



NRG Energy, Inc.  
211 Carnegie Center  
Princeton, NJ 08540

March 1, 2011

**VIA ELECTRONIC MAIL**

Kristi Izzo, Secretary  
Board of Public Utilities  
Two Gateway Center  
Suite 801  
Newark, New Jersey 07102

**Re: I/M/O the Long-Term Capacity Agreement Pilot Program  
Docket No. EO11010026**

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Dear Secretary Izzo:

On behalf of NRG Energy, Inc. ("NRG"), the enclosed supplement reply comments are submitted to the Board of Public Utilities in the above-referenced docket regarding the revised form of Standard Offer Capacity Agreement posted by Levitan & Associates, Inc., as the LCAPP Agent, on February 28, 2011.

In addition to this submission, NRG has simultaneously submitted its initial comments to the LCAPP Agent, via the website established at [www.nj-lcapp.com](http://www.nj-lcapp.com).

Respectfully submitted,

*/s/ Julie L. Friedberg*

Julie L. Friedberg

cc: (via electronic submission; w/enclosure)  
Levitan & Associates, Inc.

STATE OF NEW JERSEY  
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE LONG-TERM  
CAPACITY AGREEMENT PROGRAM

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: Docket No. EO11010026  
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**SUPPLEMENTAL REPLY COMMENTS OF NRG ENERGY, INC.  
REGARDING LCAPP AGENT REVISED FORM OF  
STANDARD OFFER CAPACITY AGREEMENT**

In accordance with the schedule established by the Board of Public Utilities (the “Board”) in the above-captioned matter (the “LCAPP Proceeding”) by Order dated February 10, 2011, and the deadline imposed by the Board’s LCAPP Agent, Levitan & Associates, Inc., NRG Energy, Inc. (“NRG”) hereby submits its supplemental reply comments regarding the form of Standard Offer Capacity Agreement (“SOCA”) proposed by the LCAPP Agent on February 28, 2011. Though the draft SOCA most recently proposed by the LCAPP Agent (the “Revised Agent SOCA”) reflects significant progress as compared to prior drafts, the Revised Agent SOCA continues to fail to address key issues previously identified by NRG and other participants in their initial and reply comments.

**(1) Generator Performance Rights and Termination Options –**

Notwithstanding uncontrollable development uncertainties, such as the ability to obtain requisite interconnection rights, permits and financing, and also considering the Board’s ability to indefinitely suspend

performance by both parties, the Revised Agent SOCA must include a provision that allows a termination for “Generator Hardship.”

(2) **Inequitable Risk Allocation and Termination Payments** –

These two, interrelated issues continue to place the Generator in a position of extreme financial vulnerability in the event that the SOCA is terminated due to a Termination Event or an Event of Default by the State’s electric distribution companies (the “EDCs”).

NRG has appended to these comments, as Exhibit A, specific edits that it is requesting be made to the Revised Agent SOCA.

(1) **Generator Performance Obligations and Termination Rights**

As noted by other parties providing comments on the form of SOCA, and by NRG in its initial comments, development, permitting and construction of a generating facility is a complex and lengthy endeavor that is not without challenges. Like prior proposed SOCAs, the Revised Agent SOCA fails to acknowledge these potential challenges and their impact on the Generator’s ability to achieve commercial operation by the Awarded Commencement Date, or, to otherwise perform its obligations under the SOCA. For these reasons, NRG proposes to revise the Revised Agent SOCA to allow the Generator to terminate the SOCA , if necessary, due to the challenges described above. See Exhibit A, changes to Section 8.1 and to Subsection 9.3.2.

(2) **Inequitable Risk Allocation and Termination Payments**

The Revised Agent SOCA requires the Generator to bear the risk of termination of the SOCA, and provides for an inadequate Termination Payment to the Generator in the event that termination is not attributable to a Generator Event of Default. Moreover,

the Revised Agent SOCA provides for an unduly burdensome Termination Payment from the Generator. Though the Revised Agent SOCA has eliminated the provision allowing for an indefinite suspension of the parties' performance under the SOCA, the elimination of this section simply leaves unanswered whether either Generator has any recourse in the event of a suspension permitted by the LCAPP Act. See N.J.S.A. 48:3-98.4 (allowing the Board to "suspend the applicability of the challenged provision or provisions during the pendency of those proceedings until final resolution").

For these reasons, NRG proposes changes to the defined Termination Events, to include a suspension enduring longer than six months, and provides for a more equitable calculation of Termination Payments so that the Generator is made whole in the event that the EDC defaults or terminates due to reasons beyond the Generator's control. Additionally, the attached revisions reflect an equitable payment in the event that the Generator chooses to terminate due to a lengthy suspension. See Exhibit A, changes to Section 8.1 and Subsections 9.3.1 and 9.3.2.

## Conclusion

For the reasons stated above, as well as the reasons set forth in its initial and reply comments, NRG respectfully requests that the Board direct the LCAPP Agent to reflect the concepts and revisions set forth above in the forms of SOCA ultimately finalized and proposed to Generators participating in the LCAPP Proceeding.

Respectfully submitted,  
NRG Energy, Inc.

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Board / LCAPP Agent Proposed Draft

February 28, 2011

[NRG COMMENTS](#)

## **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 state of 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. 2011 c. 9 (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 (“Board”) with eligible generators approved by the Board;

WHEREAS, under the Act, this Agreement shall be irrevocable once the Board issues an order approving this Agreement;

WHEREAS, under the Act, neither the Board nor any other governmental agency of New Jersey shall have the authority (i) to rescind, alter, modify, or repeal this Agreement or an order approving rate recovery of LCAPP costs, (ii) to revalue, re-evaluate, or revise the amount of the LCAPP costs, or (iii) to determine that the LCAPP costs or the revenues to recover the LCAPP costs are unjust or unreasonable;

WHEREAS, Generator has not commenced, and intends to commence, construction of an [ ] megawatt (“MW”) electric generation facility, as described in Attachment A, after January 28, 2011 (the “Capacity Facility”);

WHEREAS, Generator is willing to commit to offer and clear Unforced Capacity of the Capacity Facility into each Base Residual Auction conducted by the PJM Interconnection, L.L.C. (“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 eligibility and selection to participate in the LCAPP have been approved by the Board;

WHEREAS, this Agreement is in the form approved by the Board;

WHEREAS, Utility is an Electric Public Utility; and

WHEREAS, Generator has caused Construction Period Security to be provided to Utility, dated as of the date hereof , in support of Generator’s obligations under 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” means the New Jersey P.L. 2011 c. 9 that establishes the LCAPP.

“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 fifty percent (50%) 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 fifty percent (50%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

“Agreement” means this Standard Offer Capacity Agreement dated as of [ ], 2011 by and between Utility and Generator..

“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.

“Associated Ancillary Services” means the quantity of ancillary services, generally used by PJM to support the reliable operation of its transmission system, associated with the Available Capacity Amount.

“Associated Energy” means the quantity of electrical energy, generally used by PJM to satisfy its load requirements, associated with the Available Capacity Amount

“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 Awarded Capacity Amount.



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

“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” means the [ ] MW electric generation facility to be constructed by Generator as further defined in Attachment A.

“Cash” means cash in United States Dollars and any investment of such cash held in escrow.

“Cash Escrow Agreement” means an agreement providing for the receipt, holding (in the United States), investment and disbursement of Cash held in escrow by a Qualified Bank, to provide either Construction Period Security or Delivery Term Security.

“Commencement Date” means the last to occur of: (i) the Awarded Commencement Date; and (ii) the date the Capacity Facility first provides Unforced Capacity to PJM by having previously cleared in a Base Residual Auction.

“Conclusion Date” means May 31, [ ], which date shall not be altered by any delay or change in the Commencement Date or other provision under this Agreement.

“Construction Period” means the period commencing on the Effective Date and concluding on the date the Generator first provides Unforced Capacity to PJM by having previously cleared in a Base Residual Auction.

“Construction Period Security” means (i) a Letter of Credit, substantially in the form of Attachment B, to be provided to the Utility or (ii) Cash held in escrow for the Utility under a Cash Escrow Agreement, substantially in the form of Attachment C to be mutually agreed between the Utility and Generator, in support of the Generator’s obligations during the Construction Period in an amount defined in section 2.3.3.

“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.

“Delivery Term Security” means (i) a Letter of Credit, substantially in the form of Attachment D, to be provided to the Utility or (ii) Cash held in escrow for the Utility under a Cash Escrow Agreement, substantially in the form of Attachment E to be mutually agreed between the Utility and Generator, in support of the Generator’s obligations during the Delivery Term in an amount defined in Section 2.3.3.

“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 the four (4) electric public utilities under the jurisdiction of the Board, specifically Public Service Electric and Gas Company, Atlantic City Electric Company, Jersey Central Power & Light Company, and Rockland Electric Company.

“Event of Default” is defined in Section 7.1.

