

**STATE OF NEW JERSEY  
BEFORE THE  
BOARD OF PUBLIC UTILITIES**

IN THE MATTER OF THE LONG-TERM            )  
CAPACITY AGREEMENT PILOT                )     DOCKET NO. EO11010026  
PROGRAM                                        )

**INITIAL COMMENTS OF  
ELECTRIC DISTRIBUTION COMPANIES**

In conformance with the directives of the New Jersey Board of Public Utilities (the “Board”) in its Order Initiating Proceeding and Approving Agent, issued on February 10, 2011 in the above-captioned matter (“February 10 Order”), Public Service Electric and Gas Company, Jersey Central Power & Light Company, Atlantic City Electric Company and Rockland Electric Company (the “EDCs”), hereby submit their initial comments on the proposed forms of Standard Offer Capacity Agreement (“SOCA”) submitted to the Board on February 14, 2011.

**INTRODUCTION**

In response to the Board’s directive in the February 10 Order, four parties or groups of parties submitted proposed forms of SOCA: the EDCs, Exelon, LS Power, and CPV Shore, LLC (“CPV”). In addition, the Division of Rate Counsel (“Rate Counsel”) and Hess Corporation (“Hess”) submitted comments that did not present proposed forms of SOCA, but urged the Board to adopt a form of SOCA that implements or conforms to one or more principles as set forth in their respective comments.

As the Board recognized in the February 10 Order, the SOCA is a means of implementing the limited Long-Term Capacity Pilot Program (“LCAPP”) program established by P.L. 2011, c. 9 (the “LCAPP Law”). And the LCAPP Law, in turn,

directs the Board in administering the LCAPP to select eligible generators for the execution of SOCAs based upon the Board's evaluation of whether awarding SOCAs to an eligible generator will provide "net value to ratepayers." LCAPP Law § 3(c)(7). Accordingly, the Board must evaluate the alternative proposed forms of SOCA and consider the additional comments submitted based on (i) the conformance of each proposal to the requirements and provisions of the LCAPP Law, and (ii) whether the proposed form of SOCA provides appropriate protections to allow ratepayers to realize the net value required for the Board's selection of an eligible generator. In these comments, the EDCs will use the same perspective to address the forms of SOCA submitted by the EDCs, Exelon, LS Power and CPV, as well as the comments provided by Hess and Rate Counsel.

As discussed below, the EDCs' proposed form of SOCA is consistent with the LCAPP Law. It provides for the financial settlements that the LCAPP Law contemplates, conditioning payment on the parties' satisfaction of the obligations the statute imposes on the LCAPP participants and provides necessary protection to ratepayers as contemplated by the statute. In contrast, the forms of SOCA proposed by other parties diverge substantially from the requirements of the LCAPP Law and do not contain provisions necessary to ensure that the parties fulfill their statutory obligations and otherwise to protect the interests of ratepayers as required by the New Jersey Legislature. Those deviations, moreover, are not trivial or peripheral but, as discussed in detail below, instead, go directly to the heart of the LCAPP Law's requirements. By and large, these deviations seek to shift obligations and risks from LCAPP eligible generators to ratepayers.

Nevertheless, the EDCs acknowledge that a number of provisions proposed in one or more of the other alternatives may improve the EDCs' proposed form of SOCA. These provisions, discussed below, are incorporated in the revised form of SOCA appended to these comments as Attachment I (in clean form) and Attachment II (marked to show changes from the form of SOCA the EDCs submitted on February 14, 2011). In addition, for the convenience of the Board, the EDCs have attached to these comments a matrix, which compares, in summary fashion, key provisions of the alternative SOCA forms. Accordingly, for the reasons set forth below, the Board should approve the EDCs' proposed form of SOCA, as attached hereto.

## COMMENTS

### **I. The LCAPP Law Requires an Eligible Generator To Bid and Clear the Base Residual Auction Every Delivery Year During the Contract Term.**

The LCAPP Law requires that approved eligible generators with executed SOCAs “shall participate in and clear the annual base residual auction conducted by the PJM as part of its reliability pricing model for each delivery year of the entire term of the agreement” and “offer the capacity . . . into the PJM wholesale markets as required by the PJM market rules.”<sup>1</sup>

#### ***EDC Form***

The EDCs' proposed form of SOCA explicitly implements this Legislative mandate. Consistent with the LCAPP Law, the EDCs' SOCA imposes on each eligible generator the obligation to submit and clear a supply offer in the BRA for the amount of

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<sup>1</sup> LCAPP Law, §§ 3(c)(11), 3(c)(12). *See also* LCAPP Law, § 3(a) (“The LCAPP shall require selected eligible generators with board approved and executed SOCAs to participate and be accepted as a capacity resource in the base residual auction conducted by PJM”.)

capacity the Board has approved. EDCs SOCA, § 2.3.3(a). Failure to submit a supply offer in the auction or to clear in any year of the SOCA is an event of default under the EDCs SOCA. *Id.* §§ 7.1.8, 7.1.9.

These provisions carry out the explicit requirements of the statute. They are, moreover, necessary to protect the interests of ratepayers and the EDCs and to ensure that ratepayers are not deprived of the “net value” upon which the Board bases its selection of eligible generators to execute SOCAs. LCAPP Law § 3(c)(7). An eligible generator’s failure to clear the BRA for even one year can significantly reduce the net value of its proposal to ratepayers, vitiating the Board’s selection process. While it is critical, as discussed below, to pay eligible generators only for unforced capacity (“UCAP”) that clears the BRA and is available during the delivery year, more is required. When an eligible generator has failed to fulfill its most fundamental obligations under the LCAPP Law and the SOCA, EDCs and ratepayers should not have a continuing long-term obligation to that generator. The Board must bear in mind that such long-term obligations impose real costs on the EDCs and ultimately on ratepayers. Long-term contracts may impose additional costs on customers by having adverse impacts on utility balance sheets and borrowing costs since, in some cases, long-term contracts have been treated in a manner similar to credit obligations. There is no basis to continue to incur these costs when the eligible generator is not performing its basic obligation to participate in and clear the annual BRA.

It is accordingly necessary and appropriate to hold eligible generators in the SOCA to compliance with their obligation to submit supply offers and to clear in each BRA during the term.

### ***Alternative Forms***

All of the other proposed forms of SOCA are deficient with respect to this basic requirement of the LCAPP Law.

#### ***LS Power***

The LS Power SOCA would have the eligible generator warrant to “offer and participate in the BRA” without specifying the quantity that must be offered and without requiring that the offer clear in the BRA (LS Power SOCA, § 4), as the LCAPP Law requires. The LS Power form of SOCA also states that the eligible generator will offer the contract quantity into PJM’s markets for capacity, electricity and ancillary services, but there is no requirement that the capacity be offered into the BRA, as opposed to an incremental auction in the Reliability Pricing Model (“RPM”). *Id.* LS Power’s SOCA, therefore, appears to afford the EDC no means to enforce the eligible generator’s obligation to participate in, and clear, the BRA for the capacity it has been awarded.

#### ***CPV***

The CPV form of SOCA<sup>2</sup> is similarly deficient because it contains no obligation on the part of the eligible generator to participate and clear each BRA during the contract term. Instead, it states simply that the eligible generator will submit an offer from its facility in each BRA, but it requires the *buyer* to designate the price of that offer. CPV SOCA, § 3.1(a). This improperly requires the electric utilities to perform and assume the risks for a function the LCAPP Law unambiguously assigns to eligible generators - - participating in and clearing each BRA.

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<sup>2</sup> The CPV form is based on the same Maryland form of contract attached to Rate Counsel’s comments, which is a form prepared for use in Maryland in connection with a program very different than the New Jersey LCAPP.

## *Exelon*

Exelon's proposed form of SOCA also fails to satisfy this basic LCAPP Law requirement. Exelon's form states that the generator will participate and clear the annual BRA each year (Exelon SOCA, § 3), but the consequences of failure to do so are unclear. In particular, neither the failure to participate in an annual BRA nor the failure to clear the annual BRA is an explicit event of default. Instead, the parties are left to argue whether or not such a failure constitutes a "failure to perform any material covenant or obligation" permitting termination of the SOCA. *Id.*, § 7(iii). In light of the significance of the eligible generator's satisfaction of this obligation to the LCAPP Law and the calculation of net value to ratepayers, this is plainly inadequate.

## **II. The LCAPP Law Requires Payments to an Eligible Generator To Be Based on Unforced Capacity That Clears in the Base Residual Auction and Is Available For the Delivery Year.**

As noted above, the LCAPP Law requires eligible generators with executed SOCAs to participate in and clear the annual BRA each and every delivery year and to offer capacity in PJM's wholesale market. LCAPP Law, §§ 3(a), 3(c)(11), 3(c)(12). The statute also specifies that the SOCA provide for eligible generators to make or receive payments based on the difference between the standard offer capacity price ("SOCP") specified in the SOCA and the resource clearing price ("RCP") in PJM's base residual auction ("BRA") "multiplied by the SOCA capacity." LCAPP Law § 3(c)(4). As Rate Counsel recognizes, and the EDCs agree, these provisions reflect the Legislature's intent that the payments be applied to the UCAP as to which the eligible generator fulfills its obligation to clear the BRA for the applicable delivery year. Rate Counsel Comments at 5.

### ***EDC Form***

Payments under the EDCs' SOCA are based upon the payments on the Generator's "Available Capacity Amount," which is the amount of unforced capacity that clears the BRA and is recognized as available by PJM, but no more than the Board-approved quantity for the particular eligible generator. *Id.*, §§ 1.1, definition of "Available Capacity Amount", 4.1. This ensures that eligible generators to which the Board awards SOCAs fulfill the obligations that the LCAPP Law imposes on them in exchange for the financial benefits they receive. This is also critical to ensuring that the SOCAs deliver the "net value to ratepayers" that the eligible generators promised in their offers and which formed the basis of their selections. LCAPP Law, § 3(c)(7).

### ***Alternative Forms***

None of the other proposed forms of SOCA fully implements this requirement of the LCAPP Law: Rather, all of them (i) shift to ratepayers the risks that the LCAPP Law places on eligible generators, and (ii) allow eligible generators to reap the financial benefits of their SOCAs even if they fail to perform.

#### ***Exelon***

Exelon's proposed form of SOCA is deficient with respect to this basic requirement of the LCAPP Law and would place significant risk on ratepayers. The Exelon SOCA appears to entitle the eligible generator to receive full payment for the contract quantity, even though it has not fulfilled its obligation to bid ***and*** clear the Board-awarded capacity in the BRA. Exelon SOCA, Transaction Confirmation. The Exelon SOCA, therefore, shifts the risk of clearing the BRA from the eligible generator – where the LCAPP Law requires it to be – to ratepayers.

### ***LS Power***

The LS Power form of SOCA is similarly deficient. While the LS Power form of SOCA nominally bases payments on the amount of the generating facility's UCAP "actually cleared in the PJM BRA," it allows the eligible generator to avoid this limitation if it claims that PJM or any governmental authority has directly or indirectly interfered with its ability to clear the BRA, whether by establishing a minimum offer price or otherwise. *Id.*, § 3. In light of the breadth of this qualification and the proposals by PJM and other parties, currently pending at FERC, to modify the existing RPM minimum price rule,<sup>3</sup> this qualification means that the LS Power SOCA's limitation to cleared UCAP may be the exception instead of the rule and, therefore, is very unlikely to provide meaningful protection to ratepayers.

### ***CPV***

The CPV form of SOCA also bases payments on the contract quantity (or a lower amount if its facility proves unable to fulfill its contract commitment, as discussed below), regardless of whether the eligible generator submits and clears a supply offer for the Board-awarded amount of unforced capacity in the BRA. *Id.*, § 13.7, Exh. G. These provisions, like those in the Exelon and LS Power SOCAs, shift to ratepayers the risks and responsibilities that the LCAPP Law places on generators.

### ***Hess***

Hess's comments do not present a proposed form of SOCA. Instead, Hess describes a clearly deficient structure for pricing LCAPP transactions that it urges the Board to adopt. Notably, Hess does not propose a means to implement the pricing

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<sup>3</sup> See PJM Power Providers Group, *Complaint and Request for Clarification Requesting Fast Track Proceeding*, FERC Docket No. EL11-20-000 (dated February 1, 2011); *PJM Interconnection, L.L.C.*, FERC Docket No. ER11-2875 (filed February 11, 2011).



structure set forth in the LCAPP Law. To the contrary, Hess, remarkably, urges the Board to implement a transaction structure “that does not calculate payments to generators based on cleared capacity.” Hess Comments at 1. As Rate Counsel correctly notes in its own comments, such a structure would be inconsistent with the explicit specification in the LCAPP Law that eligible generators with executed SOCAs must participate in “and clear” the BRA for every delivery year during the SOCA term. Rate Counsel Comments at 5.

Furthermore, the pricing structure Hess urges the Board to adopt is quite different from that contemplated and required in the statute. Hess proposes that each eligible generator receive from the electric utilities the price specified in its SOCA, applied to the megawatts it has available to bid into the BRA, regardless of whether its bid clears the BRA. The eligible generator will simultaneously pay the utilities an amount equal to the BRA clearing price, applied to the generator’s megawatts that clear in the auction. The net difference between these two calculations would represent the amount that the generator either receives or pays. *Id.* at 2.

There are two obvious and fatal flaws in this structure. First, it is inherently biased in favor of the eligible generator, since it would receive payments regardless of whether its bids clear in the BRA, but it would make payments only if, and to the extent, its bids clear. In this respect, Hess’s proposal is simply a different, more complicated, way to shift to ratepayers the risk of clearing the BRA. Second, Hess’s proposed payment structure is contrary to the specific payment structure prescribed by the LCAPP Law. As noted above, the statute requires that the difference between the BRA clearing price and the SOCA price be applied to *the same quantity of megawatts*. LCAPP Law, §

3(c)(4). Hess disregards this specific requirement out of concern that the LCAPP Law, as enacted, is vulnerable to judicial challenge. Hess Comments at 1, 3. But Hess's concern regarding judicial challenges does not permit the Board to override legislative intent by mandating SOCA's that depart from the explicit provisions of the LCAPP Law. The incompatibility of Hess's proposal with the clear requirements of the statute belies Hess's claim to have divined and implemented the "intent" of the Legislature. Instead, Hess has proposed a structure that takes the benefits of the LCAPP Law (*i.e.*, the SOCA payment) without accepting the burden of necessary adherence to its requirements.

**III. To Fulfill the LCAPP Law's Requirement that Each SOCA Provide Net Value to Ratepayers, the SOCA Must Include Provisions that Assure Eligible Generators Fulfill Their Obligations.**

As noted above, the LCAPP law directs the Board to select eligible generators that it determines, based on the generators' offered price and terms, will provide net value to ratepayers. LCAPP Law, § 3(c)(7). It also calls upon the Board to give a weighted preference to eligible generators that can bring a new generating facility into commercial operation for the 2015 delivery year (*i.e.*, by June 1, 2014). LCAPP Law, § 3(c)(8).

In order for the Board's process of selecting and approving eligible generators for SOCA's to work effectively and to yield the net value to ratepayers that form the basis for the Board's determinations, the EDCs believe that the SOCA must ensure that the approved eligible generator delivers the generation project it has proposed and on which the Board based its decision to approve that generator for execution of a SOCA. To accomplish this the SOCA must (i) recognize the eligible generator's obligations under the LCAPP Law (as discussed in Section I of these comments); (ii) condition payment on the eligible generator's satisfaction of its fundamental obligation to clear the awarded

capacity from its facility in the BRA (as discussed in Section II); and (iii) include effective remedies if the eligible generator fails to fulfill those obligations. Without these provisions, the Board's determination that selected eligible generators will provide net value to ratepayers could be undermined when generators' proposals are translated into actual performance.

In addition, the EDCs are concerned that adoption of a form of SOCA that does not assure performance would encourage developers, in order to secure the award of a SOCA, to make overly-optimistic proposals of the in-service date or the amount of unforced capacity the facility could reasonably be expected to offer into, and clear, the BRA. For example, if a developer knows that failure to clear its awarded SOCA quantity in the BRA would result in the termination of an eligible generator's SOCA, a prudent developer would propose an amount of UCAP that is less than the intended capability of its facility in order to provide a margin of safety (much as suppliers of UCAP in the RPM do today). But, if the SOCA relieves the eligible generator of that risk, the developer would have an incentive to propose a SOCA quantity that is based on the most optimistic projection of its capability. A developer would also have an incentive to propose an overly optimistic in-service date in order to skew the analysis of net benefits in its favor by showing the creation of benefits as early as possible. This is a particular concern with respect to a developer proposing a June 1, 2014 in-service date since the LCAPP Law expressly assigns a preference to resources that can achieve commercial operation by that date.

A selection process with these objectively perverse incentives would deprive New Jersey ratepayers of any benefits contemplated by the LCAPP Law and that other, more

realistic, proposals might have provided had they been required as part of the LCAPP implementation process.

