAL DAMAGES WILL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES AT LAW OR IN EQUITY WILL NOT APPLY. NEITHER PARTY WILL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. THE PARTIES INTEND THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSES RELATED THERETO INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER THE NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES

ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

**SECTION 11:**

**This section was intentionally deleted.**

**SECTION 12: GOVERNING LAW AND VENUE**

This Agreement shall be governed by and construed in accordance with the laws and court decisions of the State of Texas, without giving effect to any choice or conflict of law provisions or rules regardless of the source of such laws or rules.

The obligations of the Parties shall be performable in Travis County, Texas, and if legal action is necessary in connection therewith, exclusive venue shall lie in Travis County, Texas.

**SECTION 13: INDEPENDENT CONTRACTOR**

Supplier is acting as an independent contractor hereunder and nothing in this Agreement should be construed to create or imply any joint venture, partnership or any other type business association.

**SECTION 14: NO THIRD PARTY BENEFICIARIES**

Nothing in this Agreement provides a benefit to any third-party. Each Party will be responsible for paying its own agents, brokers and representatives unless otherwise agreed to in writing by all Parties. Supplier will be responsible for collecting the fee(s) as described and required in any Request for Transactional Pricing (RFTP) which leads to an executed TCSA Electricity Contract and remitting those fees to Van Brunt & Associates, Inc. and/or TCSA, as instructed in the RFTP. Supplier's charges to Customer will reflect such fee collected to be paid to Van Brunt & Associates, Inc. Further, Van Brunt & Associates, Inc. is acting on Customer's behalf as its representative and is not a representative or agent of Supplier.

**SECTION 15: NOTICES**

All notices relating to this Agreement will be in writing and they will be deemed given when received. Notices to Supplier will be sent to the "Notice Address" listed in the Electric Supply Confirmation(s). Billing notices to Customer will be sent to the "Billing Address" listed on the Electric Supply Confirmation(s). All other notices to Customer will be sent to:

\_\_\_\_\_  
\_\_\_\_\_

Notice letters may be delivered in the following manner only, unless otherwise stated herein: in person; by third party messenger; by certified mail, return receipt requested; by facsimile transmission; or by overnight carrier (e.g., FedEx). The day notice is received, provided it is prior to 5 p.m. CPT, will be counted as the first day of any applicable notice period. If notice is received after 5 p.m. CPT, the notice will be deemed received the following Business Day.

**SECTION 16: DATA OWNERSHIP AND CUSTOMER SERVICE**

**16.1 Data Ownership.** Supplier agrees that Customer has rights to all data that it receives relating to Customer's electric accounts. Supplier agrees that upon request from Customer, and within twenty (20) Business Days after such request, Supplier will provide Customer or Customer's designated agent with an electronic file, in a mutually acceptable format, that will contain all of the demand, usage, energy cost, tax costs and wires charge information for each account for each invoice issued by Supplier. Customer agrees not to request this information more than two (2) times per twelve (12) month period for any ESI ID. The obligation of Supplier to provide this information shall survive the termination of this Agreement by twelve (12) months or when all data relating to all of Customer's ESI IDs has been provided to Customer or Customer's designated agent, whichever occurs last.

**16.2 Customer Service.** Supplier recognizes that customer service is an essential part of services requested by Customer. Supplier will use its commercially reasonable efforts to provide high quality reliable service to Customer. In order to meet this requirement, Supplier will designate one or more account representatives who will serve as the primary point of contact for the Customer if the Customer or the Customer's designated agent has any questions. At the time the Agreement is executed by Supplier, Supplier will provide the Customer with the name, telephone number, fax number, title, and a copy of the resume for the account representative. Supplier shall not change the account representative without Customer's prior written approval (which shall not be unreasonably withheld) unless said account representative is no longer employed by Supplier.