“Facility Lender” means (i) any lender providing construction, interim, long-term, or refinancing debt or equity funds to Generator for the Capacity Facility, (ii) any trustee or agent acting on their behalf, and (iii) any Person providing interest rate protection agreements to hedge any of the foregoing obligations.

“Force Majeure” means an event or circumstance, such as natural catastrophes, terrorism, war, riots, or acts of God, that (i) prevents one party from performing its obligations under this Agreement; (ii) is not within the reasonable control of, or the result of the negligence of, the claiming party; and, (iii) by the exercise of due diligence, the claiming party is unable to overcome or avoid, or cause to be avoided; provided, however, notwithstanding the foregoing, none of the following events or circumstances will constitute Force Majeure: (a) the loss or failure of Generator’s fuel supply, except when caused by Force Majeure; (b) the breakdown of Generator’s plant and/or equipment, except when caused by Force Majeure; and (c) an occurrence or an event that causes an economic hardship to a party.

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

“Letter of Credit” means an irrevocable standby letter of credit provided by a Qualified Bank to provide either Construction Period Security or Delivery Term Security.

“Locational Deliverability Area” or “LDA” means the PJM sub-regions used to calculate Resource Clearing Prices as part of the Reliability Pricing Model.

“Long-Term Capacity Agreement Pilot Program” or “LCAPP” is the program established by P.L. 2011 c. 9 to promote construction of qualified electric generation facilities.

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

“MW” means megawatt.

“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.

“PJM Market Rules” means the rules, standards, procedures, and practices set forth in the PJM Tariff, PJM Operating Agreements, PJM Reliability Assurance Agreement, PJM Consolidated Transmission Owners Agreement, PJM Manuals, PJM Regional Practices

Document, PJM-Midwest Independent Transmission System Operator Joint Operating Agreement, and other documents setting forth market rules.

“PJM Markets” means the capacity, energy, and ancillary services markets administered by PJM.

“Qualified Bank” means a United States commercial bank or similar financial institution that has assets of at least \$[ ] and a senior long-term unsecured debt rating of at least “A” by Standard & Poor’s, “A2” by Moody’s Investors Service, or “A” by Fitch Ratings.

“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 expressed in \$/MW-day for Unforced Capacity established by the Base Residual Auction for the LDA in which the Capacity facility is located and the applicable Delivery Year as posted 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.

“Standard Offer Capacity Price” or “SOCP” means the price for each Delivery Year at which the Board has approved Generator to enter into this Agreement with the Utility pursuant to the Act, which price is listed in Attachment F to this Agreement.

“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).

“Unforced Capacity” means the capacity of a capacity resource that accounts for the EFORd of that capacity resource and as periodically determined by PJM.

“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 2.5) 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” means the percentage derived by dividing Utility’s Annual Forecasted Peak Demand by Total Annual Forecasted Peak Demand, both for a given Delivery Year, such that the sum of the Utility Load Ratios for the Electric Public Utilities shall always equal 100%.

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. All c

alculations, including but not limited to RCP, New Jersey RCP, Available Capacity Amount, and Utility Load Ratios, 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 2.5 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) calendar days prior to the Awarded Commencement Date and, in the case of each subsequent Delivery Year, no less than thirty (30) calendar 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 2.10. 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. The system for making such electronic funds transfers may be the ACH, in which case 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 use all commercially reasonable efforts to 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 Awarded Commencement Date.

2.3.2. Generator shall use all commercially reasonable efforts to cause the Capacity Facility to achieve commercial operation no later than the 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;



(b) Submit supply offers for an amount of Unforced Capacity no less than 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, such that the Unforced Capacity shall be offered at the lowest commercially reasonable price under the RPM rules;

(c) Submit supply offers from the Capacity Facility for the maximum amount of Associated Energy that the Capacity Facility can provide in the PJM day-ahead energy market in accordance with PJM Market Rules throughout the Delivery Term, such that the Associated Energy shall be offered at the lowest commercially reasonable price under PJM's Market Rules;

(d) Submit supply offers from the Capacity Facility for the maximum amount of Associated Ancillary Services that the Capacity Facility can provide in the PJM ancillary services markets in accordance with PJM Market Rules throughout the Delivery Term, such that the Associated Ancillary Services shall be offered at the lowest commercially reasonable price under PJM's Market Rules;

(e) Neither physically nor financially withhold any Unforced Capacity up to the amount of Awarded Capacity, or Associated Energy and Associated Ancillary Services, from the Capacity Facility;

(f) 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;

(g) 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;

2.3.4. Cause to be provided to the Utility throughout the Construction Period, Construction Period Security in an amount to be calculated annually equal to the product of \$10,000/MW and the Awarded Capacity Amount and the Utility's Load Ratio, but in no case

more than the product of \$1 million, and the Utility's Load Ratio. Such Construction Period Security shall be in the form of a Letter of Credit or Cash held in escrow by the Utility, which shall have the right to draw upon the Construction Period Security as provided in Section 9.4. In the event of the application of any such Construction Period Security toward any amount owed hereunder to Generator the Generator shall have no obligation to increase the amount of the Construction Period Security beyond the initial amount provided.

2.3.5. Cause to be provided to the Utility throughout the Delivery Term, Delivery Term Security in an amount to be calculated annually equal to the product of \$25,000/MW and the Awarded Capacity Amount and the Utility's Load Ratio with the amount of Delivery Term Security declining *pro rata* at the conclusion of each Delivery Year over any remaining term of this Agreement. Such Delivery Period Security shall be in the form of a Letter of Credit or Cash held in escrow by the Utility, which shall have the right to draw upon the Delivery Term Security as provided in Section 9.4. In the event of the application of any such Delivery Term Security toward any amount owed hereunder to Generator the Generator shall have no obligation to increase the amount of the Delivery Term Security beyond the initial amount provided.

2.3.6. Fulfill all Generator's obligations under, and otherwise comply with all terms of, the Construction Period Security and Delivery Term Security.

2.4. Obligations of the Utility. The Utility shall prepare and file an annual report to the Board within thirty (30) calendar days after the end of each Delivery Year describing (i) the status of this Agreement, (ii) the amount of Unforced Capacity and cost of associated Transactions made under this Agreement, (iii) the performance of the Generator in supplying Unforced Capacity and Associated Energy and Associated Ancillary Services under this Agreement, and (iv) any material actions taken by the Generator or the Utility under this Agreement. Nothing in this Agreement imposes upon Utility the obligation to monitor, enforce, or declare an Event of Default with respect to the price of Unforced Capacity, or the price or amount of Associated Energy or Associated Ancillary Services, which Generator offers in or supplies to any PJM Market.

2.5. Conditions Precedent to Obligations.

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

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 to correct 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 rate 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.

2.10. Substitution Return and Handling of Credit Support

2.10.1. Election to Change Form of Credit Support. With respect to the Construction Period Security or the Delivery Term Security, the Generator may, at any time and from time to time, replace (i) a Letter of Credit with Cash held under a Cash Escrow Agreement, (ii) Cash held under a Cash Escrow Agreement with a Letter of Credit, or (iii) a Letter of Credit with a different Letter of Credit, provided that any such substitute Cash and Cash Escrow Agreement or substitute Letter of Credit (as the case may be) meets the requirements for Construction Period Security or Delivery Term Security, as applicable, whereupon the Utility shall cooperate with the Generator in obtaining the concurrent release, termination or return of the Letter of Credit or Cash and Cash Escrow Agreement (as the case may be) being replaced.

2.10.2. Return of Original Credit Support Documents. Without limitation to the generality of the foregoing, the Utility shall return to the Generator all original Credit Support Documents, and all amendment, extension and other documents related thereto, within twenty (20) calendar days of the termination, cancellation or replacement thereof.

2.10.3. Handling of Cash Collateral. If any collateral in the form of Cash is expected to be or is received by the Utility pursuant to this Agreement, whether following a Letter of Credit drawing due to failure on the part of the issuer of the Letter of Credit to renew or extend the Letter of Credit or otherwise, the parties shall cooperate to cause such collateral in the form of Cash to be delivered as soon as practicable to a custodian to be held pursuant to a Cash Escrow Agreement. Any collateral in the form of Cash that is received and held by the Utility pending delivery to a custodian shall be segregated by the Utility from its other property and held exclusively in accounts with Qualified Banks.

**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 SOCP is greater than the RCP then, subject to Section 2.5, Utility will pay Generator each Month during the Delivery Year one-twelfth of the product of (i) the difference between the SOCP and the RCP, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year; and (iv) Utility Load Ratio, each for the applicable Delivery Year.

4.1.2. If, for a Delivery Year, the RCP is greater than the SOCP then, subject to Section 2.5, Generator will pay Utility each Month an amount equal to one-twelfth of the product of (i) the difference between the RCP and the SOCP, (ii) the Available Capacity Amount, (iii) the number of days in the Delivery Year, and (iv) Utility Load Ratio, each for the applicable Delivery Year.