***EDC Form***

The EDCs' proposed form of SOCA addresses this issue by holding the eligible generator to the terms of its proposal as approved by the Board. In addition to the payment provisions discussed in Section II of these comments, the key provisions that do so include the following:

- The SOCA makes it a contractual obligation of the eligible generator to achieve commercial operation by the in-service date on which the Board's approval of the eligible generator's offer is based (EDCs SOCA §§ 1.1 (definition of "Awarded Commencement Date"), 2.3.2) and makes it an event of default allowing for termination of the SOCA if the eligible generator fails to achieve commercial operation by no later than six months after the in-service date on which the Board-awarded SOCA is based. *Id.*, § 7.1.7. The six-month grace period recognizes that the construction schedules that underpin the proposed in-service dates for newly constructed generation facilities are not an exact science, but that more extensive delays could erode the ratepayer value the Board expected an eligible generator to provide.
- The SOCA makes it a contractual obligation of the eligible generator to offer and clear in the BRA for every Delivery Year during the term of the SOCA the amount of UCAP the Board approved the generator to provide in the LCAPP and on which the Board based its SOCA award. *Id.*, §§1.1 (definitions of "Awarded Capacity Amount"), 2.3.3(b). It is an event of default if the eligible generator fails to offer to supply 90% or more of that amount of UCAP in any BRA, with the allowance for a reduction of up to 10% intended to allow for reasonably anticipated normal variations in operations. *Id.*, § 7.1.8. It is also an event of default if the eligible generator fails to clear its capacity offer in any BRA. *Id.*, § 7.1.9.
- The SOCA also provides for a Security Agreement as security for the eligible generator's obligation to pay to the electric utilities in any delivery year in which the BRA clearing price (the RCP) exceeds the contract price (the SOCP) (EDCs' SOCA, ninth recital clause and Attachment A).

The EDCs believe that these provisions create reasonable and appropriate incentives for developers to propose projects in which they have a high degree of

confidence that they can deliver. These provisions protect the efficacy of the Board's process for selecting eligible generators entitled to execute SOCAs and thereby help ensure that ratepayers will realize the benefits contemplated by the LCAPP. Such provisions also protect ratepayers against being required to continue making payments under a SOCA when the eligible generator is not fulfilling its obligations. In particular, in failing to submit supply offers that clear the BRA, an eligible generator fails to fulfill its most basic obligation under the LCAPP Law and that failure could substantially or completely vitiate the Board's calculation of net value to ratepayers that formed the basis of the generator's approval for a SOCA. Therefore, the SOCA must require clearing the BRA and the failure to do so must be an event of default. The EDC may also be harmed through increased costs from administrative and other burdens (including possible increased costs of borrowing) if it is prohibited from terminating a long-term contract under which the eligible generator is not performing its primary obligation.

Similarly, the Security Agreement, which is narrowly tailored to cover eligible generators' primary financial obligation under the SOCA, is needed to avoid a situation in which an eligible generator that has received payments for the first part of the SOCA's term, might be tempted to walk away from its payment obligations if market conditions result in a significant increase in BRA clearing prices.

### ***Alternative Forms***

None of the alternative forms of SOCA submitted by other parties provide comparable or equivalent incentives for eligible generators or protections for ratepayers.

### ***LS Power***

LS Power's proposed SOCA incorporates the concept of a commercial operation date but does not tie that date to the in-service date on which the Board award of the SOCA is based (LS Power SOCA § 3, Definition of "Commercial Operation Date"). Further, as proposed, the LS Power SOCA allows for unlimited slippage in the in-service date with no consequence, other than the delay in the onset of the generator's right to receive payment under the SOCA. In addition, as discussed above, LS Power's proposed SOCA does not obligate the eligible generator to offer the full SOCA quantity in the BRA or to clear *any* quantity of UCAP in the BRA. LS Power SOCA, § 4. Therefore, it also follows that failure to do any of these things cannot constitute an event of default that permits termination of the SOCA.

### ***Exelon***

Exelon's proposed form of SOCA does not even incorporate the concept of an in-service date. While the reference to a PJM planning year in the transaction confirmation (incorporated in Exelon's proposed SOCA) may be intended to refer to the in-service date reflected in the offer that the Board approved, there is no obligation to complete the eligible generator's facility by that date and no consequence for failure to do so. Exelon SOCA, Transaction Confirmation. Similarly, while Exelon's proposed SOCA refers to a "SOCA Capacity Amount," which forms the basis for financial settlements and, presumably, is the quantity of UCAP the Board approved, the eligible generator is not obligated to offer or clear that amount in the BRA. *Id.* Further, as discussed above, the eligible generator is obligated only to "participate in and clear" each annual BRA, but the amount of UCAP the eligible generator must bid (and clear) is unspecified. *Id.*, § 3.

Finally, Exelon's proposed SOCA appends a form of "Transaction Confirmation" which is not clear with respect to whether the offer amount is fixed for the term of the SOCA or whether it can change from one transaction confirmation to the next.

### *CPV*

CPV's proposed form of SOCA provides for a commercial operation date that, presumably, is intended to be the same commercial operation date that the eligible generator proposed in the Board-approved SOCP. While the eligible generator is nominally obligated to achieve commercial operation by the specified date, failure to do so is excused by *force majeure*. Even absent *force majeure*, it appears that the only consequence of failure under the CPV SOCA is the obligation to pay liquidated damages in an unspecified amount for a limited delay.<sup>4</sup>

Similarly, while CPV's proposed SOCA reflects the Board-awarded capacity amount, the eligible generator is *not* obligated to supply that amount of UCAP in the BRA. To the contrary, CPV's proposed SOCA provides for capability testing at the time of commercial operation and for liquidated damages if the amount of capacity the generator is capable of offering is less than the awarded amount. *Id.*, § 2.5(d). The CPV proposed SOCA also permits performance to be excused by *force majeure*. *Id.*, § 9.1. While excusing non-performance on the grounds of *force majeure* might be appropriate in a power purchase agreement (though, even in that context, CPV's *force majeure* provision seems overbroad), it has no place in the SOCA. By offering to enter into a SOCA, the eligible generator agrees to take on the risk of differences between its contract price and the BRA clearing price over the term of the agreement, in exchange for the

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<sup>4</sup> CPV's form of SOCA provides for no liquidated damages for the first 90 days of delay, followed by liquidated damages of a fixed amount per MW for delays of up to an additional 90 days, after which no additional liquidated damages would accrue. CPV SOCA, § 2.5(c).

compensation it demands in its proposal and that the Board awards. The eligible generator necessarily assumes the risks associated with completing construction of its generating facility and operating that facility; it has the ability to tailor its proposal to manage those risks. For example, the eligible generator can propose a contract quantity for the SOCA that is less than the expected capability of its generating facility to provide a margin of safety that it will be able to meet its obligations. What it cannot do is use a claim of *force majeure* to avoid the risks it has offered to assume once that offer has been accepted.

Finally, even if CPV's proposed form of SOCA provided an effective remedy for an eligible generator's failure to live up to its proposal to the Board – which it does not – it also contains a provision that would completely undermine that remedy. CPV proposes a provision that would allow the eligible generator to avoid the consequences of *any* default if it can persuade the Board to excuse its non-performance. *Id.*, § 8.1(d). Even assuming, as the EDCs do, that the Board would make any such determination judiciously, the mere presence of such a provision constitutes a “moral hazard” that encourages eligible generators to submit unrealistic proposals.

In sum, none of the forms of SOCA proposed by other parties includes adequate and appropriate provisions to assure performance by eligible generators and to protect ratepayers against the consequences of non-performance. It is noteworthy that, in its comments, Rate Counsel recognizes the need for such provisions. The EDCs and Rate Counsel are in agreement that this issue must be addressed; but differ only in how best to do so.



### ***Rate Counsel***

Rate Counsel proposes that the SOCA include extensive contract provisions to establish and monitor an eligible generator's construction activities and operations with attendant security requirements and performance penalties. The EDCs respectfully suggest that, while this approach would be appropriate if this were a long-term power purchase contract, under which the EDCs were purchasing capacity and/or energy upon which they were relying to serve ratepayers' needs, it is not appropriate under the LCAPP Law.<sup>5</sup>

First, the LCAPP Law expressly provides for the Board to establish criteria for eligible generators' participation in LCAPP that include, among other things, "demonstration of reasonable certainty of completion of development, construction and permitting activities necessary to meet the desired in-service date." LCAPP Law, § 3(c)(6). Including the monitoring and performance provisions suggested by Rate Counsel in the SOCA would needlessly duplicate the Board's selection and approval process.

Second, as reflected in the EDCs' proposed SOCA, the EDCs believe that a more effective approach is to give generators a strong financial incentive to (i) offer the Board proposals in which they have a strong degree of confidence that they can deliver, (ii) make the economic consequences of a failure to do so fair, clear and significant, and (iii) require security for their potential financial obligations. Under this approach, the SOCA can assure ratepayers get the performance from eligible generators that they are paying for (*e.g.*, among other things, certain additional capacity being provided into the PJM market) , without involving the EDCs in the eligible generators' business decisions

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<sup>5</sup> In this regard, Rate Counsel may be influenced by the Maryland form of agreement that is not a SOCA and was drafted for a very different set of circumstances.

through a complex, expensive and intrusive monitoring process. The SOCA should be based on a simple principle: if eligible generators perform in accordance with their commitments to the Board, the SOCA remains in place and they get the payments they were promised (or, as applicable, make the required payments); if eligible generators do not live up to their obligations, they lose the benefits of the SOCA.

The EDCs believe this approach is not only consistent with legislative direction and intent, but also highly appropriate for a contract that does not involve the delivery of capacity or energy to the EDCs, but instead establishes only certain payment obligations and associated rights.

If there were any doubt about the efficacy of the type of monitoring and penalty regime Rate Counsel suggests, the EDCs respectfully suggests they are removed by consideration of the form of SOCA proposed by CPV. That proposal includes extensive milestones and reporting requirements, with associated (albeit limited) liquidate damages in some cases. While Rate Counsel could no doubt improve upon those provisions, CPV's proposal nevertheless demonstrates that a monitoring and performance regime is no substitute for clearly defined obligations and clear consequences if those obligations are not satisfied. In short, without clear contractual obligations and remedies, a monitoring and enforcement approach is inadequate and unnecessarily burdensome. If the SOCA contains clear contractual obligations and remedies, the EDCs believe a monitoring and enforcement regime is unnecessary.

#### **IV. The LCAPP Law Requires that SOCAs Reflect Fixed Quantity, Price and Term Provisions.**

The LCAPP Law states that the Board must require eligible generators participating in the LCAPP “to offer a quantity, in megawatts, offer a price per megawatt-day, and a term for the SOCA to be evaluated by the agent and approved by the board.” LCAPP Law, § 3(c)(2). Accordingly, the SOCA that the Board approves for execution must contain fixed provisions for contract quantity, price and term that are not subject to variation or adjustment after execution. Without proposals that are fixed as to these critical provisions, it will be difficult or impossible for the Board to evaluate competing proposals on the basis of their relative net value to ratepayers, as the LCAPP Law requires. LCAPP Law, § 3(c)(7). The resulting SOCAs must also be based on the fixed provisions of the eligible generators’ proposals that are selected for awards so that the net benefit determination that formed the basis of its selection can be realized. Further, requiring eligible generators to submit proposals with fixed price, quantity and term provisions and to live with, and up to, those provisions if they are selected is necessary to deter eligible generators from submitting unrealistic proposals in the expectation that they can receive ratepayer subsidies while also being relieved of their unachievable promises through flexible or permissive contract provisions.

#### ***EDC Form***

The EDCs’ proposed form of SOCA complies with this Legislative requirement at two levels. First, it embodies the fixed price, quantity and term provisions of the eligible generator’s proposal approved by the Board. *See* EDCs’ SOCA § 1.1, definitions of “Awarded Capacity Amount,” “Awarded Commencement Date,” and “Standard Offer Capacity Price”. In addition, as already discussed herein, the EDCs’ SOCA includes

effective financial incentives and remedies to ensure that the eligible generator delivers on its promises.

### ***Alternative Forms***

#### ***Exelon and LS Power***

The forms of SOCA proposed by Exelon and LS Power also comply with this basic requirement insofar as they propose fixed terms for contract quantity, contract price, and contract duration. However, as discussed above, they do not include necessary and appropriate provisions to ensure that the eligible generator actually performs in accordance with its commitments. For example, the LS Power SOCA allows for the commercial operation date of the eligible generator's new facility to slip indefinitely, with no financial penalty to the eligible generator and no apparent means for the utility to terminate the agreement or take other remedial action. LS Power SOCA, §§3 (definition of Effective Date), § 4 (definition of Commercial Operation Date). Since the LCAPP Law directs the Board to give a preference to eligible generators that can enter commercial operation for the 2015 delivery year (LCAPP Law, §3(c)(8)), this approach allows (and indeed encourages) eligible generators to submit proposals promising early in-service dates in order to secure an SOCA, with no substantial consequence if they fail to fulfill that promise.

#### ***CPV***

CPV proposed form of SOCA does not comply with this statutory requirement even at the most basic level. It allows both for an indefinite delay in the commercial operation of the eligible generator's facility and for a reduction in the contract quantity if the capability of the facility turns out to be less than the proposed contract quantity. CPV

SOCA, §§ 2.5(c) and (d). While CPV's SOCA provides for liquidated damages in both cases, the amounts are limited (in the case of delay) and unrelated to the expected net benefit of the SOCA. Even more troubling, CPV's SOCA does not even require a fixed contract price. It appears to contemplate a price that may be partially indexed, that would be adjusted for an escalation factor and that provides for the recovery of unspecified "Pass-Through Components" based on costs to be determined after the contract is awarded and executed. *Id.* § 13.7, Exh. G. CPV's proposal also would permit the eligible generator to "initiate an amendment" to the SOCA if its costs increase and it is unable to recover the increased costs. *Id.*, § 12.12(a). For example, the CPV form SOCA seems to anticipate that the costs of interconnecting their facility to the PJM transmission system could be a pass-through to ratepayers and not considered as part of their bid. *Id.* §§ 13.7, Exh. G, 1 definition of "Pass-Through Component." As the Board is aware, interconnection costs in PJM can vary widely depending on the location of the generator on the grid and the amount of headroom that exists in that portion of the grid. There is no provision of the LCAPP Law which would suggest these interconnection costs or other similar costs should simply be passed through to ratepayers or not included in the net benefits analysis.

Although consistent with the risk-shifting approach of the generator commentators in this proceeding, as discussed above, this approach is flatly inconsistent with the requirements of the LCAPP Law and inimical to the interests of ratepayers. The provision to charge ratepayers for Pass-Through Components in addition to the eligible generator's proposed SOCP is especially problematic, because it could provide a vehicle to increase the costs of a SOCA by tens or, even, hundreds of millions of dollars.

## **V. The LCAPP Law Requires the Eligible Generator To Fulfill Its SOCA Obligations by Constructing a New Generation Facility.**

The LCAPP Law defines an “eligible generator” as the developer of an “electric power generation facility . . . that qualifies as a capacity resource under PJM criteria and that commences construction after the effective date of [the LCAPP Law],” *i.e.*, January 28, 2011. LCAPP Law § 3 (definition of “eligible generator”).

### ***EDC Form***

The EDCs’ proposed form of SOCA recognizes this requirement through its definition of “Capacity Facility,” which refers to the eligible generator’s specific facility, to commence construction after January 28, 2011.

### ***Alternative Forms***

None of the alternative proposed forms of SOCA address this requirement explicitly. Indeed, two of them appear to include provisions inconsistent with it. The CPV proposed SOCA includes a provision for establishing the MW capability of the eligible generator’s facility that specifies how the methodology will be applied “in the case of a Facility that is already in operation.” CPV SOCA, § 2.5(d). Exelon’s proposed SOCA provides for the identification in a Transaction Confirmation of “Capacity Resource or Sources.” Exelon SOCA § 3. This term is undefined, so it is not limited to the generating facility identified in the eligible generator’s offer to the Board. Moreover, the reference to “sources” in the plural could be read to imply that an eligible generator could meet its obligations to offer and clear capacity in the BRA from facilities or sources other than the new facility it proposes to the Board. As discussed above, this would be contrary to the requirements of the LCAPP Law.

## **VI. The LCAPP Law Specifies that Payments Be Based on the Difference between the BRA Clearing Price and the SOCP.**

The LCAPP Law specifies that payments be based upon the difference between the contract price (SOCP) and the resource clearing price (RCP) established for the delivery year by the base residual auction (BRA) of PJM's RPM market. LCAPP Law §3(c)(4). While the LCAPP Law defines RPM to include "successors" to PJM's capacity-market model (LCAPP Law § 2 (definition of Reliability Pricing Model)), this critical element of the statute can only be implemented if PJM continues to administer the RPM in a manner that calculates resource clearing prices for each delivery year in a base residual auction.

### ***EDC Form***

The EDCs' proposed form of SOCA accordingly provides for termination of the SOCA if PJM eliminates or modifies the RPM market such that the performance, calculation and payment prescribed in the LCAPP Law and mandated in the SOCA cannot be performed or implemented (EDCs SOCA, § 8.1.4).

### ***Alternative Forms***

None of the other proposed forms of SOCA has a similar provision. To the contrary, the SOCAs proposed by LS Power and CPV both provide for the continuation of the agreements and the substitution of alternative pricing regimes if PJM no longer calculates a resource clearing price through base residual auctions.<sup>6</sup> These provisions are both inappropriate and contrary to the express terms of the LCAPP Law. These provisions impose indeterminate and undue risks on ratepayers and could result in

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<sup>6</sup> LS Power SOCA § 5; CPV SOCA § 12.12(a). Exelon did not address this issue in its proposed form of SOCA.

substantial changes in the costs ratepayers must bear for the SOCAs if the pricing mechanism specified in the LCAPP Law is replaced with a different calculation methodology. The Board could not conclude that any SOCA that includes the prospect of such drastic changes in pricing will provide net value to ratepayers, as the LCAPP Law requires. In any event, even if it were appropriate to impose this additional risk on ratepayers, the LCAPP Law does not permit it. The New Jersey Legislature specified a pricing term and a calculation method for the SOCA in the statute and the Board is not free to approve a SOCA that allows for pricing on a different basis.