**SECTION 17: CONTINUING AGREEMENT; EXPIRATION**

This Agreement will continue in full force until the expiration of the Service Term, but, notwithstanding the expiration, this Agreement will continue in full force and effect until all obligations then outstanding (whether absolute or contingent) have been satisfied in full.

**SECTION 18: TRANSFER OF TITLE**

The title of electricity purchased under this Agreement shall transfer from Supplier to Customer at the Delivery Points.

## **SECTION 19: MISCELLANEOUS**

**19.1 Waiver.** A waiver of any provision in this Agreement, or of any default by either Party, will not be construed as a waiver of any other (or like) provision or default in the future; (b) the headings used are for reference purposes only and will in no way affect the meaning of the provisions of this Agreement; (c) no amendment hereto will be enforceable unless in writing and executed by both Parties; (d) any provision herein deemed unenforceable or illegal will be ineffective to the extent of the unenforceability or unlawfulness without invalidating the remaining provisions hereof; and (e) facsimile copies and photocopies of this Agreement are to be treated as originals in the event an original is not available.

**19.2 Change in Law.** If either Party or its activities hereunder become subject to any law or regulation enacted after the Effective Date (“Change in Law”) that renders performance of this Agreement unenforceable or illegal, then either Party, without any obligation or other liability, whether payment or otherwise (other than payment obligations in respect of electricity supplied hereunder prior to termination), shall have the right to terminate this Agreement without consent of, and upon notice to, the other Party, upon the earlier of sixty (60) days' prior notice or such prior notice effective as of the date the Change in Law becomes effective without liability arising from such termination other than any Termination Payment payable pursuant to Section 4.3.

If a Change in Law occurs relating to the wholesale or retail electricity market in ERCOT, resulting in new or modified fees, costs, credits or other charges being imposed upon ERCOT market participants, Supplier shall have the ability to adjust the amounts payable by Customer under this Agreement upon ninety (90) days' prior written notice to Customer to account for such new or modified charges to the extent directly related to the services provided by Supplier to Customer hereunder and provided that Supplier has provided Customer together with such notice supporting documentation reasonably acceptable to Customer verifying that the proposed cost adjustments are permitted under this Agreement, provided further that Customer may by written notice terminate the Agreement within thirty (30) days of receipt of any such notice with the required documentation, effective upon the initial date of adjustment, without liability arising from such termination, other than any Termination Payment payable pursuant to Section 4.3, and select another ESP.

**19.3 Recording.** Each Party consents to the recording of all telephone conversations between its employees and the employees of the other Party, with notice of recording. Any such recordings may be introduced to prove the intent of a transaction; provided, however, that nothing herein shall be construed as a waiver of any objection to the introduction of such evidence on the grounds of relevance. Absent manifest error, any conflict between such a recording and written documentation that is executed by both Parties shall be resolved in favor of such written documentation.

**19.4 Modification of Agreement.** Any alteration, deletion or addition to this Agreement shall be effective only if made in a written amendment executed by both Parties. No amendment, modification or supplement shall be made to this Agreement by course of performance, course of dealing or usage of trade, or by the failure of a Party to object to a deviation from the terms of this Agreement.

**SECTION 20: This section was intentionally deleted.**

**SECTION 21: This section was intentionally deleted.**

## **SECTION 22: DOCUMENTS AND RECORDS**

Upon termination or expiration of this Agreement, Supplier shall, upon written request by Customer, return to Customer all documents and records provided by Customer which are in Supplier's possession or control and shall deliver all files maintained by Supplier related to its obligations under this Agreement. However, Supplier shall be allowed to make copies of all such documents, records, information and material at Supplier's expense.

## **SECTION 23: RELEASE OF INFORMATION OR RECORDS**

In the event that Customer is required to furnish information or records compiled by Supplier in the performance of this Agreement pursuant to the Texas Public Information Act, Customer will make reasonable effort to provide Supplier with sufficient notice of any Open Records requests Customer receives so that Supplier may timely file any objections and exceptions with the Attorney General's Office to prevent such disclosure. Supplier will provide a copy of the objections and exceptions to Customer. If the Attorney General requires disclosure of the information, Supplier shall furnish such information and records to Customer and Customer shall have the right to release such information and records.