4.1.3. New Jersey RCP shall be calculated for each Delivery Year as the weighted average of the RCPs for the Electric Public Utilities, using the Utility Load Ratios as weights.

#### **4.2. Structure of Transaction.**

Nothing in this Agreement shall entitle or obligate Utility to purchase, or take title to or delivery of, capacity, electric energy, or ancillary services from the Capacity Facility.

## **SECTION 5**

### **REPRESENTATIONS AND WARRANTIES**

#### **5.1. Mutual Representations and Warranties.**

Each party represents to the other party, from the Effective Date, and, except as specified below, continuing 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 (i) to execute this Agreement, the Construction Period Security, Delivery Term Security and any other documentation relating hereto or thereto, (ii) to deliver this Agreement and cause to be delivered the Construction Period Security, Delivery Term Security and any other documentation that it is required by this Agreement to deliver and (iii) to perform its obligations hereunder or thereunder and has taken all necessary action to authorize such execution, delivery and performance.

5.1.3. As of the Effective Date, such execution, delivery and performance do not violate or conflict with any law applicable to it, 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, the Construction Period Security, and Delivery Term Security 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. As of the Effective Date, all governmental and other consents that are required to have been obtained by it with respect to this Agreement, the Construction Period Security, and the Delivery Term Security are in full force and effect and all conditions of any such consents have been complied with.

5.1.6. As of the Effective Date, 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 Construction Period Security or Delivery Term Security.

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 Internal Revenue Code section 3406 and relevant U.S. Department of the 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 approved by the Board pursuant to the Act as eligible 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 eligible to participate in the LCAPP, enter into financially-settled standard offer capacity agreements for more than 700 MW of Unforced Capacity 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;

(c) All additional documents required for Utility to provide an annual report to the Board as specified in Section 2.4.

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.

6.4. Reporting Requirements. Generator shall be responsible for any recordkeeping, reporting and other requirements applicable to this Agreement under the Commodity Exchange Act, as amended, and the regulations of the Commodity Futures Trading Commission.

## **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>) calendar 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) calendar days after such misrepresentation is made or repeated;

7.1.5. Bankruptcy.

The party: (i) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (ii) 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; (iii) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (iv) 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) calendar days of the institution or presentation thereof; (v) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (vi) 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; (vii) 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) calendar days thereafter; (viii) 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 (i) to (vii) (inclusive); or (ix) 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 the Commencement Date.



Generator fails to cause the Capacity Facility to achieve the Commencement Date by no later than two (2) years after the Awarded Commencement Date, except if an event of Force Majeure causes additional delays.

7.1.8. Failure to Participate in a PJM Market.

Generator fails to submit a supply offer, consistent with Section 2.3.3 for its Unforced Capacity and the Associated Energy and Associated Ancillary Services from the Capacity Facility. Any Capacity Facility shall be required to bid no less than the Awarded Capacity Amount beginning with the Base Residual Auction associated with the Awarded Commencement Date and continuing through the Delivery Term, except if an event of Force Majeure delays the Commencement Date.

7.1.9. Security Default.

With respect to Generator: (i) failure by Generator to comply with any provision of, or to perform any of its obligations under, either the Construction Period Security or the Delivery Term Security if such failure is continuing after any applicable grace period has elapsed; (ii) the expiration of, termination of, or failure to replace in accordance with Section 2.11 within five (5) Business Days after Utility has delivered notice to Generator of such failure, as appropriate, either the Construction Period Security or the Delivery Term Security prior to its intended expiration date; (iii) the failing or ceasing of either the Construction Period Security or the Delivery Term Security to be in full force and effect for its intended term; (iv) Generator disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, the Construction Period Security or the Delivery Term Security; or (v) a default or event of default, howsoever characterized, occurs under the Construction Period Security or the Delivery Term Security.

## **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 provide or perform its obligations under the Construction Period Security or the Delivery Period Security.

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. Generator Hardship. If, notwithstanding its commercially reasonable efforts, prior to its Awarded Commencement Date, Generator is unable (i) to obtain financing for the Capacity Facility on commercially reasonable terms, (ii) to obtain material local, state or federal permits necessary to construct or operate the Capacity Facility in accordance with its obligations under this Agreement, (iii) to execute any agreements necessary to interconnect the Capacity Facility to the transmission system, natural gas system, grey water or sewage system, if applicable, (iv) to overcome the impact of a Force Majeure, or (v) the transmission owner has not completed any network upgrades or other work necessary to allow the Capacity Facility to interconnect to the transmission system, then Generator, in its sole discretion, may declare a Termination Event, by not more than twenty (20) days notice to the Utility, designate a day not earlier than the day such notice is effective as an Early Termination Date.

8.1.4. Suspension. In the event the Board exercises its authority under the Act to suspend the applicability of any provision of the Act and such suspension continues for a period longer than six (6) months.

## **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 the other party (the “Non-Defaulting Party”) may, by not more than twenty (20) calendar days notice in writing to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than five (5) Business Days after 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 or an Invalidity of the Act, may, by not more than twenty (20) calendar days notice in writing to the other party specifying the relevant Termination Event, designate a day not earlier than five (5) Business days after 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, the Defaulting Party shall have five (5) Business Days to cure any Event of Default. If after such five (5) Business Days the Event of Default or Termination Event is continuing, then 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 2.7 will be required to be made, and this Agreement shall be null and avoid, 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.

(a) If the Early Termination Date results from a Utility Event of Default, the Utility shall pay to the Generator (i) all Unpaid Amounts owing to the Generator; and (ii) an amount equal to the product of (a) the Standard Offer Capacity Price; (b) the Awarded Capacity Amount; (c) three hundred and sixty-five (365); (d) the Utility Load Ratio; and (e) the number of Delivery Years remaining in the Delivery Term starting with and including the current Delivery Year.

(b) If the Early Termination Date results from a Generator Event of Default, prior to the Commencement Date, then the Generator shall pay to the Utility an amount equal to the Construction Period Security (and the Utility will concurrently release the Construction Period Security). For the avoidance of doubt, the Generator's liability for an Early Termination under these circumstances is limited to the face amount of the Construction Period Security.

(c) If the Early Termination Date results from a Generator Event of Default, after the Commencement Date, then the Generator shall pay to the Utility an amount equal to the Delivery Term Security (and the Utility will concurrently release the Delivery Term Security). For the avoidance of doubt, the Generator's liability for an Early Termination under these circumstances is limited to the face amount of the Delivery Term Security.

~~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 a Base Residual Auction, an amount equal to the product of (a) the amount, if any, by which the RCP for such Base Residual Auction exceeds the SOCP, (b) the Awarded Capacity Amount; (c) three hundred and sixty-five (365); (d) the Utility Load ratio, and (e) the number of Delivery Years remaining in the Delivery Term starting with and including the Delivery Year associated with such Base Residual Auction.~~

February 28, 2011

NRG COMMENTS

9.3.2. Termination Events. ~~If an Early Termination Date results from Section 8.1.1 (an Illegality) or Section 8.1.2 (an Invalidity of the Act), each party shall pay to the other all Unpaid Amounts owing pursuant to the terms of this Agreement.~~

(a) If an Early Termination Date results from Section 8.1.1 (an Illegality), Section 8.1.2 (an Invalidity of the Act) or Section 8.1.3 (Generator Hardship), then the Utility shall pay to the Generator (i) all Unpaid Amounts owing to the Generator; and (ii) an amount sufficient to make the Generator whole as of the Termination Date.

(b) If an Early Termination results from Section 8.1.3 (Generator Hardship) prior to the Commencement Date, then the Generator shall pay to the Utility an amount equal the Construction Period Security (and the Utility will concurrently release the Construction Period Security). For the avoidance of doubt, the Generator's liability for an Early Termination under these circumstances is limited the face amount of the Construction Period Security.

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. Rights Under Construction Period Security and Delivery Term Security

9.4.1. Parties' Rights and Remedies. If at any time an Early Termination Date has occurred as the result of an Event of Default or a Termination Event with respect to the Generator, then, unless the Generator has paid in full all of its obligations under this Agreement that are then due, the Utility may exercise one or more of the following rights and remedies:

(a) All rights and remedies available to the Utility under the terms of the applicable Letter of Credit or Cash Escrow Agreement, including without limitation the right to draw on such Letter of Credit and Cash held under such Cash Escrow Agreement;

(b) All other rights and remedies available to the Utility under applicable law as the beneficiary in the case of a letter of credit or secured party in the case of Cash held in escrow; and

(c) The right to set-off any amounts payable by the Generator with respect to any obligations under this Agreement against any Cash held on behalf of the Utility under any Cash Escrow Agreement.

9.4.2. Deficiencies and Excess Proceeds. The Utility will return to the Generator any Letter of Credit or Cash held on behalf of the Utility under a Cash Escrow Agreement remaining after liquidation, set-off and/or application under Section 9.4.1 after satisfaction in full of all amounts payable by the Generator with respect to any of its obligations under the Agreement. The Generator in all events will remain liable for any amounts remaining unpaid after any liquidation, set-off and/or application under such Section 9.4.1.