CPV's proposed form of SOCA also deviates from the requirements of the LCAPP Law in another respect in defining "Capacity Clearing Price" to mean the market clearing price in RPM incremental auctions, as well as Base Residual Auctions. *See* CPV SOCA, § 1, definition of "Capacity Clearing Price." The LCAPP Law, as noted previously, provides for payments (whether from the EDCs to the eligible generator or vice versa) based only on clearing prices in the BRA.<sup>7</sup>

**VII. The LCAPP Law Requires Eligible Generators To Sell Energy and Other Output of New Facilities Into PJM Markets and Does Not Require EDCs To Buy Those Products.**

The LCAPP Law is clear that the SOCA is intended to encompass only the payment of certain calculated amounts to eligible generators or from them, based on the relationship between the contract price and the clearing price in the BRA. LCAPP Law, § 3(c)(4). There is no requirement or expectation for electric utilities to purchase capacity, electric energy or ancillary services under the SOCA. To the contrary, the

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<sup>7</sup> The LCAPP Law defines the term "incremental auction" in Section 3, but this term is not used in establishing the requirements for the SOCA.



LCAPP Law obligates eligible generators with executed SOCAs to offer the capacity, electricity and ancillary services that their new facilities produce into PJM wholesale markets – which they obviously could not do if they had already sold those products to the electric utilities under the SOCAs. LCAPP Law, § 3(c)(11).

### ***EDC Form***

The EDCs' proposed form of SOCA specifically excludes the purchase and sale of capacity, electric energy and ancillary services from the scope of the SOCA and notes the eligible generator's obligation under the LCAPP law to offer those products in PJM markets at its own expense and for its own account. EDCs SOCA, §§ 2.33(a), 4.2.

### ***Alternative Forms***

#### ***Exelon and LS Power***

The forms of SOCA proposed by Exelon and LS Power appropriately make no provision for the sale or purchase of these products (although LS Power's SOCA recites that the eligible generator will offer them in PJM markets).

#### ***CPV***

While CPV's proposed form of SOCA generally provides for the type of financial transactions contemplated in the LCAPP Law, it inappropriately goes further by allowing either party to apply to the Board for an order directing the utility to take title to products generated by the facility or to convert the SOCA into a purchase and sale of unforced capacity. CPV SOCA, § 4.1(b). These provisions go beyond the authority conferred in the LCAPP Law and should not be included in the SOCA.

### **VIII. Proposals to Impose Energy and Ancillary Services Bidding Restrictions On Developers Entering Into SOCAs Are Inconsistent With The Structure of the LCAPP Law**

As noted previously, the LCAPP Law obligates eligible generators with executed SOCAs to offer the capacity, electricity and ancillary services that their new facilities produce into PJM wholesale markets. LCAPP Law, § 3(c)(11). Rate Counsel's proposal that SOCAs should include provisions requiring that the eligible generator bid the energy output from its generating facility in a particular manner, however, appears to be inconsistent with legislative intent. Rate Counsel Comments at p.4.

The requirement of the LCAPP Law that an eligible generator "bid and clear" its capacity implicitly imposes an obligation on eligible generators to bid capacity into the RPM BRAs in a particular manner. However, the only statutory obligation imposed for energy and ancillary services is to participate in the PJM markets in accordance with the PJM rules. Imposing specific obligations on how to bid energy and ancillary services would likely skew the way that developers will price SOCAs in a manner that is inconsistent with the legislative scheme. If developers are restricted in how they will bid energy and ancillary services, they can be expected to bid higher SOCA amounts to make up for lower anticipated revenues for those products. This could well tend to make SOCA contract amounts higher and thus commit ratepayers to larger payments. In addition, the requirement could also skew the selection process. Units with the highest anticipated production factors will be the most adversely affected by energy market bidding restrictions causing them to increase their SOCA bids by the largest amounts. Energy bidding requirements thus would appear to favor units with anticipated energy output at lower levels since they would be less affected.

**IX. The LCAP Law Assures EDCs of Recovery of All Costs Incurred Under or Associated with the SOCAs.**

The LCAPP law requires that the Board order “the full recovery of all costs associated with the electric public utilities’ resulting SOCAs, and the costs of the agent retained pursuant to [the law], from ratepayers through a non-bypassable, irrevocable charge.” LCAPP Law, § 3(d).

***EDC Form***

This provision is important to the EDCs, for obvious reasons. The EDCs cannot be required to continue to incur payment obligations under an SOCA if their ability to recover the costs of those obligations, as well as other costs of the LCAPP, is, for some reason, denied or frustrated, in contravention of the LCAPP Law. Accordingly, the form of SOCA proposed by the EDCs incorporates this requirement as a material condition of the agreement and provides for the early termination of the agreement if the purchasing electric utility is denied recovery of any and all such costs. EDC SOCA § 8.1.3.

***Alternative Forms***

None of the alternative forms of SOCA address this important requirement of the LCAPP Law. The EDCs respectfully submit that this requirement is a critical element of the LCAPP that must be reflected in the SOCA.

**X. The LCAP Law Recognizes that the Validity of the Law May Be Challenged.**

The LCAPP Law explicitly recognizes that its provisions may be the subject of judicial and/or regulatory challenges. It provides that in the event of such a challenge, the Board may suspend the applicability of any challenged provisions pending the resolution of the challenge and take other appropriate action. LCAPP Law, § 4.

### ***EDC Form***

The EDCs' proposed form of SOCA accordingly takes into account the possibility of challenges to the law, as well as the possibility that the Board might exercise its authority under section 4 of the LCAPP Law. It provides for the suspension of payment obligations under the SOCA in the event the Board exercises its authority to suspend any provision of the Act that imposes certain critical obligations on either Party or suspends the electric utilities' right to recover their costs associated with the SOCA. EDCs SOCA, § 2.5. It also provides that a determination that the LCAPP Law or a critical provision of the law is invalidated or declared unconstitutional is a ground warranting termination of the SOCA and the return of all monies paid under it. *Id.*, §§ 8.1.2, 9.3.2. These provisions are appropriate mechanisms to address the results of any challenge to the LCAPP Law, including any actions the Board might take pursuant to its suspension authority.

### ***Alternative Forms***

#### ***Exelon***

Only the Exelon SOCA addresses this circumstance. The omission in the other proposed SOCAs, however, does not avoid the issue; it is the equivalent of providing that the parties' will remain obligated under the SOCA even if the provisions of the LCAPP Law that create the rights and obligations under the SOCA are suspended or invalidated. This result is plainly inappropriate.

If the Board suspends operation of any provision of the LCAPP Law or a court invalidates a provision of the law that establishes or affects the parties' rights and obligations under the SOCA, there is no justification for ignoring that fundamental change in circumstances.

## **XI. Proposed Enhancements to the EDCs Proposed Form of SOCA**

The EDCs accordingly believe that the form of SOCA they submitted reasonably and appropriately sets forth the parties' obligations and the consequences for failing to fulfill them. However, the EDCs acknowledge that their proposed form of SOCA could be improved by the addition of several additional contract terms or concepts that they now propose to incorporate in their proposal, based on features of the SOCAs proposed by other parties. Those additions are shown in Attachments I and II to these comments..

For instance, CPV's proposed form of SOCA provides that it is an event of default if an eligible generator seeks or enters into a reliability must run contract, cost of service contract, or similar agreement for any part of the output of its facility. CPV SOCA, §8.1(5). The EDCs believe this is an appropriate provision. The LCAPP Law obligates the eligible generator to offer the output of its new facility into PJM markets. LCAPP Law, § 3(c)(11). If an eligible generator decides to receive payments for its capacity, energy and ancillary services through a reliability must run or other cost-based contract, the costs of which are ultimately borne by ratepayers, it would be inappropriate for that generator to continue to have its costs subsidized by those same ratepayers. It is therefore appropriate to include this additional event of default in the SOCA.

In addition, on the basis of their review of the alternative forms of SOCA, the EDCs propose to add provisions (i) providing additional detail regarding the description of Commercial Operation, (ii) confirming that any penalties accrued by the eligible generator are its sole responsibility; (iii) confirming that the EDCs do not take title to, or have any risk of loss for any product or service generated, delivered or sold by the eligible generator's facility, (iv) clarifying certain limits on the timing for adjustments to

billing calculations, (v) providing for collateral assignment, and (vi) providing for the allocation of responsibilities for taxes.

## CONCLUSION

The EDCs appreciate the opportunity to provide these comments comparing and contrasting the EDC proposed form of SOCA with those forms and ideas provided by CPV, Exelon, LS Power, Hess and Rate Counsel and with the requirements of the LCAPP Law. The EDCs believe that, as discussed and demonstrated in these comments, their proposed form of SOCA, as revised, provides the only form that is consistent, in all respects, with the requirements of the LCAPP Law and best suited to allow the Board to implement the process for awarding SOCAs on an expedited basis. The EDCs respectfully urge the Board to adopt the EDCs' proposed form of SOCA as attached hereto.

Respectfully submitted,

*Original Signed by  
Tamara Linde, Esq.*

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Public Service Electric and Gas Company  
80 Park Plaza  
Newark, NJ 07101

On behalf of the New Jersey Electric  
Distribution Companies

## Overview of Proposed Forms of Standard Offer Capacity Contract and Comments

	<b>Electric Utilities</b>	<b>CPV Shore, LLC</b>	<b>Exelon</b>	<b>Hess</b>	<b>LS Power</b>	<b>Rate Counsel</b>
<b>Requires New Facility Build Commencing After 1/28/2011 (Act § 3, Definition of “eligible generator”)</b>	Yes. (SOCA 3 <sup>rd</sup> Recital, § 5.2.2)	Unclear. (Compare SOCA §§ 2.5(b), 13.2 Ex. B with § 2.5(d)).	No.		No.	
<b>Awarded Capacity Specified (Act § 3(c)(2))</b>	Yes. (SOCA 4 <sup>th</sup> Recital, Definition of “Awarded Capacity Amount”)	Yes. (SOCA 3 <sup>rd</sup> Recital and Definition of “Original Contract Quantity”)	Unclear. (SOCA § 4)		Yes. (SOCA § 3 “Notional Quantity per Calculation Period”)	
<b>Awarded SOCP Specified (Act § 3(c)(2))</b>	Yes. (SOCA Definition of “Standard Offer Capacity Price”)	Yes, but provides for index and other adjustment of SOCP. (SOCA § 13.7 Ex. G)	Yes. (SOCA Transaction Confirmation)		Yes. (SOCA § 3 “Fixed Amount Details”)	
<b>Awarded In-Service Date Specified (Act § 3(c)(2))</b>	Yes. (SOCA Definition of “Awarded Commencement Date”)	Yes. (SOCA §§ 2.5, 13.2 Ex. B)	No.		No.	
<b>Awarded Contract Term Specified (Act § 3(c)(2))</b>	Yes. (SOCA Definition of “Delivery Term”)	Yes. (SOCA § 5)	Yes. (SOCA Transaction Confirmation)		Yes. (SOCA § 3)	
<b>Physical Purchase of Energy Products Not Required (Act § 3(c)(3))</b>	Yes. (SOCA § 4.2)	Yes, but allows Board to order Utility to buy physical products. (SOCA §§ 6.1, 13.7 Ex. G, and 4.1(b))	Yes		Yes	Yes
<b>Payment to generator if SOCP greater than RCP equal to:  SOCP less RCP times awarded capacity amount. Allocated on among utilities on annual load ratio share. (Act §§ 3 (c)(4), (9))</b>	Yes. However, if the quantity (MW) cleared in BRA or available for delivery year is less than the awarded quantity then the amount that cleared or is available is used to calculate the payment. (SOCA § 4.1.1)	No. Adjusts SOCP based on index and other factors. Uses receipts from BRA, not RCP. Load-ratio share not addressed. (SOCA §§ 6, 13.7 Ex. G)	Yes. Payment calculated on basis of awarded capacity amount regardless whether that amount clears the BRA or is available for the applicable delivery year. (SOCA Transaction Confirmation)	Utility pays generator SOCP time available capacity (MW). No requirement to clear. Netted against payment to utility from generator.	Yes. However, quantity is the lesser of the amount awarded by Board or amount cleared in the BRA.  Payment based on awarded quantity if govt or regulatory action prevents generator from bidding or clearing or if certain minimum price bids required. (SOCA § 3)	SOCA should establish a contractual target for unit availability, with penalties, if actual availability falls below the contractual target.  Generator should only be paid for MWs bid into and clear in BRA.

## Overview of Proposed Forms of Standard Offer Capacity Contract and Coments

	<b>Electric Utilities</b>	<b>CPV Shore, LLC</b>	<b>Exelon</b>	<b>Hess</b>	<b>LS Power</b>	<b>Rate Counsel</b>
<p><b>Payment to utilities if RCP greater than SOCP equal to:</b></p> <p><b>SOCP less RCP times awarded capacity amount. Allocated on among utilities on annual load ratio share.</b> (Act §§ 3 (c)(4), (9))</p>	<p>Yes. However, if the quantity (MW) cleared in BRA or available for delivery year is less than the awarded quantity then the amount that cleared or is available is used to calculate the payment. (SOCA § 4.1.2)</p>	<p>No. Adjusts SOCP based on index and other factors. Uses receipts from BRA, not RCP. Load-ratio share not addressed. (SOCA §§ 6, 13.7 Ex. G)</p>	<p>Yes. Payment calculated on basis of awarded capacity amount regardless whether that amount clears the BRA or is available for the applicable delivery year. (SOCA Transaction Confirmation)</p>	<p>Generator pays utility RCP times cleared cap (MW). Net of utility payment to generator.</p>	<p>Yes. However, quantity is the lesser of the amount awarded by Board or amount cleared in the BRA. Payment based on awarded quantity if govt or regulatory action prevents generator from bidding or clearing or if certain minimum price bids required. (SOCA § 3)</p>	
<p><b>Requirement to Bid and Clear in BRA.</b> (Act § 3(12))</p>	<p>Generator obligated to bid 90% or more of awarded MWs in each BRA and to clear; Right to terminate if Generator fails to comply</p>	<p>No. Obligated to participate in BRAs, with Buyer to set offer price. No obligation to clear. (SOCA § 3.2(a))</p>	<p>Obligated to participate in and clear BRAs. (SOCA § 3)</p>	<p>Generator should not be obligated to clear BRA.</p>	<p>Generator obligated to offer capacity in PJM markets (not limited to BRA). No obligation to clear BRA. (SOCA § 4 "Additional Representations")</p>	
<p><b>Requirement to offer the capacity, energy, and ancillary services into PJM markets.</b> (Act § 3(11))</p>	<p>Yes. (SOCA § 2.3.3(a))</p>	<p>Unclear. (Compare SOCA 4<sup>th</sup> Recital with § 3.2)</p>	<p>No.</p>		<p>Yes. (SOCA § 4 "Additional Representations")</p>	<p>Recommend that the Seller bid into the PJM next-day market (and real-time market) at prices reflecting its actual variable operating cost.</p>
<p><b>Security</b></p>	<p>EDC hold security interest for payment amounts owing to EDCs. (SOCA § 9<sup>th</sup> Recital and Security Agreement)</p>	<p>Provides for a security and liquidated damages for in-service date and capability testing below awarded capacity amount. (SOCA §§ 2.5, 3.1(e) and 10)</p>	<p>No.</p>	<p>None.</p>	<p>None.</p>	<p>Security from effective date of contract at least until the unit enters commercial service. (E.g. \$100 per kW during construction and \$50 per kW thereafter)</p>
<p><b>Default/Termination Events</b></p>	<p>Standard events plus provisions for: (i) failure to meet in-service date, (ii) failure to participate in BRA, (iii) failure to clear BRA, (iv) illegality or invalidity of Act, (v) denial of EDC recovery of costs, and (vi) material change in PJM rules re BRA. (SOCA §§ 7, 8)</p>	<p>Standard default and termination provisions.  Specific provision if no longer eligible to participate in any PJM market. (SOCA § 8)</p>	<p>Standard default and termination provisions. Failure to perform any "material" obligation is an event of default. "Material" is not defined. If "any" provision of LCAPP law held unenforceable, the SOCA deemed terminated. (SOCA §§ 7, 22)</p>	<p>None.</p>	<p>Failure to pay, false representation, failure to perform covenant, bankruptcy, breach of any other agreement between the parties. (Attached terms and conditions § 3.1)</p>	<p>Should have standard default provisions.  The Default and Termination provisions (along with any performance penalties) would be subject to force majeure exceptions specified in the contract.</p>



## Overview of Proposed Forms of Standard Offer Capacity Contract and Comments

	<b>Electric Utilities</b>	<b>CPV Shore, LLC</b>	<b>Exelon</b>	<b>Hess</b>	<b>LS Power</b>	<b>Rate Counsel</b>
<b>Dispute Procedures</b>	A calculation dispute must be resolved between the parties.  Other disputes require initial effort by the parties to resolve and if unsuccessful then either party can initiate binding arbitration or legal action. (SOCA § 12)	Requires initial effort by the parties and management. If unsuccessful, either party can petition the Board to initiate a proceeding to resolve the dispute. (SOCA § 12.9)	None.	None.	None.	
<b>Remedies: Termination, Payment/Damages</b>	Right to terminate agreement upon an event of default or a termination event. Limited cure periods specified. Damages limited. Upon termination, payment of unpaid amount due. No liquidated damages or other calculation of damages specified. (SOCA § 9)	Right to terminate upon event of default or termination event. Early termination requires calculation of gains and loss to determine payment.  Provides specific remedies and liquidated damages for failure to meet in-service date or reductions in UCAP. (SOCA § 8)	Non-defaulting party can declare SOCA terminated, withhold any payment due and pursue any other remedies available at law or in equity, except to the extent such remedies are expressly limited by SOCA. (SOCA § 8)	None.	Requires calculation of "gains" and "losses" based on market prices. (SOCA GTC § 3.2)  If PJM capacity market is eliminated, the floating price for payment calculation based on price generator actually obtains for its capacity. (SOCA § 5)	
<b>Billing</b>	EDC will calculate payments and send invoices. (SOCA § 2.2)	Provides that generator will administer billing. (SOCA § 6.3)	Generator to calculate payments and send invoices. (SOCA § 6)	None.	Generator calculates and invoices payments. (SOCA GTC §5)	

**ATTACHMENT I**

**STANDARD OFFER CAPACITY AGREEMENT**

**STANDARD OFFER CAPACITY AGREEMENT**

This STANDARD OFFER CAPACITY AGREEMENT (“Agreement”), dated as of [ ] (“Effective Date”), is entered into by and between [ UTILITY ], a corporation organized under the law of the New Jersey (“Utility”) and [ CAPACITY SELLER ], a corporation organized under the law of [ ] (“Generator”).