## **SECTION 24: NO WAIVER OF GOVERNMENTAL IMMUNITY**

Customer does not waive or relinquish any governmental immunities or defenses on behalf of itself and its trustees, officers, employees, or agents as a result of the execution of this Agreement and performance of the functions or obligations described herein. Nothing herein shall be construed as creating any personal liability on the part of any trustee, officer, director, or employee of Customer.

## **SECTION 25: COMMUNICATION OR RELEASE OF DOCUMENTS**

At no time will Supplier, its employees or its sub-consultants communicate with the public or make documents available to the public pertaining to the services performed except with the prior written consent of Customer.

## **SECTION 26: BACKGROUND CHECKS**

Supplier shall require all employees and volunteers of Supplier and its subcontractors who perform work on site and who have contact with students to have passed a criminal history background check current within the last year. Additionally, Supplier shall comply with all other related requirements of the State of Texas and federal laws and applicable regulations as such laws and regulations exist throughout the term of this Agreement. Supplier shall furnish the results of such background checks to Customer upon request.

## **SECTION 27: SUPPLIER'S RECORDS**

Supplier's records, which shall include but not be limited to accounting records (hard copy, as well as computer readable data if it can be made available), written policies and procedures; subcontract files, including bid recaps, original estimates; estimating work sheets; correspondence; back-charge logs and supporting documentation and any other supporting evidence deemed necessary by Customer to substantiate charges related to any matters related to the Agreement (including interviews with Supplier's personnel and professional consultant personnel) shall be open to inspection and subject to audit and/or reproduction by Customer's agents or its authorized representatives to the extent necessary to adequately permit evaluation and verification of (a) Supplier's compliance with Agreement requirements; (b) compliance with Customer's business ethics policies; and (c) compliance with provisions for pricing or claims submitted by the Supplier or any of its payees. Customer or its designee shall be afforded access to all of the Supplier's records pursuant to the provision of this Article throughout the term of this Agreement and for a period of five years after final payment or longer if required by law.

## **SECTION 28: LEGAL ORGANIZATIONAL REQUIREMENTS AND DELINQUENT TAXES**

**28.1. Corporations.** If Supplier is a corporation, Supplier shall be properly registered with the Texas Secretary of State and the Comptroller of Public Accounts as required by TITLE 34, Part 1, Chapter 3, Subchapter V, Rule 3.546 of the Texas Administrative Code. A current "Certificate of Good Standing" from the Texas Comptroller of Public Accounts shall be made available upon request stating that the corporation charter is current and all Texas franchise reports and taxes are paid.

**28.2. Partnerships and Joint Stock Companies, and Limited Liability Partnerships.** If Supplier is a partnership, joint stock company, or a limited liability partnership, Supplier shall be properly registered with the Texas Secretary of State in accordance with TITLE 105 --- PARTNERSHIPS AND JOINT STOCK COMPANIES, CHAPTER ONE --- PARTNERSHIPS, LIMITED PARTNERSHIPS, TEXAS REVISED LIMITED PARTNERSHIP ACT, Article 6132a-1, "Texas Revised Limited Partnership Act". All general partners in a limited partnership will file a "certificate of Limited Partnership" with the secretary of state, which shall be made available for inspection upon request.

## **SECTION 29: FEDERAL AGENCY DEBARMENT AND OTHER REQUIREMENTS**

Supplier certifies, to the best of its knowledge and belief, that it is not presently debarred, suspended for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency.

Supplier agrees to comply with all applicable requirements of all federal laws, executive orders, regulations, applicable guidelines, and policies governing this program, particularly relating to nondiscrimination. These include but are not limited to: (i) Title VI of the Civil Rights Act of 1964, as amended; (ii) Title IX of the Education Amendments of 1972, as amended; (iii) Section 504 of the Rehabilitation Act of 1973, as amended; (iv) the Age Discrimination Act of 1975, as amended; and (v) the American with Disabilities Act, as amended.