9.5. 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 Construction Period Security, the Delivery Term Security, or by reason of the early termination of the Transaction, including, but not limited to, costs of collection.

9.6. 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 approval 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 with notice to the Board, and subject to the last sentence of this Section 10.2, assign this Agreement (i) to a purchaser of all or substantially all of the assets of Generator; or (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 of obligations of any party under the Construction Period Security or Delivery Term Security, (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. The foregoing shall be subject to the provisions that such purchaser, Facility Lender, or the Person surviving such merger, as applicable, (i) 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, (ii) shall not under any circumstances have equity or ownership rights to more than 700 MW of Unforced Capacity from electric generation facilities with standard offer capacity agreements, and (iii) shall provide or maintain Construction Period Security and Delivery Term Security as required under this Agreement.

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 and with notice to the Board, 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 and to the Board 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.

12.1.1. 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.

12.1.2. If PJM's RPM is eliminated, then a Dispute shall be deemed to have occurred and both parties shall attempt to develop a replacement for the RCP as provided under Section 12.2.2 to (i) amend this Agreement and (ii) permit Transactions to continue over the remaining Delivery Term, subject to Board approval.

12.1.3. If PJM's RPM is modified in a material manner such that it adversely affects the performance, calculation or payment of the Transaction, then a party may declare a Dispute and both parties shall attempt to develop a replacement for the RCP as provided under Section 12.2.2 to (i) amend this Agreement and (ii) permit Transactions to continue over the remaining Delivery Term, subject to Board approval.

#### 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 payable within ten (10) Business Days of such resolution plus interest at the Interest Rate. .

12.2.4. If the parties are unable to resolve a Dispute between themselves pursuant to Section 12.2, then the Dispute will be submitted to the Board for resolution.

12.3. 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 (i) 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 and (ii) until approved by the Board.

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. Execution of Clearing Requirement. In the event the Transaction is determined to be subject to any requirement that it be executed or cleared pursuant to the Commodities Futures Trading commission or similar exchange or multiparty platform, the parties agree to (i) cooperate to preserve and enforce the provisions of this Agreement and (ii) consent to any commercially reasonable margin or other requirements.

13.6. 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.

13.7. 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

February 28, 2011

NRG COMMENTS

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.

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

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

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

**ATTACHMENT A**

**DESCRIPTION OF THE CAPACITY FACILITY**

General Technology (such as combined cycle, steam cycle, integrated gasification combined cycle, nuclear, wind, etc.): \_\_\_\_\_

Size (net MW of installed capacity): \_\_\_\_\_

Full Load Heat Rate (BTU/kWh, HHV, summer rating): \_\_\_\_\_

Primary Fuel (such as coal, gas, residual oil, distillate oil): \_\_\_\_\_

Secondary Fuel (if applicable): \_\_\_\_\_

Number and Configuration of Prime Movers (such as two industrial frame gas turbines plus one steam turbine generator, single pulverized fuel boiler plus steam turbine generator, two circulating fluidized bed boiler plus steam turbine generator, nuclear plant uprate, twenty onshore wind turbines): \_\_\_\_\_

Location (town or city, county, state): \_\_\_\_\_

Owner(s) and Ownership Percentage(s): \_\_\_\_\_  
\_\_\_\_\_

**ATTACHMENT B**

**FORM OF CONSTRUCTION PERIOD SECURITY LETTER OF CREDIT**

IRREVOCABLE NONTRANSFERABLE STANDBY LETTER OF CREDIT

Reference Number: \_\_\_\_\_ Date: \_\_\_\_\_

AMOUNT:USD \_\_\_\_\_

EXPIRY: \_\_\_\_\_

BENEFICIARY:

APPLICANT:

[UTILITY]

[GENERATOR]

[ADDRESS OF UTILITY]

[ADDRESS OF GENERATOR]

Ladies and Gentlemen:

[BANK] ("we" or the "Bank") hereby establish our Irrevocable Nontransferable Standby Letter of Credit No. \_\_\_\_\_ (this "Letter of Credit") in your favor in the amount of XXX AND XX/100 Dollars (\$) (the "Available Amount"), effective immediately and expiring at 5:00 p.m., Eastern Prevailing Time, on the Expiration Date (as hereinafter defined).

This Letter of Credit expires and shall be of no further force or effect upon the close of business on \_\_\_\_\_ or, if such day is not a Business Day (as hereinafter defined), on the next [preceding] [succeeding] Business Day (the "Expiration Date"); provided, however, that this Letter of Credit shall automatically be extended for additional one-year terms unless we provide written notice to you, by certified mail return receipt requested or overnight delivery, at least 60 days prior to the then current Expiration Date. For the purposes hereof, "Business Day" shall mean any day on which commercial banks are not authorized or required to close in New York, NY.

Subject to the terms and conditions herein, funds under this Letter of Credit are available to Beneficiary by presentation of your sight draft(s) drawn on the Bank of the following, on or prior to 5:00 p.m. Eastern Prevailing Time, on or prior to the Expiration Date:

1. The original of this Letter of Credit and all amendments (or photocopy of the original for partial drawings); and

2. The Drawing Certificate issued in the form of Exhibit A attached hereto and which forms an integral part hereof, duly completed (including a Statement of Damages, in the

February 28, 2011

NRG COMMENTS

case of a drawing pursuant to paragraph 1.A, 1.B, 1.C or 1.D thereof) and purportedly bearing the signature of an executive officer or director of the Beneficiary.

Notwithstanding the foregoing, any drawing hereunder may be requested by transmitting the requisite documents as described above to the Bank by facsimile at \_\_\_\_\_ or such other number as specified from time-to-time by the Bank.

The facsimile transmittal shall be deemed delivered when received, provided, however, that the original documents referenced in paragraphs 1 and 2 above and the sight draft referenced above are received by the Bank prior to 5:00 p.m. Eastern Prevailing Time on the third Business Day following receipt of such facsimile transmittal.

Partial drawing of funds shall be permitted under this Letter of Credit, and this Letter of Credit shall remain in full force and effect with respect to any continuing balance; provided that, the Available Amount shall be reduced by the amount of each such drawing.

This Letter of Credit may be cancelled upon written notice from the Beneficiary, requesting that the Letter of Credit be cancelled, accompanied by the original of this Letter of Credit and all amendments.

This Letter of Credit is not transferable or assignable. Any purported transfer or assignment shall be void and of no force or effect.

Banking charges shall be the sole responsibility of the Applicant.

This Letter of Credit sets forth in full our obligations and such obligations shall not in any way be modified, amended, amplified or limited by reference to any documents, instruments or agreements referred to herein, except only the attachment referred to herein; and any such reference shall not be deemed to incorporate by reference any document, instrument or agreement except for such attachment.

The Bank engages with the Beneficiary that Beneficiary's drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to the Bank on or before the Expiration Date.

Except so far as otherwise stated, this Letter of Credit is subject to the International Standby Practices ISP98 (also known as International Chamber of Commerce Publication No. 590), or revision currently in effect (the "ISP"). As to matters not covered by the ISP, the laws of the State of New York, without regard to the principles of conflicts of laws thereunder (other than Section 5-1401 of the General Obligations Law of the State of New York), shall govern all matters with respect to this Letter of Credit.

AUTHORIZED SIGNATURE for Issuer

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
Title:

**EXHIBIT A**

**DRAWING CERTIFICATE**

TO [ISSUING BANK NAME]

IRREVOCABLE NONTRANSFERABLE STANDBY LETTER OF CREDIT

No. \_\_\_\_\_

DRAWING CERTIFICATE

Bank

Bank Address

Subject: Irrevocable Nontransferable Standby Letter of Credit

Reference Number: \_\_\_\_\_

The undersigned executive officer or director of [UTILITY] (the “Beneficiary”), hereby certifies under penalty of perjury to [ISSUING BANK NAME] (the “Bank”), and [GENERATOR] (the “Applicant”), with reference to Irrevocable Nontransferable Standby Letter of Credit No. \_\_\_\_\_, dated \_\_\_\_\_ (the Letter of Credit”), issued by the Bank in favor of the Beneficiary, as follows as of the date hereof:

1. The Beneficiary is entitled to payment of an amount equal to \$\_\_\_\_\_ under that certain Standard Offer Capacity Agreement between Applicant and Beneficiary dated as of \_\_\_\_\_, 20\_\_\_\_ (the “Agreement”) for the following reason(s) [check applicable provision]:

[ ]A. An “Early Termination Date” (as defined in the Agreement) has occurred or been designated as a result of an “Event of Default” (as defined in the Agreement) or Termination Event for which the Applicant owes a termination payment, and the true calculation of such payment amount is set forth in detail in the attached Statement of Damages.