WHEREAS, the State of New Jersey has established the Long-Term Capacity Agreement Pilot Program (“LCAPP”) to promote construction of qualified electric generation facilities pursuant to P.L.\_\_\_\_ c. \_\_ (C.\_\_\_\_) (the “Act”);

WHEREAS, the Act requires that each Electric Public Utility enter into a standard offer capacity agreement as described in the Act and in a form approved by the New Jersey Board of Public Utilities with each Eligible Generator approved by the New Jersey Board of Public Utilities;

WHEREAS, Generator has commenced or intends to commence construction of an [ ] MW electric power generation facility located in [ ], [ ] after January 28, 2011 (the “Capacity Facility”);

WHEREAS, Generator is willing to commit to offer and clear [ ] MW of unforced capacity of the Capacity Facility into each Base Residual Auction conducted by PJM for all Delivery Years through the Conclusion Date.

WHEREAS, Generator is willing to commit to offer all the electric energy output and ancillary services of the Capacity Facility into the PJM markets during the Delivery Term;

WHEREAS, Generator’s selection to participate in the LCAPP as an Eligible Generator has been approved by the New Jersey Board of Public Utilities;

WHEREAS, this Agreement is in the form approved by the New Jersey Board of Public Utilities;

WHEREAS, Utility is an Electric Public Utility; and

WHEREAS, Generator and Utility have entered into a security agreement (the “Security Agreement”), dated as of the date hereof and attached hereto as Attachment A, pursuant to which Generator grants Utility, as security for Generator’s payment obligations hereunder, a first priority security interest in certain amounts that Utility may owe to Generator under this Agreement and any and all payments Generator receives from PJM for Generator's supply of unforced capacity in the RPM in each Delivery Year for, and to the extent to which, Generator has any payment obligation to Utility under Section 4.1.2 of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and mutual terms and conditions set forth herein, and for further good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

**SECTION 1**  
**DEFINITIONS; RULES OF INTERPRETATION**

1.1. Defined Terms. Unless otherwise required by the context in which any term appears, initially capitalized terms used herein have the following meanings:

“Act” is defined in the first Recital hereof.

“Affiliate” means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes of this definition, “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least ten percent (10%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least ten percent (10%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

“Agreement” is defined in the Preamble hereof.

“Annual Forecasted Peak Demand” means in the case of Utility, its forecasted peak demand and, in the case of another Electric Public Utility, the forecasted peak demand of such other Electric Public Utility, for a given Delivery Year as determined by PJM and published in the most recent PJM Load Forecast Report issued before the start of the Delivery Year.

“Applicable Law” means all legally binding constitutions, treaties, statutes, laws, ordinances, rules, regulations, orders, interpretations, permits, judgments, decrees, injunctions, writs and orders of any Governmental Authority or arbitrator that apply to the LCAPP or any one or both of the parties to this Agreement or the terms hereof.

“Automated Clearing House” or “ACH” means an electronic network for financial transactions administered by NACHA-The Electronic Payments Association.

“Available Capacity Amount” means the lesser of: (i) the quantity of unforced capacity from the Capacity Facility that is offered by Generator and cleared by PJM in the relevant Base Residual Auction, and (ii) the quantity of unforced capacity from the Capacity Facility that the Capacity Facility is deemed by PJM to be capable of supplying for the Delivery Year in accordance with the RPM Rules; provided, however, if the Available Capacity Amount exceeds the Awarded Capacity Amount then in such case for purposes of the calculations required under Section 4.1, the Available Capacity Amount shall equal the Awarded Capacity Amount.

“Awarded Capacity Amount” means the amount of capacity for which the Board has approved Generator to enter into standard offer capacity agreements with the Electric Public Utilities pursuant to the Act, which amount is [ ] megawatts.

“Awarded Commencement Date” means the first day of the first Delivery Year for which the Board has approved Generator to receive or make payments under standard offer capacity agreements with the Electric Public Utilities pursuant to the Act, which date is June 1, [    ].

“Base Residual Auction” means the primary auction conducted by PJM as part of PJM’s Reliability Pricing Model to secure electrical capacity as necessary to satisfy the capacity requirements imposed under the PJM reliability assurance agreement for the Delivery Year.

“Board” means the New Jersey Board of Public Utilities or any successor agency.

“Business Day” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday.

“Calculation Dispute” is defined in Section 12.2.1.

“Capacity Facility” is defined in the third Recital hereof.

“Commencement Date” means the last to occur of: (i) the Awarded Commencement Date; and (ii) the date the Capacity Facility achieves Commercial Operation.

“Commercial Operation” means the completion of the interconnection of the Capacity Facility to the PJM transmission system in accordance with the interconnection agreement between PJM and Generator and Generator’s certification that the Capacity Facility is substantially complete pursuant to the terms of the Capacity Facility’s major construction contracts.

“Conclusion Date” means May 31, [            ].

“Defaulting Party” is defined in Section 9.1.1.

“Delivery Year” means each 12-month period from June 1<sup>st</sup> through May 31<sup>st</sup> numbered according to the calendar year in which it ends beginning on the Commencement Date and concluding on the Conclusion Date.

“Delivery Term” means the period commencing with the Commencement Date and concluding on the Conclusion Date.

“Denial of Utility’s Recovery” is defined in Section 8.1.3.

“Dispute” is defined in Section 12.1.

“Early Termination Date” means the date determined in accordance with Section 9.1.

“Effective Date” is defined in the Preamble hereof.

“EFORD” means a measure calculated by PJM of the probability that an electric power generating unit will not be available due to a forced outage or forced derating when there is a demand on the unit to generate.

“Electric Public Utility” means each of Public Service Electric and Gas Company, Atlantic City Electric Company, Jersey Central Power & Light Company, and Rockland Electric Company.

“Eligible Generator” means a developer of an electric power generating facility that the Board has determined to qualify as an “eligible generator” pursuant to the Act.

“Elimination or Substantial Modification of RPM” is defined in Section 8.1.4.

“Execution or Clearing Requirement” is defined in Section 8.1.5.

“Event of Default” is defined in Section 7.1.

“Facility Lender” means any lender providing senior or subordinated construction, interim or long-term debt or equity financing or refinancing to Generator for or in connection with the development, construction, purchase, installation or operation of the Capacity Facility, whether that financing or refinancing takes the form of private debt, public debt or any other form (including debt financing or refinancing provided to a member or other direct or indirect owner of Generator), including any equity and tax investor directly or indirectly providing financing or refinancing for the Capacity Facility or purchasing equity ownership interests of Generator and/or its Affiliates, and any trustee or agent acting on their behalf, and any Person providing interest rate protection agreements to hedge any of the foregoing obligations.

“Generator” is defined in the Preamble hereof.

“Governmental Authority” means any international, national, federal, provincial, state, municipal, county, regional or local government, administrative, judicial or regulatory entity with jurisdiction over any party hereto, this Agreement, the LCAPP, or PJM, and includes any department, commission, bureau, board, administrative agency or regulatory body of any government.

“Interest Rate” means for any date, the per annum rate of interest equal to the yield on Two-Year U.S. Treasury Notes as may be published in *The Wall Street Journal* on such day (or if not published on such day the most recent preceding day on which published) plus sixty (60) basis points.

“Illegality” is defined in Section 8.1.1.

“Invalidity of the Act” is defined in Section 8.1.2.

“LCAPP” is defined in the first Recital hereof.

“Month” means a calendar month commencing on the first day of such month and ending on the last day of such month.

“NACHA Operating Rules” means the rules issued by NACHA – The Electronic Payments Association for the administration of the Automated Clearing House.

“Non-Defaulting Party” is defined in Section 9.1.1.

“Payment Date” is defined in Section 2.2.

“Person” means an individual, partnership, corporation, limited liability company, joint venture, association, trust, unincorporated organization, Governmental Authority, or other form of entity.

“PJM Interconnection, L.L.C.” or “PJM” means the regional transmission organization that manages the regional, high-voltage electricity grid serving New Jersey and all or parts of other states and, among other things, administers the Reliability Pricing Model, and any successor.

“Reliability Pricing Model” or “RPM” means PJM’s capacity-market model that secures capacity on behalf of electric load serving entities to satisfy load obligations not satisfied through the output of electric generation facilities owned by those entities or otherwise secured by those entities through bilateral contracts.

“Resource Clearing Price” or “RCP” means the clearing price (\$/MW-day) for the applicable Delivery Year established by the Base Residual Auction and posted by PJM for the unforced capacity offered into the Base Residual Auction from the Capacity Facility and cleared by PJM.

“RPM Rules” means the provisions of PJM’s tariffs and agreements accepted by the Federal Energy Regulatory Commission and the provisions of PJM’s manuals governing the Reliability Pricing Model, as in effect from time to time during the term of this Agreement.

“Security Agreement” is defined in the ninth Recital hereof.

“Standard Offer Capacity Price” or “SOCP” means the price at which the Board has approved Generator to enter into standard offer capacity agreements with the Electric Public Utilities pursuant to the Act, which price is \$[ ]/MW-day.

“Termination Date” means the earlier to occur of (i) the Conclusion Date or (ii) the Early Termination Date.

“Termination Event” is defined in Section 8.1.

“Total Annual Forecasted Peak Demand” for a given Delivery Year means the sum of the Annual Forecasted Peak Demands for each Electric Public Utility for such Delivery Year.

“Transaction” means the calculations, payments and payment obligations under Section 4.1 and the related provisions of this Agreement (including without limitation Section 2.1).

“Unpaid Amounts” owing to any party means, with respect to an Early Termination Date, the amounts that became payable to such party under Section 2.1 in respect of the Transaction on or prior to such Early Termination Date (including amounts not paid by the other party on the ground of the occurrence of an Event of Default, in accordance with Section 2.4) and which remain unpaid as at such Early Termination Date, together with (to the extent permitted under Applicable Law) interest from (and including) the date such amounts were to have been paid to (but excluding) such Early Termination Date, at the Interest Rate. Such amounts of interest will be calculated on the basis of a 360-day year, daily compounding and the actual number of days elapsed.

“Utility” is defined in the Preamble hereof.

“Utility’s Load-Ratio Factor” means the percentage derived by dividing Utility’s Annual Forecasted Peak Demand by Total Annual Forecasted Peak Demand, both for a given Delivery Year.

1.2. Rules of Interpretation

1.2.1. General. Unless otherwise required by the context in which any term appears, (a) the singular includes the plural and vice versa; (b) references to “Articles,” “Sections,” “Schedules,” “Annexes,” “Appendices” or “Exhibits” (if any) are to articles, sections, schedules, annexes, appendices or exhibits hereof; (c) all references to a particular entity or an electricity or gas market price index include a reference to such entity’s or index’s successors and (if applicable) permitted assigns; (d) the words “herein,” “hereof” and “hereunder” refer to this Agreement as a whole and not to any particular Section or subsection hereof; (e) references to this Agreement include a reference to all appendices, annexes, schedules and exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time; (f) the masculine includes the feminine and neuter and vice versa; (g) the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined; (h) “including” means “including, without limitation” or “including, but not limited to”; and (i) the word “or” is not necessarily exclusive.

1.2.2. Terms Not to be Construed For or Against Either Party. Each term hereof will be construed simply according to its fair meaning and not strictly for or against either party. No term hereof will be construed against a party on the ground that the party is the author of that provision.

1.2.3. Headings. The headings used for the sections and articles hereof are for convenience and reference purposes only and will in no way affect the meaning or interpretation of the provisions hereof.



1.2.4. Rounding. Calculations of megawatt-days will be rounded to the nearest third decimal place.

## **SECTION 2** **OBLIGATIONS**

2.1. General Conditions. Each party will make each payment specified herein to be made by it, including without limitation the payments under Section 2.2, subject to Section 2.4 and the other provisions hereof.

2.2. Calculation and Payment of Transaction Amounts. In the case of the first Delivery Year, no less than thirty (30) days prior to the Awarded Commencement Date and, in the case of each subsequent Delivery Year, no less than thirty (30) days prior to the commencement of such Delivery Year, Utility will provide a statement to Generator of the result of the calculation under Section 4.1 for the Delivery Year, specifying the party obligated to make payments with respect to such Delivery Year, and the monthly amount of such payments, including any correction made under Section 2.9. The party obligated to make payments will make such payments with respect to each Month on or before the last Business Day of the subsequent Month (the "Payment Date") to the account specified herein in freely transferable funds via electronic funds transfer through a system that provides for final credit no later than one business day after transfer including without limitation the ACH. If payment is made through ACH, the paying party will originate the ACH credit for receipt the following Business Day. Each party agrees to be bound by the NACHA Operating Rules in connection with payments made via ACH and agrees that the origination of all ACH transactions will comply with applicable provisions of U.S. law. Whenever payments are made via ACH, the receiving party hereby authorizes the paying party to initiate credit entries to the account of the receiving party at the receiving party's financial institution as set forth in Section 2.6. This authorization will remain in full force and effect until a party has received prior written notice from the other party of its termination, such notice to be provided in such time and in such manner as to afford the party receiving such notice a reasonable opportunity to act on it.

2.3. Obligations of Generator.

2.3.1. Generator shall cause the Capacity Facility to qualify under the RPM Rules as a capacity resource in an amount no less than the Awarded Capacity Amount for the Base Residual Auction associated with each Delivery Year during the term of this Agreement, commencing upon the Commencement Date.

2.3.2. Generator shall cause the Capacity Facility to achieve commercial operation no later than the Awarded Commencement Date.

2.3.3. Throughout the Delivery Term, Generator shall:

(a) Cause the Capacity Facility to comply with all obligations of a capacity resource under the RPM Rules, including without limitation the obligations relating to the submission of offers to supply electric energy and ancillary services in PJM markets, and Generator shall bear all costs associated with such compliance, including without limitation all fees and penalties imposed by PJM, and no such fees or penalties shall be charged to Utility;

(b) Submit a supply offer for the Awarded Capacity Amount from the Capacity Facility in accordance with the RPM Rules in the Base Residual Auction associated with each Delivery Year during the term of this Agreement, which supply offer shall clear in each such Base Residual Auction;

(c) Provide on a timely basis (which, in the case of documentation provided to Generator by PJM, shall mean within five (5) Business Days of Generator's receipt of such documentation) all documentation required by Utility to make the calculations and notifications required by Sections 2.2 and 4.1, including without limitation: (i) documentation provided to Generator by PJM after the conclusion of each Base Residual Auction showing the amount of unforced capacity offered from the Capacity Facility and cleared by PJM in such Base Residual Auction; (ii) documentation provided to Generator by PJM in advance of each Delivery Year showing the all EFORd measurements for the Capacity Facility for the Delivery Year; (iii) the result of any capability test of the Capacity Facility conducted by PJM; (iv) documentation provided to Generator by PJM in advance of each Delivery Year showing the Available Capacity Amount for the Delivery Year or required to calculate the Available Capacity Amount for the Delivery Year; and (v) documentation notifying Generator of any correction to an input to a calculation, as provided in Section 2.9; provided that Generator may redact from any such documentation data that do not relate to the Capacity Facility;

(d) Provide on a timely basis all documentation reasonably requested by Utility to demonstrate Generator's compliance with all of its obligations as set forth in this Section 2.3 and affirmative covenants as set forth in Section 6. Utility shall have the right, upon reasonable notice to Generator, to request such information once each year and, in addition, upon the occurrence of any event or upon Utility's receipt of information that gives Utility reasonable grounds for concern in good faith as to Generator's compliance with one or more such obligations; and

(e) Fulfill all Generator's obligations under, and otherwise comply with all terms of, the Security Agreement.

2.4. Conditions Precedent to Obligations. Each obligation of each party under this Agreement is subject to (1) the condition precedent that no Event of Default with respect to the other party has occurred and is continuing and (2) the condition precedent that no Early Termination Date has occurred or been effectively designated.

2.5. Suspension of Obligations.

In the event the Board exercises its authority under the Act to suspend the applicability of any provision of the Act that (i) imposes an obligation on either party to make any payment to another party; (ii) assures Utility of recovery from ratepayers through a non-bypassable irrevocable charge of all costs directly or indirectly associated with this Agreement or any costs of the agent retained to implement provisions of the Act; or (iii) imposes an obligation on Generator to offer and clear capacity from the Capacity Facility in the Base Residual Auction, then, no payment pursuant to Sections 2.1, 2.2 and 4.1 with respect to any Delivery Year or portion of a Delivery Year that is within the period of suspension shall be owed by either party, and the non-performance of the requirements of those provisions with respect to the period of suspension shall not be an Event of Default.

2.6. Accounts; Change of Account

2.6.1. Payments are to be made to the following accounts:

Generator:

Pay:

For the Account of:

Account Number:

Fed. ABA Number:

Utility:

Pay:

For the Account of:

Account Number:

Fed. ABA Number:

2.6.2. Either party may change its account for receiving a payment by giving written notice to the other party, which notice will be effective for the next payment date that is at least five Business Days after the effective date of such notice unless such other party gives timely notice of a reasonable objection to such change.