## **SECTION 30: RECORDS RETENTION AND AUDITS**

Customer or its authorized representatives, shall be afforded unrestricted access to and permitted to inspect and copy all the Supplier's records, which access shall include but not be limited to accounting records (hard copy as well as computer readable data), correspondence, instructions, drawings, receipts, vouchers, memoranda and similar data relating to this Agreement. The Supplier shall preserve all such records for a period of five (5) years, or for such longer period as may be required by law, after final payment under this Agreement. If this Agreement is funded from contract/grant funds provided by the United States Government or the State of Texas, the Agreement, books, and records shall be available for review and audit by the Comptroller General of the United States and/or the Inspector General of the federal sponsoring agency, of the State of Texas and its duly authorized representatives.

To the extent that Supplier will come into possession of student records and information, and to the extent that Supplier will be involved in the survey, analysis, or evaluation of students, incidental to this Agreement, Supplier agrees to comply with all applicable requirements of the Family Educational Rights and Privacy Act. In the event that Customer is required to furnish information or records pursuant to the Texas Public Information Act, Supplier shall furnish all such information and records to Customer and Customer shall have the right to release such information and records.

## **SECTION 31: SUPPLIER'S INDEMNITY**

**31.1 Indemnification obligation.** Supplier shall indemnify, and hold harmless and defend Customer and each of its respective past, present and future officers, trustees, agents and employees in their individual and official capacities, from and against all claims, losses or damages, including attorneys' fees, court costs and expenses incurred by Customer and its officers, trustees, agents, and employees, for injury, including death, to persons, or damage to or destruction of property, and demands or causes of action of whatsoever kind or nature based upon, resulting from or arising out of or in connection with any negligent act, error, omission, misrepresentation, or misconduct by the Supplier or its employees, officers, sub-consultants, or agents arising out of the performance of Supplier's obligations under this Agreement. Such indemnification shall also include reasonable attorneys' fees and court costs and expenses.

**31.2 Survival.** All obligations as set forth in this section shall survive the completion, expiration or termination of the Agreement. It is agreed with respect to any legal limitations now or hereafter in effect and affecting the validity or enforceability of the indemnification obligation under Section 31.1 such legal limitations are made a part of the indemnification obligation to the minimum extent necessary to bring the provision into conformity with the requirements of such limitations, and as so modified, the indemnification obligation shall continue in full force and effect.

**31.3 Attorneys Fees.** In connection with Customer's defense of any suit against it and/or Customer's prosecution of any claim, counterclaim or actions to enforce any of its rights and/or claims hereunder, in which Customer prevails as to all or a substantial portion of its defense(s), claims, counterclaims or actions, Customer shall be entitled to recover its reasonable attorney's fees and expenses incurred in defending such suit and/or in prosecuting such claim or action.

## **SECTION 32: DEFINITIONS**

**"Actual Usage"** means the actual amount of electric energy (in kWh) consumed at all the ESI ID locations which are part of this Agreement.

**"Business Day"** means any day that is not a Saturday, Sunday or bank holiday or legal holiday recognized by the government of the United States or the State of Texas and with respect to Customer only, Customer's Christmas holidays and spring break, as posted on its website.

**"Contract Rate"** means the charge per unit of energy or the formula that is used to calculate the charge per unit of energy, as specified in the Electric Supply Confirmation(s).

**"Contract Value"** means the Contract Rate multiplied by the Remaining Anticipated Usage.

**"Costs"** means, with respect to a Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred or reasonably expected to be incurred in entering into new arrangements which replace this Agreement or in connection with termination of this Agreement.

**"Customer Location"** means each ESI ID identified in the Electric Supply Confirmation(s) or which may be added to this Agreement.