[ ]B. (i) (A) The Bank has heretofore provided written notice to the Beneficiary of the Bank’s intent not to renew the Letter of Credit following the present Expiration Date thereof or (B) the Letter of Credit will expire in fewer than 30 days from the date hereof, and (ii) the Applicant is required to but has not provided Beneficiary alternative Construction Period Security (as defined in the Agreement). The Applicant will hold the proceeds of the Letter of

February 28, 2011

NRG COMMENTS

Credit as cash collateral for any and all amounts owing to the Applicant under the Agreement until such time as it is entitled to payment of such amount pursuant to the Agreement.

2. Based upon the foregoing, the Beneficiary hereby makes demand under the Letter of Credit for payment of \_\_\_\_\_ U.S. DOLLARS AND \_\_\_\_/100ths (U.S.\$\_\_\_\_\_), which amount does not exceed (i) the amount set forth in paragraph 1 above and (ii) the Available Amount under the Letter of Credit as of the date hereof.

3. Funds paid pursuant to the provisions of the Letter of Credit shall be wire transferred to the Beneficiary in accordance with the following instructions:

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

Unless otherwise provided herein, capitalized terms which are used and not defined herein shall have the meaning given each such term in the Letter of Credit.

IN WITNESS WHEREOF, this Certificate has been duly executed and delivered, [together with the attached Statement of Damages,] on behalf of the Beneficiary by its undersigned executive officer or director as of this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

Beneficiary: [UTILITY]

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

Copy to:

[GENERATOR]

[ADDRESS OF GENERATOR]

[ATTACH STATEMENT OF DAMAGES, IF APPLICABLE]



**STATEMENT OF DAMAGES**

For the reason(s) indicated in the Drawing Certificate to which this Statement of Damages is attached, and which this Statement of Damages is an integral part of, the Beneficiary certifies (i) that it has calculated that \$ (or a greater amount) is presently due and owing to Beneficiary on account of [a continuing “Event of Default”] [a Termination Event] [an “Early Termination Date”] (as defined in the Agreement), calculated as set forth in detail below, and (ii) such calculation is made in accordance with Sections 2.3.4 and 9 of the Agreement.

[INSERT DETAILED CALCULATION OF DAMAGES]

ATTACHMENT C

**FORM OF CASH ESCROW AGREEMENT FOR CONSTRUCTION PERIOD  
SECURITY**

Pursuant to this Escrow Agreement (“**Agreement**”) dated [\_\_\_\_], [UTILITY] (the “**Secured Party**”) and [GENERATOR] (the “**Depositor**”) hereby establish an Escrow Account (the “**Account**”) with \_\_\_\_\_ (the “**Agent**”) (the Secured Party, Depositor and Agent hereafter referred to individually as a “**Party**” and collectively as the “**Parties**”), to be maintained and administered for the purposes described in Schedule I attached hereto in accordance with the following terms and conditions:

The funds and/or property described on Schedule I attached hereto and incorporated herein (the “Cash Deposit”) will be deposited in the Account upon delivery thereof to the Agent in the manner and at the time(s) specified in the said Schedule I. The Agent is hereby authorized and directed by the Secured Party and the Depositor, as their escrow agent, to hold, deal with and dispose of the Cash Deposit as provided in the Instructions set forth in Schedule II attached hereto and incorporated herein; subject to and in accordance with, however, the terms and conditions set forth in the following paragraphs of this Agreement, which in all events shall govern and control over any contrary or inconsistent provisions contained in Schedules I or II attached hereto.

Terms not defined but used herein and in Schedules I, II, III and IV hereto will have the meanings given to them in the Standard Offer Capacity Agreement (the “**SOCA**”), dated as of [\_\_\_\_], 20\_\_ between Secured Party and Depositor.

1. Agent’s Duties. Agent’s duties and responsibilities shall be limited to those expressly set forth in this Agreement, and Agent shall not be subject to, or obliged to recognize, any other agreement between any or all of the other Parties or any other persons, even though reference thereto may be made herein; *provided, however*, this Agreement may be amended at any time or times by an instrument in writing signed by all of the Parties. Agent shall not be subject to or obligated to recognize any notice, direction or instruction of any or all of the Parties or of any other person, except as expressly provided for and authorized in Schedule II, and in performing any duties under this Agreement, the Agent shall not be liable to any Party for consequential damages (including, without limitation lost profits), losses or expenses, except and to the extent attributable to any gross negligence or willful misconduct on the part of the Agent.

2. Court Orders or Process. If any controversy arises between the Parties, or with any other party, concerning the subject matter of this Agreement, its terms or conditions, Agent will not be required to determine and/or resolve the controversy or to take any action regarding it. Agent may hold all documents and funds and may wait for settlement of any such controversy by final appropriate legal proceedings or other means as, in Agent’s discretion, Agent may require as evidence of final settlement, despite what may be set forth elsewhere in this Agreement. In such event, Agent will not be liable for interest or damage. Agent is authorized, in its sole discretion, to comply with orders issued or process entered by any court with respect to the Account, the Cash Deposit or this Agreement, without determination by the Agent of such court’s jurisdiction in the matter. If any part of the Cash Deposit are at any time attached,

garnished, or levied upon under any court order, or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then in any such event, Agent is authorized, in its sole discretion, to rely upon and comply with any such order, writ, judgment or decree which it is advised by legal counsel of its own choosing is binding upon it; and if Agent complies with any such order writ, judgment or decree, it shall not be liable to either the Secured Party or the Depositor or to any other person, firm or corporation by reason of such compliance, even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

3. Agent's Actions and Reliance. Agent shall not be personally liable for any act taken or omitted by it hereunder if taken or omitted by it in good faith and in the exercise of its own best judgment, except and to the extent any such act or omission constitutes gross negligence or willful misconduct on the part of the Agent. Agent shall also be fully protected in relying upon any written notice, instruction, direction, certificate or document provided to it under and pursuant to this Agreement that in good faith it believes to be genuine, including written instructions from the Secured Party or the Depositor in the form of the attached Exhibit(s), if any.

4. Collections. Unless otherwise specifically indicated in Schedule II, Agent shall proceed as soon as practicable to collect any checks, interest due, matured principal or other collection items with respect to Cash Deposit at any time deposited in the Account. All such collections shall be subject to the usual collection procedures regarding items received by Agent for deposit or collection. Agent shall not be responsible for any collections with respect to the Cash Deposit if Agent is not registered as record owner thereof or otherwise is not entitled to request or receive payment thereof as a matter of legal or contractual right. All collection payments or receipts shall be deposited to the respective Account, except as otherwise provided in Schedule II. Agent shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument, security or obligation deposited in the Account, nor to take any legal action to enforce payment of any check, instrument or other security deposited in the Account. The Account is a safekeeping escrow account, and no interest shall be paid by Agent on any money deposited or held therein, except as provided in Section 6 hereof.

5. Agent Responsibility. Agent shall not be responsible or liable for the sufficiency or accuracy of the form, execution, validity or genuineness of documents, instruments or securities now or hereafter deposited in the Account, or of any endorsement thereon, or for any lack of endorsement thereon, or for any description therein. Registered ownership of or other legal title to Cash Deposit deposited in the Account shall be maintained in the name of Agent, or its nominee, only if expressly provided in Schedule II. Agent may maintain qualifying Cash Deposit in a Federal Reserve Bank or in any registered clearing agency as Agent may select, and may register such deposited Cash Deposit in the name of Agent or its agent or nominee on the records of such Federal Reserve Bank or such registered clearing agency or a nominee of either. Agent shall not be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such document, security or endorsement or this Agreement.

6. Investments. All monies held in the Account shall be invested by Agent in a triple "A" rated money market fund or in such other investments as may be provided for in Schedule III. The shares of the funds are not deposits or obligations of, or guaranteed by any bank, nor are they insured by the Federal Deposit Insurance Corporation, the Federal Reserve Board or any other agency. The investment in such fund or other investments may involve investment risk, including possible loss of principal. The Agent shall not be liable for losses, penalties or charges incurred upon any sale or purchase of any such investment. All interest, dividends, distributions and other accretions to the Cash Deposit shall [become part of the Cash Deposit] [be disbursed pursuant to Schedule III]. All entities entitled to receive interest or income from the Account will provide Agent with a W-9 or W-8 IRS tax form prior to the disbursement of interest or income. A statement of citizenship will be provided if requested by Agent.

7. Notices/Directions to Agent. Notices and directions to Agent from the Secured Party or the Depositor, or from other persons authorized to give such notices or directions as expressly set forth in Schedule II, shall be in writing and signed by an authorized representative as identified pursuant to Schedule II, and shall not be deemed to be given until actually received by Agent's employee or officer who administers the Account. Agent shall not be responsible or liable for the authenticity or accuracy of notices or directions properly given hereunder if the written form and execution thereof on its face purports to satisfy the requirements applicable thereto as set forth in Schedule II, as determined by Agent in good faith without additional confirmation or investigation.