2.6.3. The parties agree that any payments hereunder shall be deemed made in full when confirmation is received from the financial institution holding the account into which payment is made that the payment has been successfully received in immediately available funds. Such confirmation shall be considered by the parties as conclusive evidence of receipt.

2.7. Default Interest; Other Amounts. Prior to the occurrence or effective designation of an Early Termination Date, a party that defaults in the performance of any payment obligation will, to the extent permitted by law and subject to Section 9.3.3, be required to pay interest (before as well as after judgment) on the overdue amount to the other party on demand for the period from (and including) the original due date for payment to (but excluding) the date of actual payment, at the Interest Rate. Such interest will be calculated on the basis of a 360-day year, daily compounding and the actual number of days elapsed. Each payment will be made in

U.S. Dollars in freely transferable funds via electronic funds transfer, as set forth in Section 2.2, on the relevant Payment Date (or if that date is not a Business Day, on the next Business Day).

2.8. Calculations. Utility shall make all calculations of payments due under Sections 2.2 and 4.1 in accordance with the terms of this Agreement, in good faith and with commercial reasonableness, and its determinations and calculations will be binding, subject to the resolution of any Calculation Dispute. Inaccuracy in any calculation shall not be an Event of Default. The sole remedy of the parties with respect to any inaccuracy of a calculation will be the right (but not the obligation), to commence a Calculation Dispute.

2.9. Corrections to Input to Transaction Payment. If PJM revises any of the inputs required for Utility to calculate any payment required under Section 4.1 within the time permitted by PJM's applicable tariff or rate schedule for the revision of PJM charges, Utility will reflect the amount (if any) that is payable as a result of that correction (including without limitation interest on such amount payable from the date of original payment under Section 4.1 through the date of payment under this Section 2.9 at the Interest Rate) in the calculation of payment of payments due for the Delivery Year after Utility receives notice of the revision. Utility shall calculate the correction so as to place the parties in the same economic position after such payment as they would have been had the correct input been employed initially.

### **SECTION 3 TERM AND TERMINATION**

This Agreement is effective as of the Effective Date and will remain in effect until the later to occur of the Termination Date or the fulfillment by the parties of all obligations hereunder.

### **SECTION 4 TRANSACTIONS**

4.1. Transactions.

4.1.1. If, for a Delivery Year, the Standard Offer Capacity Price is greater than the Resource Clearing Price then, subject to Section 2.4, Utility will pay Generator each Month during the Delivery Year one-twelfth of the product of (i) the difference between the Standard Offer Capacity Price and the Resource Clearing Price for the applicable Delivery Year, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year; and (iv) Utility's Load-Ratio Factor for the applicable Delivery Year.

4.1.2. If, for a Delivery Year, the Resource Clearing Price is greater than the Standard Offer Capacity Price then, subject to Section 2.4, Generator will pay Utility each Month an amount equal to one-twelfth of the product of (i) the difference between the Resource

Clearing Price for the applicable Delivery Year and the Standard Offer Capacity Price, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year, and (iv) Utility's Load-Ratio Factor for the applicable Delivery Year .

4.2. Structure of Transaction. Nothing in this Agreement shall entitle or obligate Utility to purchase or take delivery of capacity, electric energy or ancillary services from the Capacity Facility and Utility does not take title to or assume any risk of loss for any product or service generated, delivered or sold by Generator from the Capacity Facility.

## **SECTION 5** **REPRESENTATIONS AND WARRANTIES**

5.1. Mutual Representations and Warranties. Each party represents to the other party, continuing from the Effective Date throughout the Delivery Term, that:

5.1.1. It is duly organized and validly existing under the laws of the jurisdiction of its organization or incorporation and, if relevant under such laws, in good standing.

5.1.2. It has the power to execute this Agreement, the Security Agreement and any other documentation relating hereto or thereto, to deliver this Agreement, the Security Agreement and any other documentation that it is required by this Agreement or the Security Agreement to deliver and to perform its obligations hereunder or thereunder and has taken all necessary action to authorize such execution, delivery and performance.

5.1.3. Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets.

5.1.4. Its obligations under this Agreement and the Security Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).

5.1.5. All governmental and other consents that are required to have been obtained by it with respect to this Agreement and the Security Agreement are in full force and effect and all conditions of any such consents have been complied with.

5.1.6. No Event of Default or event which, with notice or the passage of time or both, would constitute an Event of Default has occurred and is continuing and no such event

5.1.7. All applicable information that is furnished in writing by or on behalf of it to the other party required by Section 6.1 is, as of the date of the information, true, accurate and complete in every material respect.

5.1.8. It is an “eligible contract participant” within the meaning of Section 1(a)18 of the Commodities Exchange Act, as amended.

5.1.9. In connection with the negotiation of, the entering into, and the confirming of the execution of, this Agreement: (i) it is acting as principal (and not as agent or in any other capacity, fiduciary or otherwise); (ii) the other party is not acting as a fiduciary or financial or investment advisor for it; (iii) it is not relying upon any representations (whether written or oral) of the other party other than the representations expressly set forth in this Agreement; (iv) the other party has not given to it (directly or indirectly through any other Person) any advice, counsel, assurance, guarantee, or representation whatsoever as to the expected or projected success, profitability, return, performance, result, effect, consequence, or benefit (either legal, regulatory, tax, financial, accounting, or otherwise) hereof; (v) it has consulted with its own legal, regulatory, tax, business, investment, financial, and accounting advisors to the extent it has deemed necessary, and it has made its own decision to enter into the Transaction based upon its own judgment and upon any advice from such advisors as it has deemed necessary, and not upon any view expressed by the other party; and (vii) it is entering into this Agreement with a full understanding of all the risks hereof and thereof (economic and otherwise), and it is capable of assuming and willing to assume (financially and otherwise) those risks.

5.1.10. It is a “United States person” (within the meaning of section 7701(a)(30) of the Internal Revenue Code of 1986, as amended, and is exempt from backup withholding under Code section 3406 and relevant Treasury Regulations.

5.2. Generator’s Representations and Warranties. Generator hereby represents and warrants to Utility as of the Effective Date that:

5.2.1. Generator’s selection to participate in the LCAPP has been approved by the Board.

5.2.2. Generator is an Eligible Generator approved by the Board pursuant to the Act to enter into standard offer capacity agreements with the Electric Public Utilities for the Awarded Capacity Amount at the SOCP.

5.2.3. Generator will not, either alone or in combination with any Affiliate of Generator that is an Eligible Generator, enter into more than 700 MW of financially-settled standard offer capacity agreements pursuant to the LCAPP.

**SECTION 6**  
**AFFIRMATIVE COVENANTS**

Each party agrees with the other that, so long as either party has or may have any obligation hereunder:

6.1. Furnish Specified Information.

6.1.1. Each party will deliver to the other party such proof of the names, true signatures and authority of Persons signing this Agreement on its behalf as the other party may reasonably request upon execution hereof;

6.1.2. Generator will deliver to Utility on a timely basis:

(a) All information required by the Utility to perform the calculations specified in Sections 2. 2 and 4.1, including without limitation information supplied to Generator by PJM;

(b) All documents, including all written notifications and other communications from PJM, related to Generator's compliance or non-compliance with the RPM Rules

6.2. Maintain Authorizations. Each party will use all reasonable efforts, including the maintenance of records and provision of notices, to maintain in full force and effect all consents, licenses or approvals of PJM and of any Governmental Authority or other authority that are required to be obtained by it with respect to this Agreement and the Security Agreement and its obligations hereunder and thereunder and will use all reasonable efforts to obtain any that may become necessary in the future.

6.3. Comply with Laws and RPM Rules. Each party will comply in all material respects with all Applicable Laws and orders and all RPM Rules to which it may be subject if failure so to comply would materially impair its ability to perform its obligations hereunder or under the Security Agreement.

**SECTION 7**  
**EVENTS OF DEFAULT**

7.1. Events of Default. The occurrence at any time with respect to a party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:

7.1.1. Failure to Pay. Failure by the party to make, when due, any payment under this Agreement required to be made by it if such failure is not remedied on or before the third (3<sup>rd</sup>) Business Day after notice of such failure is given to the party.

7.1.2. Failure to Provide Information.

Failure by Generator to provide to Utility such information or documentation required by Section 2.3.3 or Section 6.1.2 if such failure is not remedied on or before the fifth (5<sup>th</sup>) Business Day after notice of such failure is given to Generator by Utility.

7.1.3. Breach of Agreement. Failure by the party to comply with or perform any agreement or obligation (other than an obligation to make any payment under this Agreement or to provide information or documentation) to be complied with or performed by the party in accordance with this Agreement if such failure is not remedied on or before the thirtieth (30<sup>th</sup>) day after notice of such failure is given to the party, or, in the case of a failure to comply with any applicable provision of the RPM Rules, within the time (if any) provided in the RPM Rules to remedy such failure.

7.1.4. Misrepresentation. A representation made or repeated by the party in this Agreement proves to have been incorrect or misleading in any material respect when made or repeated or deemed to have been made or repeated and such misrepresentation is not cured within thirty (30) days after such misrepresentation is made or repeated;

7.1.5. Bankruptcy. The party: (1) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (B) is not dismissed, discharged, stayed or restrained in each case within fifteen (15) days of the institution or presentation thereof; (5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; (7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within fifteen (15) days thereafter; (8) causes or is subject to any event with respect to it which, under the Applicable Laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) (inclusive); or (9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts; or

7.1.6. Merger Without Assumption. The party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity and, at



the time of such consolidation, amalgamation, merger or transfer the resulting, surviving or transferee entity fails to assume all the obligations of such party hereunder or under the Security Agreement.

7.1.7. Failure to Achieve Commercial Operation of the Capacity Facility.

Generator fails to cause the Capacity Facility to achieve commercial operation by no later than the six (6) months after the Awarded Commencement Date.

7.1.8. Failure to Participate in a Base Residual Auction

With respect to Generator, Generator fails to submit a supply offer for an amount equal to ninety percent (90%) or more of the Awarded Capacity Amount from the Capacity Facility in any Base Residual Auction with respect to a Delivery Year during the Delivery Term.

7.1.9. Failure to Clear a Base Residual Auction

With respect to Generator, Generator's supply offer from the Capacity Facility fails to clear in any Base Residual Auction with respect to a Delivery Year during the Delivery Term.

7.1.10. Security Agreement Default.

With respect to Generator: (i) failure by Generator to comply with any provision of, or to perform any of its obligations under, the Security Agreement if such failure is continuing after any applicable grace period has elapsed; (ii) the expiration or termination of the Security Agreement or the failing or ceasing of the Security Agreement to be in full force and effect; (iii) Generator disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, the Security Agreement; or (iv) a default or event of default, howsoever characterized, occurs under the Security Agreement.

7.1.11. Reliability Must Run or Cost of Service Contract

With respect to Generator, Generator seeks or enters into a reliability must run contract, cost of service contract or similar agreement for all or any part of the output of the Capacity Facility.

**SECTION 8**  
**TERMINATION EVENTS**

8.1. Termination Events. The occurrence at any time of any of the following events constitutes a Termination Event (a “Termination Event”).

8.1.1. Illegality. Due to the adoption of, or any change in, any Applicable Law after the Effective Date, or due to the promulgation of, or any change in, the interpretation by any court, tribunal or regulatory authority with competent jurisdiction of any Applicable Law after such date, it becomes unlawful (other than as a result of a breach by the party of Section 6.2) for a party:

- (1) to perform any absolute or contingent obligation to make a payment or to receive a payment in respect of the Transaction or to comply with any other material provision of this Agreement;
- (2) to perform any contingent or other obligation which the party has or any other material provision of this Agreement; or
- (3) to perform its obligations under the Security Agreement, to maintain the security interest under the Security Agreement or to maintain the first priority perfected status of such security interest.

8.1.2. Invalidity of the Act. If a court invalidates or declares unconstitutional the Act or portion thereof requiring or specifying some performance, right, or obligation of Utility or Generator.

8.1.3. Denial of Utility’s Recovery. If the Board or any court with jurisdiction denies Utility, or fails to uphold Utility’s right to, timely and complete recovery from ratepayers through a non-bypassable, irrevocable charge of any payment under this Agreement or any other cost directly or indirectly arising from Utility’s performance of this Agreement or any costs of the agent retained to implement provisions of the Act.

8.1.4. Elimination or Substantial Modification of RPM. If PJM’s RPM is eliminated or modified in such a way that the performance, calculation and payment of the Transaction set forth in Sections 2 and 4 cannot be performed or implemented.

8.1.5. Execution or Clearing Requirement. The Transaction is determined to be subject to any requirement that it be executed or cleared on an exchange or a multiparty platform or similar facility.

**SECTION 9**  
**REMEDIES**

9.1. Right to Terminate Following Event of Default or Termination Event.

9.1.1. If at any time an Event of Default with respect to a party (the “Defaulting Party”) has occurred and is then continuing, then: (i) in the case of an Event of Default under Section 7.1.9, an Early Termination Date will occur immediately without further action by Utility upon Utility’s obtaining notice of the results of a Base Residual Auction in which Generator’s supply offer from the Capacity Facility fails to clear; or (ii) in the case of any other Event of Default, the other party (the “Non-Defaulting Party”) may, by not more than twenty (20) days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date.

9.1.2. If at any time a Termination Event has occurred and is then continuing, then either party in the case of an Illegality, an Invalidity of the Act, an Elimination or Substantial Modification of RPM or an Execution or Clearing Requirement or Utility in the case of Denial of Utility’s Recovery, may, by not more than twenty (20) days notice to the other party specifying the relevant Termination Event, designate a day not earlier than the day such notice is effective as an Early Termination Date.

9.2. Effect of Designation.

9.2.1. If notice designating an Early Termination Date is given under Section 9.1, the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

9.2.2. Upon the occurrence or effective designation of an Early Termination Date, no further payments under Section 2.1 or 2.6 will be required to be made, and this Agreement shall be null and void, except with respect to the provisions hereof required to effect payments of the amounts, if any, payable in respect of an Early Termination Date, which amounts shall be determined and paid pursuant to Section 9.3.

9.3. Payments on Early Termination. If an Early Termination Date occurs, the following provisions will apply.

9.3.1. Events of Default. If the Early Termination Date results from an Event of Default, the Defaulting Party will pay the Non-Defaulting Party: (i) all Unpaid Amounts owing to the Non-Defaulting Party; (ii) all expenses payable under Section 9.4; and (iii), in the case of an Event of Default relating to participating in or clearing a Base Residual Auction, an amount equal to the product of (a) the amount, if any, by which the Resource Clearing Price for such Base Residual Auction exceeds the Standard Offer Capacity Price; (b) the Awarded Capacity Amount; (c) three hundred and sixty-five (365); and (d) the number of Delivery Years remaining in the Delivery Term starting with and including the Delivery Year associated with such Base Residual Auction.

9.3.2. Termination Events. If an Early Termination Date results from Section 8.1.1 (an Illegality), Section 8.1.2 (an Invalidity of the Act), or Section 8.1.5 (Execution or Clearing Requirement), each party shall return to the other party all amounts received from that party pursuant to Sections 2.2 and 4.1 of this Agreement. If an Early Termination Date results from Section 8.1.3 (a Denial of Utility's Recovery), the Generator shall return to Utility all amounts paid by Utility to Generator pursuant to Section 2.2 and 4.1 of this Agreement recovery of which has been denied Utility. If an Early Termination Date results from Section 8.1.4 (an Elimination or Substantial Modification of RPM), each party shall pay to the other all Unpaid Amounts owing pursuant to the terms of this Agreement.

9.3.3. Notice and Payment. The party designating an Early Termination Date shall provide notice of such Early Termination Date to the other party. Upon Utility's issuance or receipt of such notice, Utility shall, as soon as practicable, calculate the amounts payable under Section 9.3.1 or 9.3.2, as applicable, and shall provide the calculation to the parties, specifying the party who is obligated to pay and the amount of such payment. An amount calculated as being due in respect of an Unpaid Amount will be payable, as applicable: (i) on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default); or (ii) on the day which is two (2) Business Days after the date on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under Applicable Law) interest thereon (before as well as after judgment), from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Interest Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.

9.4. Expenses. A Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees, incurred by the Non-Defaulting Party by reason of the enforcement and protection of its rights hereunder or under the Security Agreement or by reason of the early termination of the Transaction, including, but not limited to, costs of collection.

9.5. LIMITATION OF LIABILITY. NO PARTY WILL BE REQUIRED TO PAY OR BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR PUNITIVE DAMAGES (WHETHER OR NOT ARISING FROM ITS NEGLIGENCE) TO ANY OTHER PARTY EXCEPT TO THE EXTENT THAT THE PAYMENTS REQUIRED TO BE MADE PURSUANT HERETO ARE DEEMED TO BE SUCH DAMAGES. IF AND TO THE EXTENT ANY PAYMENT REQUIRED TO BE MADE PURSUANT HERETO IS DEEMED TO CONSTITUTE LIQUIDATED DAMAGES, THE PARTIES ACKNOWLEDGE AND AGREE THAT SUCH DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE AND THAT SUCH PAYMENT IS INTENDED TO BE A REASONABLE APPROXIMATION OF THE AMOUNT OF SUCH DAMAGES AND NOT A PENALTY.

**SECTION 10**  
**TRANSFER**

10.1. Restriction of Assignments. Except as otherwise provided in this Section 10, neither party may assign this Agreement without (i) the other party's prior written consent, such consent not to be unreasonably delayed, conditioned or withheld, it being understood that refusal to consent to the assignment of the Agreement to a Person that does not own or control the operation of the Capacity Facility shall not be deemed to be unreasonable, and (ii) the prior written consent of the Board. Any assignment in violation of this provision shall be void.