**"Delivery Charges"** means Transmission and Distribution Charges, System Benefit Fund Charge, Nuclear Decommissioning Charge, Competitive Transition Charge, Transition Charges, Standard Customer Metering Charge, Customer Charge, Merger Savings and Rate Reduction Credit, Excess Mitigation Credit and Utility Imposed Reactive Power Charges, and any similar charges that the TDSP may impose from time to time.

**"Delivery Point"** means the interconnection of the facilities of Customer and TDSP located at each of Customer's ESI IDs.

**"Discretionary Charges"** means any charges, other than charges included within Delivery Charges, imposed by the TDSP for services, repairs or additional equipment needed for Customer's electric service.

**"Effective Date"** means the date that this Agreement is finally executed by Supplier and Customer.

**"Electric Supply Confirmations"** means a confirmation entered into by the Parties substantially in the form on Exhibit A -1 or A-2, hereto, setting forth ESI IDs of Customer to be supplied by Supplier and the applicable Contract Rate with respect thereto.

**"Electricity Related Charges"** means Electric Energy, Capacity Charges, Ancillary Services Charge, Congestion, ERCOT Administrative Fee, Delivery Loss Charge, Transmission Loss Charge, Hub to Load Zone Basis also known as Nodal Charges, Renewable Energy Credit Charge, Residential Energy Credit Charge, Unaccounted For Energy Charge, Qualified Scheduling Entity Charge, Scheduling Service Charge, Forecasting Service Charge, Imbalance Settlement Charge, ERCOT Credit Requirements, and PUCT Credit Requirements, all costs, charges and adders related to the implementation of the Operational Reserve Demand Curve and all other charges related to the procurement, scheduling or delivery of electricity (other than Delivery Charges or Discretionary Charges).

**"ERCOT"** means the Electric Reliability Council of Texas.

**"ESI ID"** means the electric service identifier used for each of Customer's meter points on the Texas electric grid.

**"Guarantor"** means with respect to Supplier, the entity providing a guaranty of payment of Supplier's obligations under this Agreement.

**"ISO"** means the independent system operator certified by the Public Utility Commission of Texas.

**"kWh"** means kilowatt hour.

**"MWh"** means megawatt hour.

**"POLR"** means the REP designated by the PUCT required to offer Energy to any requesting customer in a specified territory.

**"Present Value"** is discounted at the one month London InterBank Offered Rate quoted in the *Wall Street Journal* on the date of calculation of the Termination Payment.

**"PUCT"** means Public Utility Commission of Texas.



**“Remaining Anticipated Usage”** means the amount of electricity (in kWh) reasonably expected to be used during the remaining term of the Agreement (or ESI ID in question) had it not been terminated early. This is calculated by using monthly contract usage listed for each ESI ID for the remaining months of the contract term in the applicable Electric Supply Confirmations to this Agreement.

**“REP”** means Retail Electric Provider.

**“Service Term”** is the time period beginning on the meter read date of the month in which electric service is supposed to begin per this Agreement and any Electric Supply Confirmations and ending on the last meter read date of the month in which service is supposed to end.

**“Taxes”** means applicable gross receipts tax, and PUCT assessment fees, and any additional taxes required to be paid by Customer as a result of future change in law. Customer is exempt from payment of Federal Excise and Transportation Taxes and Texas Limited Sales and Use Tax. Supplier’s invoices to the Customer shall not contain assessments of any taxes other than those described in the preceding sentence. Customer will provide all requested exemption certificates.

**“Transmission and Distribution Service Provider” (“TDSP”)** means an entity regulated by the State of Texas, which transmits or distributes electric energy.

This Agreement is the entire agreement and understanding between the Parties; it supersedes all prior agreements and understandings; it may not be contradicted by any prior or contemporaneous oral or written agreement.

[Signature Page Follows]

This Agreement is made and entered into as of \_\_\_\_\_, 20\_\_\_\_.

**SUPPLIER**

\_\_\_\_\_  
**(“CUSTOMER”)**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name

**Printed Name**

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Printed Title

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