8. Books and Records. Agent shall maintain books and records regarding its administration of the Account, and the deposit, investment, collections and disbursement or transfer of Cash Deposit, shall retain copies of all written notices and directions sent or received by it in the performance of its duties hereunder, and shall afford each of the Secured Party and the Depositor reasonable access, during regular business hours, to review and make photocopies (at Depositor's cost) of the same.

9. Disputes Among Depositors and/or Third Parties. In the event Agent is notified of any dispute, disagreement or legal action between the Secured Party and the Depositor and/or any third parties, relating to or arising in connection with the Account, the Cash Deposit or the performance of the Agent's duties under this Agreement, the Agent shall be authorized and entitled, subject to Section 2 hereof, to suspend further performance hereunder, to retain and hold the Cash Deposit then in the Account, and to take no further action with respect thereto until the matter has been fully resolved, as evidenced by written notification signed by the Secured Party and the Depositor and any other parties to such dispute, disagreement or legal action.

10. Notice by Agent. Any notices which Agent is required or desires to give hereunder to the Secured Party or the Depositor shall be in writing and may be given by mailing the same to the address indicated below opposite the signature of such Party (or to such other address as said Party may have theretofore substituted therefor by written notification to Agent), by United States certified or registered mail, postage prepaid, by reputable overnight courier service, or by facsimile, so long as receipt of any such facsimile is confirmed. For all purposes hereof, any notice so mailed shall be as effective as though served upon the person of the Party to whom it was mailed on the third (3rd) business day after the time it is deposited in the United

States mail by Agent, properly addressed and with postage prepaid, whether or not such Party thereafter actually receives such notice. Notice given in any other manner shall be effective upon receipt. Whenever under the terms hereof the time for Agent's giving a notice or performing an act falls upon a Saturday, Sunday, or holiday, such time shall be extended to the next business day.

11. Agent Compensation and Expenses. Agent shall be paid a fee for its services as set forth on Schedule IV attached hereto and incorporated herein, which shall be subject to increase upon notice sent to the Secured Party and the Depositor, and reimbursed for its reasonable costs and expenses incurred. The Depositor will pay all Agent's usual charges and Agent may deduct such sums from the funds deposited. If Agent's fees, reasonable costs or expenses provided for herein are not promptly paid when due, and if there is no cash or insufficient cash in the Account to pay the same, then upon thirty (30) days' prior written notice to the Secured Party and the Depositor, Agent may sell such portion of the Cash Deposit held in the Account as necessary and reimburse itself therefor from the proceeds of such sale. In the event that the conditions of this Agreement are not promptly fulfilled; or if Agent renders any service not provided for in this Agreement; or if the Secured Party and the Depositor request a substantial modification of its terms; or if any controversy arises, or if Agent is made a party to or intervenes in any litigation pertaining to this escrow or its subject matter or, in the exercise of its business judgment, finds it necessary to consult with counsel regarding the same, then in any such case Agent shall be reasonably compensated for such extraordinary services and reimbursed for all costs, attorney's fees (including reasonably allocated costs of in-house counsel), and expenses reasonably incurred by Agent in connection with such default, delay, controversy or litigation, and Agent shall have the right to retain all documents and/or other things of value at any time held by Agent in this escrow until such compensation, fees, costs, and expenses are paid. The Depositor promise to pay these sums upon demand. The Depositor and its respective successors and assigns agree to indemnify and hold Agent harmless against any and all losses, claims, damages, liabilities, and expenses, including reasonable costs of investigation, counsel fees (including reasonably allocated costs of in-house counsel) and disbursements that may be imposed on Agent or incurred by Agent in connection with the performance of its duties under this Agreement. Agent shall have a first lien on the Cash Deposit for such compensation and expenses.

12. Agent Resignation. It is understood that Agent reserves the right to resign at any time by giving written notice of its resignation, specifying the effective date thereof, to the Secured Party and the Depositor. Within thirty (30) days after receiving the aforesaid notice, the Secured Party and the Depositor agree to appoint a successor escrow agent to which Agent may transfer the Cash Deposit then held in the Account, less its unpaid fees, costs and expenses. If a successor escrow agent has not been appointed and has not accepted such appointment by the end of such thirty (30) day period, Agent may apply to a court of competent jurisdiction for the appointment of a successor escrow agent, and the costs, expenses and reasonable attorney's fees which Agent incurs in connection with such a proceeding shall be paid by the Secured Party and the Depositor.

13. Escrow Termination. If this Agreement shall not have previously terminated, then it shall terminate on [\_\_\_\_\_], as provided in Schedule II, at which time the Cash

Deposit then held in the Account, less Agent's unpaid fees, costs and expenses shall be distributed in the following manner:

[\_\_\_\_\_]

14. Governing Law. This Agreement shall be construed, enforced, and administered in accordance with the laws of the State of [New Jersey].

15. Automatic Succession. Any company into which the Agent may be merged or with which it may be consolidated, or any company to whom Agent may transfer a substantial amount of its Escrow business, shall be the Successor to the Agent without the execution or filing of any paper or any further act on the part of any of the Parties, anything herein to the contrary notwithstanding.

16. Disclosure: The Parties hereby agree not to use the name of *[insert name of Agent]* to imply an association with the transaction other than that of a legal escrow agent.

17. Counterparts: This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which, when taken together, shall constitute and be one and the same instrument. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the Parties and may be used in lieu of the original Agreement for all purposes. Signatures of the Parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

The undersigned Agent hereby agrees to hold, deal with and dispose of the Cash Deposit at any time deposited to the Account in accordance with the foregoing Agreement.

*[Signature page follows]*

February 28, 2011

NRG COMMENTS

IN WITNESS WHEREOF, the undersigned have affixed their signatures and hereby adopt as part of this instrument Schedules I, II, III and IV, which are incorporated by reference.

SECURED PARTY:

By:

Its:

(Address)

(City, State and Zip Code)

(Telephone)

(Facsimile Number)

Tax I.D.

DEPOSITOR:

By:

Its:

(Address)

(City, State and Zip Code)

(Telephone)

(Facsimile Number)

Tax I.D.

as Agent

By:

Its:

Notices to Agent shall be sent to:

[Name]

[Address]

[City, State, Zip]

With Fax Copy to:

[Name]

[Facsimile Number]

**SCHEDULE I  
TO CASH ESCROW AGREEMENT**

**PURPOSE AND MANNER OF DEPOSITS**

Credit Support provided by Depositor in the form of Cash under the SOCA, all investments of such Cash, and all proceeds of such investments.

All Credit Support in the form of Cash provided by the Depositor shall be deposited in the Account promptly upon receipt by the Agent.

Instructions for transfer of funds into the Account:

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**SCHEDULE II  
TO CASH ESCROW AGREEMENT  
INSTRUCTIONS OF DEPOSITORS**

1. Upon written notice signed by the Secured Party to the Agent that one or more of the following events has occurred, Agent shall withdraw Cash in the amount specified in such notice from the Account (as described on Schedule I) and shall transfer such Cash in accordance with the Secured Party's instructions.

- (d) An Early Termination Date (as defined in the SOCA) has occurred or been designated as a result of an Event of Default or a Termination Event (as defined in the Agreement) and a specified amount of the Termination Payment (as defined in the SOCA) owed by the Depositor to the Secured Party remains outstanding.

2. Upon written notice signed by both the Secured Party and the Depositor that the Depositor has replaced a specified amount of Cash in the Account with a Letter of Credit (as defined in the SOCA), the Agent shall withdraw such amount of Cash from Depositor's Subaccount and transfer such Cash in accordance with the Depositor's instructions.

3. The Agent shall liquidate such Cash Deposit from the Account as may be necessary to meet the withdrawal instructions under paragraphs 1 through 2 of this Schedule II.

7. Authorized persons referred to in Sections 1 and 7 of the Agreement are as specified below, as such names may be amended from time to time by notice to the Agent:

For Depositor:

For Secured Party:

**SCHEDULE III  
TO CASH ESCROW AGREEMENT  
PERMITTED INVESTMENTS**

**SCHEDULE IV  
TO CASH ESCROW AGREEMENT  
SCHEDULE OF FEES FOR SERVICES  
AS ESCROW AGENT**

**ATTACHMENT D**

**FORM OF DELIVERY TERM SECURITY LETTER OF CREDIT**

IRREVOCABLE NONTRANSFERABLE STANDBY LETTER OF CREDIT

Reference Number: \_\_\_\_\_ Date: \_\_\_\_\_

AMOUNT:USD \_\_\_\_\_

EXPIRY: \_\_\_\_\_

BENEFICIARY:

APPLICANT:

[UTILITY]

[GENERATOR]

[ADDRESS OF UTILITY]

[ADDRESS OF GENERATOR]

Ladies and Gentlemen:

[BANK] ("we" or the "Bank") hereby establish our Irrevocable Nontransferable Standby Letter of Credit No. \_\_\_\_\_ (this "Letter of Credit") in your favor in the amount of XXX AND XX/100 Dollars (\$) (the "Available Amount"), effective immediately and expiring at 5:00 p.m., Eastern Prevailing Time, on the Expiration Date (as hereinafter defined).