10.2. Generator's Assignment Without Consent. Notwithstanding the foregoing or anything expressed or implied herein to the contrary, Generator may, without the prior written consent of Utility and the Board, assign this Agreement (i) to a purchaser of all or substantially all of the assets of Generator; (ii) in connection with the grant of a security interest to any Facility Lender, provided that such security interest does not interfere with the rights or obligations of any party under the Security Agreement, or (iii) in connection with a merger of Generator with another Person or any other transaction resulting in a direct or indirect change of control of Generator; provided that such purchaser, Facility Lender, or the Person surviving such merger, as applicable, agrees in writing to be bound by the terms of this Agreement, including the satisfaction of all obligations through its ownership of or control over the operation of the Capacity Facility, and not from another electric generating facility.

10.3. Utility's Assignment Without Consent. Notwithstanding the foregoing or anything expressed or implied herein to the contrary, Utility may, without the prior written consent of Generator, assign this Agreement (i) to a purchaser of all or substantially all of the assets of Utility; or (iii) in connection with a merger of Utility with another Person or any other transaction resulting in a change of control of Utility; provided that such purchaser, Affiliate or the Person surviving such merger, as applicable, agrees in writing to be bound by the terms of this Agreement.

10.4. Assumption by Assignee; No Release from Liabilities. Any permitted assignee or transferee of a party's interest in this Agreement shall assume all existing and future obligations of such party to be performed under this Agreement. Whether or not prior written consent to an assignment is required hereunder, the assignor shall give notice to the other party promptly after a permitted assignment of this Agreement. Unless otherwise agreed to by the parties and except as set forth in Sections 10.2 and 10.3 above, upon any permitted assignment of this Agreement to an assignee and such assignee's written assumption of this Agreement, the assigning party shall be released from the performance of its obligations under this Agreement for the period from and after the date of such assignment and assumption; provided, however, that in all other cases, the assigning party shall continue to be bound by this Agreement unless the parties otherwise agree.

**SECTION 11**  
**NOTICES**

11.1. Effectiveness. Any notice or other communication in respect hereof may be given in any manner set forth below (except that a notice or other communication under Section 7, 8 or 9 will not be effective if given by facsimile transmission or electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided and will be deemed effective as indicated: (i) if in writing and delivered in person or by courier, on the date it is delivered; (ii) if sent by telex, on the date the recipient's answerback is received; (iii) if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine); (iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or (v) if sent by electronic messaging system, on the date that electronic message is received, unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Business Day, in which case that communication will be deemed given and effective on the first following day that is a Business Day.

11.2. Addresses for Notices.

11.2.1. Addresses for notices or communications to Generator:

Address:

11.2.2. Address for notices or communications to Utility:

Address:

11.2.3. Change of Addresses. Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.

## SECTION 12

### RESOLUTION OF DISPUTES

#### 12.1. Notice of Dispute.

In the event of any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof should arise between the parties (a "Dispute"), a party may declare a Dispute by delivering to the other party a written notice identifying the disputed issue.

#### 12.2. Resolution by the Parties

12.2.1. If the Dispute relates to the accuracy of Utility's calculation of any payment required to be made under this Agreement (a "Calculation Dispute"), then Generator must provide written notice of the Dispute to Utility within ten (10) Business Days of Generator's receipt of Utility's calculation of the payment pursuant to Section 2.2., which notice must state the nature of Generator's disagreement with Utility's calculation and include all documentation upon which Generator bases its disagreement. Within ten (10) Business Days of Utility's receipt of a written notice claiming a Calculation Dispute, Utility shall either: (a) notify Generator that Utility agrees the initial calculation was in error and provide a revised calculation of the payment that is the subject of the Calculation Dispute; or (b) provide Generator with the basis of Utility's determination that the calculation was correct, including all documentation upon which Utility relies. If Generator does not accept Utility's revised calculation or Utility's explanation of the original calculation, then, within ten (10) Business Days, executives of both parties shall meet at a mutually agreeable time and place and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute.

12.2.2. If the Dispute is not a Calculation Dispute, then upon receipt of a written notice claiming a Dispute, executives of both parties shall meet at a mutually agreeable time and place within ten (10) Business Days after delivery of such notice and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute. In such meetings and exchanges, a party shall have the right to designate as confidential any information that such party offers. No confidential information exchanged in such meetings for the purpose of resolving a Dispute may be used by a party in litigation against the other party.

12.2.3. Any correction to a calculation upon which the parties agree to resolve the Calculation Dispute, shall be reflected in the Utility's calculation under Section 2.2 for the next Delivery Year following the resolution of the Dispute.

#### 12.3. Optional Resolution Through Arbitration

If the parties are unable to resolve a Dispute between themselves pursuant to Section 12.2, then, if both parties mutually agree to submit the Dispute to binding arbitration, then the disputing party may initiate binding arbitration in Newark, New Jersey, conducted in accordance with the then current American Arbitration Association's ("AAA") Large, Complex Commercial Rules or other mutually agreed procedures. If the parties do not mutually agree to submit a Dispute to binding arbitration, then either party may initiate a proceeding in a court of competent jurisdiction with respect to the Dispute.

12.4. Effect of Dispute

The pendency of a Dispute shall not suspend, either: (a) the obligation of the parties to perform their obligations under this Agreement, including the obligation to make payments, prior to a Termination Date; or (b) the effectiveness of a notice of an Event of Default under Section 9.1.1 or a notice designating an Early Termination Date under Section 9.1.2.

**SECTION 13**  
**MISCELLANEOUS**

13.1. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto.

13.2. Amendments. No amendment, modification or waiver in respect hereof will be effective unless in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or electronic messages on an electronic messaging system.

13.3. Remedies Cumulative. Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.

13.4. Counterparts. This Agreement (and each amendment, modification and waiver in respect of it) may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

13.5. No Waiver of Rights. A failure or delay in exercising any right, power or privilege in respect hereof will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

13.6. Taxes



Each party shall be responsible for all federal, state, and local taxes incurred by it as result of entering into this Agreement. Without limiting the foregoing, it is understood and agreed that Generator shall be solely responsible for all taxes imposed on or assessed to the Capacity Facility, any payments obtained by Generator pursuant to this Agreement, and any payments Generator receives resulting from participation in any PJM market.

13.7. Relationship of the Parties

The parties acknowledge that the relationship between Utility and Generator is an independent contractual relationship and nothing in this Agreement shall create any joint venture, partnership or principal/agent relationship between Utility and Generator. Neither Utility nor Generator shall have any right, power or authority to enter into any agreement or commitment, act on behalf of, or otherwise bind the other party in any way.

13.8. Governing Law and Jurisdiction

13.8.1. Governing Law. This Agreement will be governed by and construed in accordance with the substantive law of the State of New Jersey, without regard to the application of such state's laws relating to conflicts of laws.

13.8.2. Jurisdiction. With respect to any suit, action or proceedings relating hereto ("Proceedings"), each party irrevocably: (i) submits to the exclusive jurisdiction of the courts of the State of New Jersey; and (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party. Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction in order to enforce any judgment obtained in any Proceedings referred to in the preceding sentence.

13.9. Waiver of Immunities. Each party irrevocably waives, to the fullest extent permitted by Applicable Law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of injunction, order for specific performance or for recovery of property, (iv) attachment of its assets (whether before or after judgment) and (v) execution or enforcement of any judgment to which it or its revenues or assets might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by Applicable Law, that it will not claim any such immunity in any Proceedings.

13.10. Waiver of Jury Trial. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH OF THE PARTIES HERETO WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY TRIAL HAS

BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED. EACH PARTY ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAVE BEEN INDUCED TO ENTER HEREINTO BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

*[Remainder of Page Intentionally Left Blank]*

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

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

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

**ATTACHMENT II**

**STANDARD OFFER CAPACITY AGREEMENT**

## STANDARD OFFER CAPACITY AGREEMENT

This STANDARD OFFER CAPACITY AGREEMENT (“Agreement”), dated as of [ ] (“Effective Date”), is entered into by and between [ UTILITY ], a corporation organized under the law of the New Jersey (“Utility”) and [ CAPACITY SELLER ], a corporation organized under the law of [ ] (“Generator”).

WHEREAS, the State of New Jersey has established the Long-Term Capacity Agreement Pilot Program (“LCAPP”) to promote construction of qualified electric generation facilities pursuant to P.L.\_\_\_\_ c. \_\_ (C.\_\_\_\_) (the “Act”);

WHEREAS, the Act requires that each Electric Public Utility enter into a standard offer capacity agreement as described in the Act and in a form approved by the New Jersey Board of Public Utilities with each Eligible Generator approved by the New Jersey Board of Public Utilities;

WHEREAS, Generator has commenced or intends to commence construction of an [ ] MW electric power generation facility located in [ ], [ ] after January 28, 2011 (the “Capacity Facility”);

WHEREAS, Generator is willing to commit to offer and clear [ ] MW of unforced capacity of the Capacity Facility into each Base Residual Auction conducted by PJM for all Delivery Years through the Conclusion Date.

WHEREAS, Generator is willing to commit to offer all the electric energy output and ancillary services of the Capacity Facility into the PJM markets during the Delivery Term;

WHEREAS, Generator’s selection to participate in the LCAPP as an Eligible Generator has been approved by the New Jersey Board of Public Utilities;

WHEREAS, this Agreement is in the form approved by the New Jersey Board of Public Utilities;

WHEREAS, Utility is an Electric Public Utility; and

WHEREAS, Generator and Utility have entered into a security agreement (the “Security Agreement”), dated as of the date hereof and attached hereto as Attachment A, pursuant to which Generator grants Utility, as security for Generator’s payment obligations hereunder, a first priority security interest in certain amounts that Utility may owe to Generator under this Agreement and any and all payments Generator receives from PJM for Generator's supply of unforced capacity in the RPM in each Delivery Year for, and to the extent to which, Generator has any payment obligation to Utility under Section 4.1.2 of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and mutual terms and conditions set forth herein, and for further good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

**SECTION 1**  
**DEFINITIONS; RULES OF INTERPRETATION**

1.1. Defined Terms. Unless otherwise required by the context in which any term appears, initially capitalized terms used herein have the following meanings:

“Act” is defined in the first Recital hereof.

“Affiliate” means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes of this definition, “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least ten percent (10%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least ten percent (10%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

“Agreement” is defined in the Preamble hereof.

“Annual Forecasted Peak Demand” means in the case of Utility, its forecasted peak demand and, in the case of another Electric Public Utility, the forecasted peak demand of such other Electric Public Utility, for a given Delivery Year as determined by PJM and published in the most recent PJM Load Forecast Report issued before the start of the Delivery Year.

“Applicable Law” means all legally binding constitutions, treaties, statutes, laws, ordinances, rules, regulations, orders, interpretations, permits, judgments, decrees, injunctions, writs and orders of any Governmental Authority or arbitrator that apply to the LCAPP or any one or both of the parties to this Agreement or the terms hereof.

“Automated Clearing House” or “ACH” means an electronic network for financial transactions administered by NACHA-The Electronic Payments Association.

“Available Capacity Amount” means the lesser of: (i) the quantity of unforced capacity from the Capacity Facility that is offered by Generator and cleared by PJM in the relevant Base Residual Auction, and (ii) the quantity of unforced capacity from the Capacity Facility that the Capacity Facility is deemed by PJM to be capable of supplying for the Delivery Year in accordance with the RPM Rules; provided, however, if the Available Capacity Amount exceeds the Awarded Capacity Amount then in such case for purposes of the calculations required under Section 4.1, the Available Capacity Amount shall equal the Awarded Capacity Amount.

“Awarded Capacity Amount” means the amount of capacity for which the Board has approved Generator to enter into standard offer capacity agreements with the Electric Public Utilities pursuant to the Act, which amount is [ ] megawatts.

“Awarded Commencement Date” means the first day of the first Delivery Year for which the Board has approved Generator to receive or make payments under standard offer capacity agreements with the Electric Public Utilities pursuant to the Act, which date is June 1, [ ].

“Base Residual Auction” means the primary auction conducted by PJM as part of PJM’s Reliability Pricing Model to secure electrical capacity as necessary to satisfy the capacity requirements imposed under the PJM reliability assurance agreement for the Delivery Year.

“Board” means the New Jersey Board of Public Utilities or any successor agency.

“Business Day” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday.

“Calculation Dispute” is defined in Section 12.2.1.

“Capacity Facility” is defined in the third Recital hereof.

“Commencement Date” means the last to occur of: (i) the Awarded Commencement Date; and (ii) the date the Capacity Facility achieves Commercial Operation.

“Commercial Operation” means the completion of the interconnection of the Capacity Facility to the PJM transmission system in accordance with the interconnection agreement between PJM and Generator and Generator’s certification that the Capacity Facility is substantially complete pursuant to the terms of the Capacity Facility’s major construction contracts.

“Conclusion Date” means May 31, [ ].

“Defaulting Party” is defined in Section 9.1.1.

“Delivery Year” means each 12-month period from June 1<sup>st</sup> through May 31<sup>st</sup> numbered according to the calendar year in which it ends beginning on the Commencement Date and concluding on the Conclusion Date.

“Delivery Term” means the period commencing with the Commencement Date and concluding on the Conclusion Date.

“Denial of Utility’s Recovery” is defined in Section 8.1.3.

“Dispute” is defined in Section 12.1.

“Early Termination Date” means the date determined in accordance with Section 9.1.

“Effective Date” is defined in the Preamble hereof.

“EFORD” means a measure calculated by PJM of the probability that an electric power generating unit will not be available due to a forced outage or forced derating when there is a demand on the unit to generate.

“Electric Public Utility” means each of Public Service Electric and Gas Company, Atlantic City Electric Company, Jersey Central Power & Light Company, and Rockland Electric Company.

“Eligible Generator” means a developer of an electric power generating facility that the Board has determined to qualify as an “eligible generator” pursuant to the Act.

“Elimination or Substantial Modification of RPM” is defined in Section 8.1.4.

“Execution or Clearing Requirement” is defined in Section 8.1.5.

“Event of Default” is defined in Section 7.1.

“Facility Lender” means any lender providing senior or subordinated construction, interim or long-term debt or equity financing or refinancing to Generator for or in connection with the development, construction, purchase, installation or operation of the Capacity Facility, whether that financing or refinancing takes the form of private debt, public debt or any other form (including debt financing or refinancing provided to a member or other direct or indirect owner of Generator), including any equity and tax investor directly or indirectly providing financing or refinancing for the Capacity Facility or purchasing equity ownership interests of Generator and/or its Affiliates, and any trustee or agent acting on their behalf, and any Person providing interest rate protection agreements to hedge any of the foregoing obligations.

“Generator” is defined in the Preamble hereof.

“Governmental Authority” means any international, national, federal, provincial, state, municipal, county, regional or local government, administrative, judicial or regulatory entity with jurisdiction over any party hereto, this Agreement, the LCAPP, or PJM, and includes any department, commission, bureau, board, administrative agency or regulatory body of any government.

“Interest Rate” means for any date, the per annum rate of interest equal to the yield on Two-Year U.S. Treasury Notes as may be published in *The Wall Street Journal* on such day (or if not published on such day the most recent preceding day on which published) plus sixty (60) basis points.

“Illegality” is defined in Section 8.1.1.

“Invalidity of the Act” is defined in Section 8.1.2.

“LCAPP” is defined in the first Recital hereof.



“Month” means a calendar month commencing on the first day of such month and ending on the last day of such month.

“NACHA Operating Rules” means the rules issued by NACHA – The Electronic Payments Association for the administration of the Automated Clearing House.

“Non-Defaulting Party” is defined in Section 9.1.1.

“Payment Date” is defined in Section 2.2.

“Person” means an individual, partnership, corporation, limited liability company, joint venture, association, trust, unincorporated organization, Governmental Authority, or other form of entity.

“PJM Interconnection, L.L.C.” or “PJM” means the regional transmission organization that manages the regional, high-voltage electricity grid serving New Jersey and all or parts of other states and, among other things, administers the Reliability Pricing Model, and any successor.

“Reliability Pricing Model” or “RPM” means PJM’s capacity-market model that secures capacity on behalf of electric load serving entities to satisfy load obligations not satisfied through the output of electric generation facilities owned by those entities or otherwise secured by those entities through bilateral contracts.

“Resource Clearing Price” or “RCP” means the clearing price (\$/MW-day) for the applicable Delivery Year established by the Base Residual Auction and posted by PJM for the unforced capacity offered into the Base Residual Auction from the Capacity Facility and cleared by PJM.

“RPM Rules” means the provisions of PJM’s tariffs and agreements accepted by the Federal Energy Regulatory Commission and the provisions of PJM’s manuals governing the Reliability Pricing Model, as in effect from time to time during the term of this Agreement.

“Security Agreement” is defined in the ninth Recital hereof.

“Standard Offer Capacity Price” or “SOCP” means the price at which the Board has approved Generator to enter into standard offer capacity agreements with the Electric Public Utilities pursuant to the Act, which price is \$[ ]/MW-day.

“Termination Date” means the earlier to occur of (i) the Conclusion Date or (ii) the Early Termination Date.

“Termination Event” is defined in Section 8.1.

“Total Annual Forecasted Peak Demand” for a given Delivery Year means the sum of the Annual Forecasted Peak Demands for each Electric Public Utility for such Delivery Year.

“Transaction” means the calculations, payments and payment obligations under Section 4.1 and the related provisions of this Agreement (including without limitation Section 2.1).

“Unpaid Amounts” owing to any party means, with respect to an Early Termination Date, the amounts that became payable to such party under Section 2.1 in respect of the Transaction on or prior to such Early Termination Date (including amounts not paid by the other party on the ground of the occurrence of an Event of Default, in accordance with Section 2.4) and which remain unpaid as at such Early Termination Date, together with (to the extent permitted under Applicable Law) interest from (and including) the date such amounts were to have been paid to (but excluding) such Early Termination Date, at the Interest Rate. Such amounts of interest will be calculated on the basis of a 360-day year, daily compounding and the actual number of days elapsed.

“Utility” is defined in the Preamble hereof.

“Utility’s Load-Ratio Factor” means the percentage derived by dividing Utility’s Annual Forecasted Peak Demand by Total Annual Forecasted Peak Demand, both for a given Delivery Year.

## 1.2. Rules of Interpretation

1.2.1. General. Unless otherwise required by the context in which any term appears, (a) the singular includes the plural and vice versa; (b) references to “Articles,” “Sections,” “Schedules,” “Annexes,” “Appendices” or “Exhibits” (if any) are to articles, sections, schedules, annexes, appendices or exhibits hereof; (c) all references to a particular entity or an electricity or gas market price index include a reference to such entity’s or index’s successors and (if applicable) permitted assigns; (d) the words “herein,” “hereof” and “hereunder” refer to this Agreement as a whole and not to any particular Section or subsection hereof; (e) references to this Agreement include a reference to all appendices, annexes, schedules and exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time; (f) the masculine includes the feminine and neuter and vice versa; (g) the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined; (h) “including” means “including, without limitation” or “including, but not limited to”; and (i) the word “or” is not necessarily exclusive.

1.2.2. Terms Not to be Construed For or Against Either Party. Each term hereof will be construed simply according to its fair meaning and not strictly for or against either party. No term hereof will be construed against a party on the ground that the party is the author of that provision.

1.2.3. Headings. The headings used for the sections and articles hereof are for convenience and reference purposes only and will in no way affect the meaning or interpretation of the provisions hereof.

1.2.4. Rounding. Calculations of megawatt-days will be rounded to the nearest third decimal place.

## **SECTION 2** **OBLIGATIONS**

2.1. General Conditions. Each party will make each payment specified herein to be made by it, including without limitation the payments under Section 2.2, subject to Section 2.4 and the other provisions hereof.

2.2. Calculation and Payment of Transaction Amounts. In the case of the first Delivery Year, no less than thirty (30) days prior to the Awarded Commencement Date and, in the case of each subsequent Delivery Year, no less than thirty (30) days prior to the commencement of such Delivery Year, Utility will provide a statement to Generator of the result of the calculation under Section 4.1 for the Delivery Year, specifying the party obligated to make payments with respect to such Delivery Year, and the monthly amount of such payments, including any correction made under Section 2.9. The party obligated to make payments will make such payments with respect to each Month on or before the last Business Day of the subsequent Month (the "Payment Date") to the account specified herein in freely transferable funds via electronic funds transfer through a system that provides for final credit no later than one business day after transfer including without limitation the ACH. If payment is made through ACH, the paying party will originate the ACH credit for receipt the following Business Day. Each party agrees to be bound by the NACHA Operating Rules in connection with payments made via ACH and agrees that the origination of all ACH transactions will comply with applicable provisions of U.S. law. Whenever payments are made via ACH, the receiving party hereby authorizes the paying party to initiate credit entries to the account of the receiving party at the receiving party's financial institution as set forth in Section 2.6. This authorization will remain in full force and effect until a party has received prior written notice from the other party of its termination, such notice to be provided in such time and in such manner as to afford the party receiving such notice a reasonable opportunity to act on it.

2.3. Obligations of Generator.

2.3.1. Generator shall cause the Capacity Facility to qualify under the RPM Rules as a capacity resource in an amount no less than the Awarded Capacity Amount for the Base Residual Auction associated with each Delivery Year during the term of this Agreement, commencing upon the Commencement Date.

2.3.2. Generator shall cause the Capacity Facility to achieve commercial operation no later than the Awarded Commencement Date.

2.3.3. Throughout the Delivery Term, Generator shall:

(a) Cause the Capacity Facility to comply with all obligations of a capacity resource under the RPM Rules, including without limitation the obligations relating to the submission of offers to supply electric energy and ancillary services in PJM markets, and Generator shall bear all costs associated with such compliance, including without limitation all fees and penalties imposed by PJM, and no such fees or penalties shall be charged to Utility;

(b) Submit a supply offer for the Awarded Capacity Amount from the Capacity Facility in accordance with the RPM Rules in the Base Residual Auction associated with each Delivery Year during the term of this Agreement, which supply offer shall clear in each such Base Residual Auction;

(c) Provide on a timely basis (which, in the case of documentation provided to Generator by PJM, shall mean within five (5) Business Days of Generator's receipt of such documentation) all documentation required by Utility to make the calculations and notifications required by Sections 2.2 and 4.1, including without limitation: (i) documentation provided to Generator by PJM after the conclusion of each Base Residual Auction showing the amount of unforced capacity offered from the Capacity Facility and cleared by PJM in such Base Residual Auction; (ii) documentation provided to Generator by PJM in advance of each Delivery Year showing the all EFORd measurements for the Capacity Facility for the Delivery Year; (iii) the result of any capability test of the Capacity Facility conducted by PJM; (iv) documentation provided to Generator by PJM in advance of each Delivery Year showing the Available Capacity Amount for the Delivery Year or required to calculate the Available Capacity Amount for the Delivery Year; and (v) documentation notifying Generator of any correction to an input to a calculation, as provided in Section 2.9; provided that Generator may redact from any such documentation data that do not relate to the Capacity Facility;

(d) Provide on a timely basis all documentation reasonably requested by Utility to demonstrate Generator's compliance with all of its obligations as set forth in this Section 2.3 and affirmative covenants as set forth in Section 6. Utility shall have the right, upon reasonable notice to Generator, to request such information once each year and, in addition, upon the occurrence of any event or upon Utility's receipt of information that gives Utility reasonable grounds for concern in good faith as to Generator's compliance with one or more such obligations; and

(e) Fulfill all Generator's obligations under, and otherwise comply with all terms of, the Security Agreement.

2.4. Conditions Precedent to Obligations. Each obligation of each party under this Agreement is subject to (1) the condition precedent that no Event of Default with respect to the other party has occurred and is continuing and (2) the condition precedent that no Early Termination Date has occurred or been effectively designated.

2.5. Suspension of Obligations.

In the event the Board exercises its authority under the Act to suspend the applicability of any provision of the Act that (i) imposes an obligation on either party to make any payment to another party; (ii) assures Utility of recovery from ratepayers through a non-bypassable irrevocable charge of all costs directly or indirectly associated with this Agreement or any costs of the agent retained to implement provisions of the Act; or (iii) imposes an obligation on Generator to offer and clear capacity from the Capacity Facility in the Base Residual Auction, then, no payment pursuant to Sections 2.1, 2.2 and 4.1 with respect to any Delivery Year or portion of a Delivery Year that is within the period of suspension shall be owed by either party, and the non-performance of the requirements of those provisions with respect to the period of suspension shall not be an Event of Default.

2.6. Accounts; Change of Account

2.6.1. Payments are to be made to the following accounts:

Generator:

Pay:

For the Account of:

Account Number:

Fed. ABA Number:

Utility:

Pay:

For the Account of:

Account Number:

Fed. ABA Number:

2.6.2. Either party may change its account for receiving a payment by giving written notice to the other party, which notice will be effective for the next payment date that is at least five Business Days after the effective date of such notice unless such other party gives timely notice of a reasonable objection to such change.

2.6.3. The parties agree that any payments hereunder shall be deemed made in full when confirmation is received from the financial institution holding the account into which payment is made that the payment has been successfully received in immediately available funds. Such confirmation shall be considered by the parties as conclusive evidence of receipt.

2.7. Default Interest; Other Amounts. Prior to the occurrence or effective designation of an Early Termination Date, a party that defaults in the performance of any payment obligation will, to the extent permitted by law and subject to Section 9.3.3, be required to pay interest (before as well as after judgment) on the overdue amount to the other party on demand for the period from (and including) the original due date for payment to (but excluding) the date of actual payment, at the Interest Rate. Such interest will be calculated on the basis of a 360-day year, daily compounding and the actual number of days elapsed. Each payment will be made in

U.S. Dollars in freely transferable funds via electronic funds transfer, as set forth in Section 2.2, on the relevant Payment Date (or if that date is not a Business Day, on the next Business Day).

2.8. Calculations. Utility shall make all calculations of payments due under Sections 2.2 and 4.1 in accordance with the terms of this Agreement, in good faith and with commercial reasonableness, and its determinations and calculations will be binding, subject to the resolution of any Calculation Dispute. Inaccuracy in any calculation shall not be an Event of Default. The sole remedy of the parties with respect to any inaccuracy of a calculation will be the right (but not the obligation), to commence a Calculation Dispute.

2.9. Corrections to Input to Transaction Payment. If PJM revises any of the inputs required for Utility to calculate any payment required under Section 4.1 within the time permitted by PJM's applicable tariff or rate schedule for the revision of PJM charges, Utility will reflect the amount (if any) that is payable as a result of that correction (including without limitation interest on such amount payable from the date of original payment under Section 4.1 through the date of payment under this Section 2.9 at the Interest Rate) in the calculation of payment of payments due for the Delivery Year after Utility receives notice of the revision. Utility shall calculate the correction so as to place the parties in the same economic position after such payment as they would have been had the correct input been employed initially.

### **SECTION 3** **TERM AND TERMINATION**

This Agreement is effective as of the Effective Date and will remain in effect until the later to occur of the Termination Date or the fulfillment by the parties of all obligations hereunder.

### **SECTION 4** **TRANSACTIONS**

#### 4.1. Transactions.

4.1.1. If, for a Delivery Year, the Standard Offer Capacity Price is greater than the Resource Clearing Price then, subject to Section 2.4, Utility will pay Generator each Month during the Delivery Year one-twelfth of the product of (i) the difference between the Standard Offer Capacity Price and the Resource Clearing Price for the applicable Delivery Year, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year; and (iv) Utility's Load-Ratio Factor for the applicable Delivery Year.

4.1.2. If, for a Delivery Year, the Resource Clearing Price is greater than the Standard Offer Capacity Price then, subject to Section 2.4, Generator will pay Utility each Month an amount equal to one-twelfth of the product of (i) the difference between the Resource

Clearing Price for the applicable Delivery Year and the Standard Offer Capacity Price, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year, and (iv) Utility's Load-Ratio Factor for the applicable Delivery Year .

4.2. Structure of Transaction. Nothing in this Agreement shall entitle or obligate Utility to purchase or take delivery of capacity, electric energy or ancillary services from the Capacity Facility and Utility does not take title to or assume any risk of loss for any product or service generated, delivered or sold by Generator from the Capacity Facility.

## **SECTION 5** **REPRESENTATIONS AND WARRANTIES**

5.1. Mutual Representations and Warranties. Each party represents to the other party, continuing from the Effective Date throughout the Delivery Term, that:

5.1.1. It is duly organized and validly existing under the laws of the jurisdiction of its organization or incorporation and, if relevant under such laws, in good standing.

5.1.2. It has the power to execute this Agreement, the Security Agreement and any other documentation relating hereto or thereto, to deliver this Agreement, the Security Agreement and any other documentation that it is required by this Agreement or the Security Agreement to deliver and to perform its obligations hereunder or thereunder and has taken all necessary action to authorize such execution, delivery and performance.

5.1.3. Such execution, delivery and performance do not violate or conflict with any law applicable to it, any provision of its constitutional documents, any order or judgment of any court or other agency of government applicable to it or any of its assets or any contractual restriction binding on or affecting it or any of its assets.

5.1.4. Its obligations under this Agreement and the Security Agreement constitute its legal, valid and binding obligations, enforceable in accordance with their respective terms (subject to applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law)).

5.1.5. All governmental and other consents that are required to have been obtained by it with respect to this Agreement and the Security Agreement are in full force and effect and all conditions of any such consents have been complied with.

5.1.6. No Event of Default or event which, with notice or the passage of time or both, would constitute an Event of Default has occurred and is continuing and no such event

or circumstance would occur as a result of its entering into or performing its obligations hereunder or under the Security Agreement.

5.1.7. All applicable information that is furnished in writing by or on behalf of it to the other party required by Section 6.1 is, as of the date of the information, true, accurate and complete in every material respect.

5.1.8. It is an “eligible contract participant” within the meaning of Section 1(a)18 of the Commodities Exchange Act, as amended.

5.1.9. In connection with the negotiation of, the entering into, and the confirming of the execution of, this Agreement: (i) it is acting as principal (and not as agent or in any other capacity, fiduciary or otherwise); (ii) the other party is not acting as a fiduciary or financial or investment advisor for it; (iii) it is not relying upon any representations (whether written or oral) of the other party other than the representations expressly set forth in this Agreement; (iv) the other party has not given to it (directly or indirectly through any other Person) any advice, counsel, assurance, guarantee, or representation whatsoever as to the expected or projected success, profitability, return, performance, result, effect, consequence, or benefit (either legal, regulatory, tax, financial, accounting, or otherwise) hereof; (v) it has consulted with its own legal, regulatory, tax, business, investment, financial, and accounting advisors to the extent it has deemed necessary, and it has made its own decision to enter into the Transaction based upon its own judgment and upon any advice from such advisors as it has deemed necessary, and not upon any view expressed by the other party; and (vii) it is entering into this Agreement with a full understanding of all the risks hereof and thereof (economic and otherwise), and it is capable of assuming and willing to assume (financially and otherwise) those risks.

5.1.10. It is a “United States person” (within the meaning of section 7701(a)(30) of the Internal Revenue Code of 1986, as amended, and is exempt from backup withholding under Code section 3406 and relevant Treasury Regulations.

5.2. Generator’s Representations and Warranties. Generator hereby represents and warrants to Utility as of the Effective Date that:

5.2.1. Generator’s selection to participate in the LCAPP has been approved by the Board.

5.2.2. Generator is an Eligible Generator approved by the Board pursuant to the Act to enter into standard offer capacity agreements with the Electric Public Utilities for the Awarded Capacity Amount at the SOCP.

5.2.3. Generator will not, either alone or in combination with any Affiliate of Generator that is an Eligible Generator, enter into more than 700 MW of financially-settled standard offer capacity agreements pursuant to the LCAPP.



**SECTION 6**  
**AFFIRMATIVE COVENANTS**

Each party agrees with the other that, so long as either party has or may have any obligation hereunder:

6.1. Furnish Specified Information.

6.1.1. Each party will deliver to the other party such proof of the names, true signatures and authority of Persons signing this Agreement on its behalf as the other party may reasonably request upon execution hereof;

6.1.2. Generator will deliver to Utility on a timely basis:

(a) All information required by the Utility to perform the calculations specified in Sections 2. 2 and 4.1, including without limitation information supplied to Generator by PJM;

(b) All documents, including all written notifications and other communications from PJM, related to Generator's compliance or non-compliance with the RPM Rules

6.2. Maintain Authorizations. Each party will use all reasonable efforts, including the maintenance of records and provision of notices, to maintain in full force and effect all consents, licenses or approvals of PJM and of any Governmental Authority or other authority that are required to be obtained by it with respect to this Agreement and the Security Agreement and its obligations hereunder and thereunder and will use all reasonable efforts to obtain any that may become necessary in the future.

6.3. Comply with Laws and RPM Rules. Each party will comply in all material respects with all Applicable Laws and orders and all RPM Rules to which it may be subject if failure so to comply would materially impair its ability to perform its obligations hereunder or under the Security Agreement.

**SECTION 7**  
**EVENTS OF DEFAULT**

7.1. Events of Default. The occurrence at any time with respect to a party of any of the following events constitutes an event of default (an "Event of Default") with respect to such party:

7.1.1. Failure to Pay. Failure by the party to make, when due, any payment under this Agreement required to be made by it if such failure is not remedied on or before the third (3<sup>rd</sup>) Business Day after notice of such failure is given to the party.

7.1.2. Failure to Provide Information.

Failure by Generator to provide to Utility such information or documentation required by Section 2.3.3 or Section 6.1.2 if such failure is not remedied on or before the fifth (5<sup>th</sup>) Business Day after notice of such failure is given to Generator by Utility.

7.1.3. Breach of Agreement. Failure by the party to comply with or perform any agreement or obligation (other than an obligation to make any payment under this Agreement or to provide information or documentation) to be complied with or performed by the party in accordance with this Agreement if such failure is not remedied on or before the thirtieth (30<sup>th</sup>) day after notice of such failure is given to the party, or, in the case of a failure to comply with any applicable provision of the RPM Rules, within the time (if any) provided in the RPM Rules to remedy such failure.

7.1.4. Misrepresentation. A representation made or repeated by the party in this Agreement proves to have been incorrect or misleading in any material respect when made or repeated or deemed to have been made or repeated and such misrepresentation is not cured within thirty (30) days after such misrepresentation is made or repeated;

7.1.5. Bankruptcy. The party: (1) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4) institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition (A) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (B) is not dismissed, discharged, stayed or restrained in each case within fifteen (15) days of the institution or presentation thereof; (5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (6) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets; (7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within fifteen (15) days thereafter; (8) causes or is subject to any event with respect to it which, under the Applicable Laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) (inclusive); or (9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts; or

7.1.6. Merger Without Assumption. The party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity and, at

the time of such consolidation, amalgamation, merger or transfer the resulting, surviving or transferee entity fails to assume all the obligations of such party hereunder or under the Security Agreement.

7.1.7. Failure to Achieve Commercial Operation of the Capacity Facility.

Generator fails to cause the Capacity Facility to achieve commercial operation by no later than the six (6) months after the Awarded Commencement Date.