This Letter of Credit expires and shall be of no further force or effect upon the close of business on \_\_\_\_\_ or, if such day is not a Business Day (as hereinafter defined), on the next [preceding] [succeeding] Business Day (the "Expiration Date"); provided, however, that this Letter of Credit shall automatically be extended for additional one-year terms unless we provide written notice to you, by certified mail return receipt requested or overnight delivery, at least 60 days prior to the then current Expiration Date. For the purposes hereof, "Business Day" shall mean any day on which commercial banks are not authorized or required to close in New York, NY.

Subject to the terms and conditions herein, funds under this Letter of Credit are available to Beneficiary by presentation of your sight draft(s) drawn on the Bank of the following, on or prior to 5:00 p.m. Eastern Prevailing Time, on or prior to the Expiration Date:

1. The original of this Letter of Credit and all amendments (or photocopy of the original for partial drawings); and

2. The Drawing Certificate issued in the form of Attachment A attached hereto and which forms an integral part hereof, duly completed (including a Statement of Damages, in the

case of a drawing pursuant to paragraph 1.A, 1.B or 1.C thereof) and purportedly bearing the signature of an executive officer or director of the Beneficiary.

Notwithstanding the foregoing, any drawing hereunder may be requested by transmitting the requisite documents as described above to the Bank by facsimile at \_\_\_\_\_ or such other number as specified from time-to-time by the Bank.

The facsimile transmittal shall be deemed delivered when received, provided, however, that the original documents referenced in paragraphs 1 and 2 above and the sight draft referenced above are received by the Bank prior to 5:00 p.m. Eastern Prevailing Time on the third Business Day following receipt of such facsimile transmittal.

Partial drawing of funds shall be permitted under this Letter of Credit, and this Letter of Credit shall remain in full force and effect with respect to any continuing balance; provided that, the Available Amount shall be reduced by the amount of each such drawing.

This Letter of Credit may be cancelled upon written notice from the Beneficiary, requesting that the Letter of Credit be cancelled, accompanied by the original of this Letter of Credit and all amendments.

This Letter of Credit is not transferable or assignable. Any purported transfer or assignment shall be void and of no force or effect.

Banking charges shall be the sole responsibility of the Applicant.

This Letter of Credit sets forth in full our obligations and such obligations shall not in any way be modified, amended, amplified or limited by reference to any documents, instruments or agreements referred to herein, except only the attachment referred to herein; and any such reference shall not be deemed to incorporate by reference any document, instrument or agreement except for such attachment.

The Bank engages with the Beneficiary that Beneficiary's drafts drawn under and in compliance with the terms of this Letter of Credit will be duly honored if presented to the Bank on or before the Expiration Date.

Except so far as otherwise stated, this Letter of Credit is subject to the International Standby Practices ISP98 (also known as International Chamber of Commerce Publication No. 590), or revision currently in effect (the "ISP"). As to matters not covered by the ISP, the laws of the State of New York, without regard to the principles of conflicts of laws thereunder (other than Section 5-1401 of the General Obligations Law of the State of New York), shall govern all matters with respect to this Letter of Credit.

AUTHORIZED SIGNATURE for Issuer

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
Title:

**EXHIBIT A**

**DRAWING CERTIFICATE**

TO [ISSUING BANK NAME]

IRREVOCABLE NONTRANSFERABLE STANDBY LETTER OF CREDIT

No. \_\_\_\_\_

DRAWING CERTIFICATE

Bank

Bank Address

Subject:      Irrevocable Nontransferable Standby Letter of Credit

Reference Number: \_\_\_\_\_

The undersigned executive officer or director of [UTILITY] (the "Beneficiary"), hereby certifies under penalty of perjury to [ISSUING BANK NAME] (the "Bank"), and [GENERATOR] (the "Applicant"), with reference to Irrevocable Nontransferable Standby Letter of Credit No. \_\_\_\_\_, dated \_\_\_\_\_ (the Letter of Credit"), issued by the Bank in favor of the Beneficiary, as follows as of the date hereof:

1. The Beneficiary is entitled to payment of an amount equal to \$\_\_\_\_\_ under that certain Standard Offer Capacity Agreement between Applicant and Beneficiary dated as of \_\_\_\_\_, 20\_\_\_\_ (the "Agreement") for the following reason(s) [check applicable provision]:

[ ]A. The Payment Date under Section 2.2 of the Agreement has occurred with respect to such amount, and such amount is presently due and owing under Section 4.1.2 of the Agreement.

[ ]B. An "Early Termination Date" (as defined in the Agreement) has occurred or been designated as a result of an "Event of Default" (as defined in the Agreement) or Termination Event for which the Applicant owes a termination payment, and the true calculation of such payment amount is set forth in detail in the attached Statement of Damages.

[ ]C. (i) (A) The Bank has heretofore provided written notice to the Beneficiary of the Bank's intent not to renew the Letter of Credit following the present Expiration Date thereof or

February 28, 2011

NRG COMMENTS

(B) the Letter of Credit will expire in fewer than 30 days from the date hereof, and (ii) the Applicant is required to but has not provided Beneficiary alternative Delivery Term Security (as defined in the Agreement). The Applicant will hold the proceeds of the Letter of Credit as cash collateral for any and all amounts owing to the Applicant under the Agreement until such time as it is entitled to payment of such amount pursuant to the Agreement.

2. Based upon the foregoing, the Beneficiary hereby makes demand under the Letter of Credit for payment of \_\_\_\_\_ U.S. DOLLARS AND \_\_\_\_/100ths (U.S.\$\_\_\_\_), which amount does not exceed (i) the amount set forth in paragraph 1 above and (ii) the Available Amount under the Letter of Credit as of the date hereof.

3. Funds paid pursuant to the provisions of the Letter of Credit shall be wire transferred to the Beneficiary in accordance with the following instructions:

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

Unless otherwise provided herein, capitalized terms which are used and not defined herein shall have the meaning given each such term in the Letter of Credit.

IN WITNESS WHEREOF, this Certificate has been duly executed and delivered, [together with the attached Statement of Damages,] on behalf of the Beneficiary by its undersigned executive officer or director as of this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_.

Beneficiary: [UTILITY]

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Copy to:

[GENERATOR]

[ADDRESS OF GENERATOR]

[ATTACH STATEMENT OF DAMAGES, IF APPLICABLE]



**STATEMENT OF DAMAGES**

For the reason(s) indicated in the Drawing Certificate to which this Statement of Damages is attached, and which this Statement of Damages is an integral part of, the Beneficiary certifies (i) that it has calculated that \$ (or a greater amount) is presently due and owing to Beneficiary on account of [a failure to make a payment under Section 4.1.2 of the Agreement] [an “Early Termination Date”] (as defined in the Agreement), calculated as set forth in detail below, and (ii) such calculation is made in accordance with Sections [2.3.4 and 9 of the Agreement].

[INSERT DETAILED CALCULATION OF DAMAGES]



## ATTACHMENT E

## FORM OF CASH ESCROW AGREEMENT FOR DELIVERY TERM SECURITY

Pursuant to this Escrow Agreement ("**Agreement**") dated [\_\_\_\_], [UTILITY] (the "**Secured Party**") and [GENERATOR] (the "**Depositor**") hereby establish an Escrow Account (the "**Account**") with \_\_\_\_\_ (the "**Agent**") (the Secured Party, Depositor and Agent hereafter referred to individually as a "**Party**" and collectively as the "**Parties**"), to be maintained and administered for the purposes described in Schedule I attached hereto in accordance with the following terms and conditions:

The funds and/or property described on Schedule I attached hereto and incorporated herein (the "Cash Deposit") will be deposited in the Account upon delivery thereof to the Agent in the manner and at the time(s) specified in the said Schedule I. The Agent is hereby authorized and directed by the Secured Party and the Depositor, as their escrow agent, to hold, deal with and dispose of the Cash Deposit as provided in the Instructions set forth in Schedule II attached hereto and incorporated herein; subject to and in accordance with, however, the terms and conditions set forth in the following paragraphs of this Agreement, which in all events shall govern and control over any contrary or inconsistent provisions contained in Schedules I or II attached hereto.

Terms not defined but used herein and in Schedules I, II, III and IV hereto will have the meanings given to them in the Standard Offer Capacity Agreement (the "**SOCA**"), dated as of [\_\_\_\_], 20\_\_ between the Secured Party and Depositor.