7.1.8. Failure to Participate in a Base Residual Auction

With respect to Generator, Generator fails to submit a supply offer for an amount equal to ninety percent (90%) or more of the Awarded Capacity Amount from the Capacity Facility in any Base Residual Auction with respect to a Delivery Year during the Delivery Term.

7.1.9. Failure to Clear a Base Residual Auction

With respect to Generator, Generator's supply offer from the Capacity Facility fails to clear in any Base Residual Auction with respect to a Delivery Year during the Delivery Term.

7.1.10. Security Agreement Default.

With respect to Generator: (i) failure by Generator to comply with any provision of, or to perform any of its obligations under, the Security Agreement if such failure is continuing after any applicable grace period has elapsed; (ii) the expiration or termination of the Security Agreement or the failing or ceasing of the Security Agreement to be in full force and effect; (iii) Generator disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, the Security Agreement; or (iv) a default or event of default, howsoever characterized, occurs under the Security Agreement.

7.1.11. Reliability Must Run or Cost of Service Contract

With respect to Generator, Generator seeks or enters into a reliability must run contract, cost of service contract or similar agreement for all or any part of the output of the Capacity Facility.

**SECTION 8**  
**TERMINATION EVENTS**

8.1. Termination Events. The occurrence at any time of any of the following events constitutes a Termination Event (a “Termination Event”).

8.1.1. Illegality. Due to the adoption of, or any change in, any Applicable Law after the Effective Date, or due to the promulgation of, or any change in, the interpretation by any court, tribunal or regulatory authority with competent jurisdiction of any Applicable Law after such date, it becomes unlawful (other than as a result of a breach by the party of Section 6.2) for a party:

- (1) to perform any absolute or contingent obligation to make a payment or to receive a payment in respect of the Transaction or to comply with any other material provision of this Agreement;
- (2) to perform any contingent or other obligation which the party has or any other material provision of this Agreement; or
- (3) to perform its obligations under the Security Agreement, to maintain the security interest under the Security Agreement or to maintain the first priority perfected status of such security interest.

8.1.2. Invalidity of the Act. If a court invalidates or declares unconstitutional the Act or portion thereof requiring or specifying some performance, right, or obligation of Utility or Generator.

8.1.3. Denial of Utility’s Recovery. If the Board or any court with jurisdiction denies Utility, or fails to uphold Utility’s right to, timely and complete recovery from ratepayers through a non-bypassable, irrevocable charge of any payment under this Agreement or any other cost directly or indirectly arising from Utility’s performance of this Agreement or any costs of the agent retained to implement provisions of the Act.

8.1.4. Elimination or Substantial Modification of RPM. If PJM’s RPM is eliminated or modified in such a way that the performance, calculation and payment of the Transaction set forth in Sections 2 and 4 cannot be performed or implemented.

8.1.5. Execution or Clearing Requirement. The Transaction is determined to be subject to any requirement that it be executed or cleared on an exchange or a multiparty platform or similar facility.

## **SECTION 9** **REMEDIES**

### 9.1. Right to Terminate Following Event of Default or Termination Event.

9.1.1. If at any time an Event of Default with respect to a party (the “Defaulting Party”) has occurred and is then continuing, then: (i) in the case of an Event of Default under Section 7.1.9, an Early Termination Date will occur immediately without further action by Utility upon Utility’s obtaining notice of the results of a Base Residual Auction in which Generator’s supply offer from the Capacity Facility fails to clear; or (ii) in the case of any other Event of Default, the other party (the “Non-Defaulting Party”) may, by not more than twenty (20) days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date.

9.1.2. If at any time a Termination Event has occurred and is then continuing, then either party in the case of an Illegality, an Invalidity of the Act, an Elimination or Substantial Modification of RPM or an Execution or Clearing Requirement or Utility in the case of Denial of Utility’s Recovery, may, by not more than twenty (20) days notice to the other party specifying the relevant Termination Event, designate a day not earlier than the day such notice is effective as an Early Termination Date.

### 9.2. Effect of Designation.

9.2.1. If notice designating an Early Termination Date is given under Section 9.1, the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.

9.2.2. Upon the occurrence or effective designation of an Early Termination Date, no further payments under Section 2.1 or 2.6 will be required to be made, and this Agreement shall be null and void, except with respect to the provisions hereof required to effect payments of the amounts, if any, payable in respect of an Early Termination Date, which amounts shall be determined and paid pursuant to Section 9.3.

9.3. Payments on Early Termination. If an Early Termination Date occurs, the following provisions will apply.

9.3.1. Events of Default. If the Early Termination Date results from an Event of Default, the Defaulting Party will pay the Non-Defaulting Party: (i) all Unpaid Amounts owing to the Non-Defaulting Party; (ii) all expenses payable under Section 9.4; and (iii), in the case of an Event of Default relating to participating in or clearing a Base Residual Auction, an amount equal to the product of (a) the amount, if any, by which the Resource Clearing Price for such Base Residual Auction exceeds the Standard Offer Capacity Price; (b) the Awarded Capacity Amount; (c) three hundred and sixty-five (365); and (d) the number of Delivery Years remaining in the Delivery Term starting with and including the Delivery Year associated with such Base Residual Auction.

9.3.2. Termination Events. If an Early Termination Date results from Section 8.1.1 (an Illegality), Section 8.1.2 (an Invalidity of the Act), or Section 8.1.5 (Execution or Clearing Requirement), each party shall return to the other party all amounts received from that party pursuant to Sections 2.2 and 4.1 of this Agreement. If an Early Termination Date results from Section 8.1.3 (a Denial of Utility's Recovery), the Generator shall return to Utility all amounts paid by Utility to Generator pursuant to Section 2.2 and 4.1 of this Agreement recovery of which has been denied Utility. If an Early Termination Date results from Section 8.1.4 (an Elimination or Substantial Modification of RPM), each party shall pay to the other all Unpaid Amounts owing pursuant to the terms of this Agreement.

9.3.3. Notice and Payment. The party designating an Early Termination Date shall provide notice of such Early Termination Date to the other party. Upon Utility's issuance or receipt of such notice, Utility shall, as soon as practicable, calculate the amounts payable under Section 9.3.1 or 9.3.2, as applicable, and shall provide the calculation to the parties, specifying the party who is obligated to pay and the amount of such payment. An amount calculated as being due in respect of an Unpaid Amount will be payable, as applicable: (i) on the day that notice of the amount payable is effective (in the case of an Early Termination Date which is designated or occurs as a result of an Event of Default); or (ii) on the day which is two (2) Business Days after the date on which notice of the amount payable is effective (in the case of an Early Termination Date which is designated as a result of a Termination Event). Such amount will be paid together with (to the extent permitted under Applicable Law) interest thereon (before as well as after judgment), from (and including) the relevant Early Termination Date to (but excluding) the date such amount is paid, at the Interest Rate. Such interest will be calculated on the basis of daily compounding and the actual number of days elapsed.

9.4. Expenses. A Defaulting Party will, on demand, indemnify and hold harmless the other party for and against all reasonable out-of-pocket expenses, including legal fees, incurred by the Non-Defaulting Party by reason of the enforcement and protection of its rights hereunder or under the Security Agreement or by reason of the early termination of the Transaction, including, but not limited to, costs of collection.

9.5. LIMITATION OF LIABILITY. NO PARTY WILL BE REQUIRED TO PAY OR BE LIABLE FOR INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR PUNITIVE DAMAGES (WHETHER OR NOT ARISING FROM ITS NEGLIGENCE) TO ANY OTHER PARTY EXCEPT TO THE EXTENT THAT THE PAYMENTS REQUIRED TO BE MADE PURSUANT HERETO ARE DEEMED TO BE SUCH DAMAGES. IF AND TO THE EXTENT ANY PAYMENT REQUIRED TO BE MADE PURSUANT HERETO IS DEEMED TO CONSTITUTE LIQUIDATED DAMAGES, THE PARTIES ACKNOWLEDGE AND AGREE THAT SUCH DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE AND THAT SUCH PAYMENT IS INTENDED TO BE A REASONABLE APPROXIMATION OF THE AMOUNT OF SUCH DAMAGES AND NOT A PENALTY.

**SECTION 10**  
**TRANSFER**

10.1. Restriction of Assignments. Except as otherwise provided in this Section 10, neither party may assign this Agreement without (i) the other party's prior written consent, such consent not to be unreasonably delayed, conditioned or withheld, it being understood that refusal to consent to the assignment of the Agreement to a Person that does not own or control the operation of the Capacity Facility shall not be deemed to be unreasonable, and (ii) the prior written consent of the Board. Any assignment in violation of this provision shall be void.

10.2. Generator's Assignment Without Consent. Notwithstanding the foregoing or anything expressed or implied herein to the contrary, Generator may, without the prior written consent of Utility and the Board, assign this Agreement (i) to a purchaser of all or substantially all of the assets of Generator; (ii) in connection with the grant of a security interest to any Facility Lender, provided that such security interest does not interfere with the rights or obligations of any party under the Security Agreement, or (iii) in connection with a merger of Generator with another Person or any other transaction resulting in a direct or indirect change of control of Generator; provided that such purchaser, Facility Lender, or the Person surviving such merger, as applicable, agrees in writing to be bound by the terms of this Agreement, including the satisfaction of all obligations through its ownership of or control over the operation of the Capacity Facility, and not from another electric generating facility.

10.3. Utility's Assignment Without Consent. Notwithstanding the foregoing or anything expressed or implied herein to the contrary, Utility may, without the prior written consent of Generator, assign this Agreement (i) to a purchaser of all or substantially all of the assets of Utility; or (iii) in connection with a merger of Utility with another Person or any other transaction resulting in a change of control of Utility; provided that such purchaser, Affiliate or the Person surviving such merger, as applicable, agrees in writing to be bound by the terms of this Agreement.

10.4. Assumption by Assignee; No Release from Liabilities. Any permitted assignee or transferee of a party's interest in this Agreement shall assume all existing and future obligations of such party to be performed under this Agreement. Whether or not prior written consent to an assignment is required hereunder, the assignor shall give notice to the other party promptly after a permitted assignment of this Agreement. Unless otherwise agreed to by the parties and except as set forth in Sections 10.2 and 10.3 above, upon any permitted assignment of this Agreement to an assignee and such assignee's written assumption of this Agreement, the assigning party shall be released from the performance of its obligations under this Agreement for the period from and after the date of such assignment and assumption; provided, however, that in all other cases, the assigning party shall continue to be bound by this Agreement unless the parties otherwise agree.

**SECTION 11**  
**NOTICES**

11.1. Effectiveness. Any notice or other communication in respect hereof may be given in any manner set forth below (except that a notice or other communication under Section 7, 8 or 9 will not be effective if given by facsimile transmission or electronic messaging system) to the address or number or in accordance with the electronic messaging system details provided and will be deemed effective as indicated: (i) if in writing and delivered in person or by courier, on the date it is delivered; (ii) if sent by telex, on the date the recipient's answerback is received; (iii) if sent by facsimile transmission, on the date that transmission is received by a responsible employee of the recipient in legible form (the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine); (iv) if sent by certified or registered mail (airmail, if overseas) or the equivalent (return receipt requested), on the date that mail is delivered or its delivery is attempted; or (v) if sent by electronic messaging system, on the date that electronic message is received, unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Business Day, in which case that communication will be deemed given and effective on the first following day that is a Business Day.

11.2. Addresses for Notices.

11.2.1. Addresses for notices or communications to Generator:

Address:

11.2.2. Address for notices or communications to Utility:

Address:

11.2.3. Change of Addresses. Either party may by notice to the other change the address, telex or facsimile number or electronic messaging system details at which notices or other communications are to be given to it.



## SECTION 12

### RESOLUTION OF DISPUTES

#### 12.1. Notice of Dispute.

In the event of any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof should arise between the parties (a “Dispute”), a party may declare a Dispute by delivering to the other party a written notice identifying the disputed issue.

#### 12.2. Resolution by the Parties

12.2.1. If the Dispute relates to the accuracy of Utility’s calculation of any payment required to be made under this Agreement (a “Calculation Dispute”), then Generator must provide written notice of the Dispute to Utility within ten (10) Business Days of Generator’s receipt of Utility’s calculation of the payment pursuant to Section 2.2., which notice must state the nature of Generator’s disagreement with Utility’s calculation and include all documentation upon which Generator bases its disagreement. Within ten (10) Business Days of Utility’s receipt of a written notice claiming a Calculation Dispute, Utility shall either: (a) notify Generator that Utility agrees the initial calculation was in error and provide a revised calculation of the payment that is the subject of the Calculation Dispute; or (b) provide Generator with the basis of Utility’s determination that the calculation was correct, including all documentation upon which Utility relies. If Generator does not accept Utility’s revised calculation or Utility’s explanation of the original calculation, then, within ten (10) Business Days, executives of both parties shall meet at a mutually agreeable time and place and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute.

12.2.2. If the Dispute is not a Calculation Dispute, then upon receipt of a written notice claiming a Dispute, executives of both parties shall meet at a mutually agreeable time and place within ten (10) Business Days after delivery of such notice and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute. In such meetings and exchanges, a party shall have the right to designate as confidential any information that such party offers. No confidential information exchanged in such meetings for the purpose of resolving a Dispute may be used by a party in litigation against the other party.

12.2.3. Any correction to a calculation upon which the parties agree to resolve the Calculation Dispute, shall be reflected in the Utility’s calculation under Section 2.2 for the next Delivery Year following the resolution of the Dispute.

#### 12.3. Optional Resolution Through Arbitration

If the parties are unable to resolve a Dispute between themselves pursuant to Section 12.2, then, if both parties mutually agree to submit the Dispute to binding arbitration, then the disputing party may initiate binding arbitration in Newark, New Jersey, conducted in accordance with the then current American Arbitration Association's ("AAA") Large, Complex Commercial Rules or other mutually agreed procedures. If the parties do not mutually agree to submit a Dispute to binding arbitration, then either party may initiate a proceeding in a court of competent jurisdiction with respect to the Dispute.

#### 12.4. Effect of Dispute

The pendency of a Dispute shall not suspend, either: (a) the obligation of the parties to perform their obligations under this Agreement, including the obligation to make payments, prior to a Termination Date; or (b) the effectiveness of a notice of an Event of Default under Section 9.1.1 or a notice designating an Early Termination Date under Section 9.1.2.

### **SECTION 13**

#### **MISCELLANEOUS**

13.1. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter and supersedes all oral communication and prior writings with respect thereto.

13.2. Amendments. No amendment, modification or waiver in respect hereof will be effective unless in writing (including a writing evidenced by a facsimile transmission) and executed by each of the parties or confirmed by an exchange of telexes or electronic messages on an electronic messaging system.

13.3. Remedies Cumulative. Except as provided in this Agreement, the rights, powers, remedies and privileges provided in this Agreement are cumulative and not exclusive of any rights, powers, remedies and privileges provided by law.

13.4. Counterparts. This Agreement (and each amendment, modification and waiver in respect of it) may be executed and delivered in counterparts (including by facsimile transmission), each of which will be deemed an original.

13.5. No Waiver of Rights. A failure or delay in exercising any right, power or privilege in respect hereof will not be presumed to operate as a waiver, and a single or partial exercise of any right, power or privilege will not be presumed to preclude any subsequent or further exercise, of that right, power or privilege or the exercise of any other right, power or privilege.

#### 13.6. Taxes

Each party shall be responsible for all federal, state, and local taxes incurred by it as result of entering into this Agreement. Without limiting the foregoing, it is understood and agreed that Generator shall be solely responsible for all taxes imposed on or assessed to the Capacity Facility, any payments obtained by Generator pursuant to this Agreement, and any payments Generator receives resulting from participation in any PJM market.

### 13.7. Relationship of the Parties

The parties acknowledge that the relationship between Utility and Generator is an independent contractual relationship and nothing in this Agreement shall create any joint venture, partnership or principal/agent relationship between Utility and Generator. Neither Utility nor Generator shall have any right, power or authority to enter into any agreement or commitment, act on behalf of, or otherwise bind the other party in any way.

### ~~13.6.~~13.8. Governing Law and Jurisdiction

~~13.6.1.~~13.8.1. Governing Law. This Agreement will be governed by and construed in accordance with the substantive law of the State of New Jersey, without regard to the application of such state's laws relating to conflicts of laws.

~~13.6.2.~~13.8.2. Jurisdiction. With respect to any suit, action or proceedings relating hereto ("Proceedings"), each party irrevocably: (i) submits to the exclusive jurisdiction of the courts of the State of New Jersey; and (ii) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party. Nothing in this Agreement precludes either party from bringing Proceedings in any other jurisdiction in order to enforce any judgment obtained in any Proceedings referred to in the preceding sentence.

~~13.7.~~13.9. Waiver of Immunities. Each party irrevocably waives, to the fullest extent permitted by Applicable Law, with respect to itself and its revenues and assets (irrespective of their use or intended use), all immunity on the grounds of sovereignty or other similar grounds from (i) suit, (ii) jurisdiction of any court, (iii) relief by way of injunction, order for specific performance or for recovery of property, (iv) attachment of its assets (whether before or after judgment) and (v) execution or enforcement of any judgment to which it or its revenues or assets might otherwise be entitled in any Proceedings in the courts of any jurisdiction and irrevocably agrees, to the extent permitted by Applicable Law, that it will not claim any such immunity in any Proceedings.

~~13.8.~~13.10. Waiver of Jury Trial. TO THE FULLEST EXTENT PERMITTED BY LAW, EACH OF THE PARTIES HERETO WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. EACH PARTY FURTHER WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION IN WHICH A JURY

TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL CANNOT BE OR HAS NOT BEEN WAIVED. EACH PARTY ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAVE BEEN INDUCED TO ENTER HEREINTO BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

*[Remainder of Page Intentionally Left Blank]*

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

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

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