1. Agent's Duties. Agent's duties and responsibilities shall be limited to those expressly set forth in this Agreement, and Agent shall not be subject to, or obliged to recognize, any other agreement between any or all of the other Parties or any other persons, even though reference thereto may be made herein; *provided, however*, this Agreement may be amended at any time or times by an instrument in writing signed by all of the Parties. Agent shall not be subject to or obligated to recognize any notice, direction or instruction of any or all of the Parties or of any other person, except as expressly provided for and authorized in Schedule II, and in performing any duties under this Agreement, the Agent shall not be liable to any Party for consequential damages (including, without limitation lost profits), losses or expenses, except and to the extent attributable to any gross negligence or willful misconduct on the part of the Agent.

2. Court Orders or Process. If any controversy arises between the Parties, or with any other party, concerning the subject matter of this Agreement, its terms or conditions, Agent will not be required to determine and/or resolve the controversy or to take any action regarding it. Agent may hold all documents and funds and may wait for settlement of any such controversy by final appropriate legal proceedings or other means as, in Agent's discretion, Agent may require as evidence of final settlement, despite what may be set forth elsewhere in this Agreement. In such event, Agent will not be liable for interest or damage. Agent is authorized, in its sole discretion, to comply with orders issued or process entered by any court with respect to the Account, the Cash Deposit or this Agreement, without determination by the Agent of such

court's jurisdiction in the matter. If any Cash Deposit are at any time attached, garnished, or levied upon under any court order, or in case the payment, assignment, transfer, conveyance or delivery of any such property shall be stayed or enjoined by any court order, or in case any order, judgment or decree shall be made or entered by any court affecting such property or any part thereof, then in any such event, Agent is authorized, in its sole discretion, to rely upon and comply with any such order, writ, judgment or decree which it is advised by legal counsel of its own choosing is binding upon it; and if Agent complies with any such order writ, judgment or decree, it shall not be liable to either the Secured Party or the Depositor or to any other person, firm or corporation by reason of such compliance, even though such order, writ, judgment or decree may be subsequently reversed, modified, annulled, set aside or vacated.

3. Agent's Actions and Reliance. Agent shall not be personally liable for any act taken or omitted by it hereunder if taken or omitted by it in good faith and in the exercise of its own best judgment, except and to the extent any such act or omission constitutes gross negligence or willful misconduct on the part of the Agent. Agent shall also be fully protected in relying upon any written notice, instruction, direction, certificate or document provided to it under and pursuant to this Agreement that in good faith it believes to be genuine, including written instructions from the Secured Party or the Depositor in the form of the attached Exhibit(s), if any.

4. Collections. Unless otherwise specifically indicated in Schedule II, Agent shall proceed as soon as practicable to collect any checks, interest due, matured principal or other collection items with respect to Cash Deposit at any time deposited in the Account. All such collections shall be subject to the usual collection procedures regarding items received by Agent for deposit or collection. Agent shall not be responsible for any collections with respect to any of the Cash Deposit if Agent is not registered as record owner thereof or otherwise is not entitled to request or receive payment thereof as a matter of legal or contractual right. All collection payments or receipts shall be deposited to the respective Account, except as otherwise provided in Schedule II. Agent shall not be required or have a duty to notify anyone of any payment or maturity under the terms of any instrument, security or obligation deposited in the Account, nor to take any legal action to enforce payment of any check, instrument or other security deposited in the Account. The Account is a safekeeping escrow account, and no interest shall be paid by Agent on any money deposited or held therein, except as provided in Section 6 hereof.

5. Agent Responsibility. Agent shall not be responsible or liable for the sufficiency or accuracy of the form, execution, validity or genuineness of documents, instruments or securities now or hereafter deposited in the Account, or of any endorsement thereon, or for any lack of endorsement thereon, or for any description therein. Registered ownership of or other legal title to Cash Deposit deposited in the Account shall be maintained in the name of Agent, or its nominee, only if expressly provided in Schedule II. Agent may maintain qualifying Cash Deposit in a Federal Reserve Bank or in any registered clearing agency as Agent may select, and may register such deposited Cash Deposit in the name of Agent or its agent or nominee on the records of such Federal Reserve Bank or such registered clearing agency or a nominee of either. Agent shall not be responsible or liable in any respect on account of the identity, authority or rights of the persons executing or delivering or purporting to execute or deliver any such document, security or endorsement or this Agreement.

6. Investments. All monies held in the Account shall be invested by Agent in a triple "A" rated money market fund or in such other investments as may be provided for in Schedule III. The shares of the funds are not deposits or obligations of, or guaranteed by any bank, nor are they insured by the Federal Deposit Insurance Corporation, the Federal Reserve Board or any other agency. The investment in such fund or other investments may involve investment risk, including possible loss of principal. The Agent shall not be liable for losses, penalties or charges incurred upon any sale or purchase of any such investment. All interest, dividends, distributions and other accretions to the Cash Deposit shall [become part of the Cash Deposit] [be disbursed pursuant to Schedule III]. All entities entitled to receive interest or income from the Account will provide Agent with a W-9 or W-8 IRS tax form prior to the disbursement of interest or income. A statement of citizenship will be provided if requested by Agent.

7. Notices/Directions to Agent. Notices and directions to Agent from the Secured Party or the Depositor, or from other persons authorized to give such notices or directions as expressly set forth in Schedule II, shall be in writing and signed by an authorized representative as identified pursuant to Schedule II, and shall not be deemed to be given until actually received by Agent's employee or officer who administers the Account. Agent shall not be responsible or liable for the authenticity or accuracy of notices or directions properly given hereunder if the written form and execution thereof on its face purports to satisfy the requirements applicable thereto as set forth in Schedule II, as determined by Agent in good faith without additional confirmation or investigation.

8. Books and Records. Agent shall maintain books and records regarding its administration of the Account, and the deposit, investment, collections and disbursement or transfer of Cash Deposit, shall retain copies of all written notices and directions sent or received by it in the performance of its duties hereunder, and shall afford each of the Secured Party and the Depositor reasonable access, during regular business hours, to review and make photocopies (at Depositor's cost) of the same.

9. Disputes Among Depositors and/or Third Parties. In the event Agent is notified of any dispute, disagreement or legal action between the Secured Party and the Depositor and/or any third parties, relating to or arising in connection with the Account, the Cash Deposit or the performance of the Agent's duties under this Agreement, the Agent shall be authorized and entitled, subject to Section 2 hereof, to suspend further performance hereunder, to retain and hold the Cash Deposit then in the Account, and to take no further action with respect thereto until the matter has been fully resolved, as evidenced by written notification signed by the Secured Party and the Depositor and any other parties to such dispute, disagreement or legal action.

10. Notice by Agent. Any notices which Agent is required or desires to give hereunder to the Secured Party or the Depositor shall be in writing and may be given by mailing the same to the address indicated below opposite the signature of such Party (or to such other address as said Party may have theretofore substituted therefor by written notification to Agent), by United States certified or registered mail, postage prepaid, by reputable overnight courier service, or by facsimile, so long as receipt of any such facsimile is confirmed. For all purposes hereof, any notice so mailed shall be as effective as though served upon the person of the Party to whom it was mailed on the third (3rd) business day after the time it is deposited in the United

States mail by Agent, properly addressed and with postage prepaid, whether or not such Party thereafter actually receives such notice. Notice given in any other manner shall be effective upon receipt. Whenever under the terms hereof the time for Agent's giving a notice or performing an act falls upon a Saturday, Sunday, or holiday, such time shall be extended to the next business day.

11. Agent Compensation and Expenses. Agent shall be paid a fee for its services as set forth on Schedule IV attached hereto and incorporated herein, which shall be subject to increase upon notice sent to the Secured Party and the Depositor, and reimbursed for its reasonable costs and expenses incurred. The Depositor will pay all Agent's usual charges and Agent may deduct such sums from the funds deposited. If Agent's fees, reasonable costs or expenses provided for herein are not promptly paid when due, and if there is no cash or insufficient cash in the Account to pay the same, then upon thirty (30) days' prior written notice to the Secured Party and the Depositor, Agent may sell such portion of the Cash Deposit held in the Account as necessary and reimburse itself therefor from the proceeds of such sale. In the event that the conditions of this Agreement are not promptly fulfilled; or if Agent renders any service not provided for in this Agreement; or if the Secured Party and the Depositor request a substantial modification of its terms; or if any controversy arises, or if Agent is made a party to or intervenes in any litigation pertaining to this escrow or its subject matter or, in the exercise of its business judgment, finds it necessary to consult with counsel regarding the same, then in any such case Agent shall be reasonably compensated for such extraordinary services and reimbursed for all costs, attorney's fees (including reasonably allocated costs of in-house counsel), and expenses reasonably incurred by Agent in connection with such default, delay, controversy or litigation, and Agent shall have the right to retain all documents and/or other things of value at any time held by Agent in this escrow until such compensation, fees, costs, and expenses are paid. The Depositor promise to pay these sums upon demand. The Depositor and its respective successors and assigns agree to indemnify and hold Agent harmless against any and all losses, claims, damages, liabilities, and expenses, including reasonable costs of investigation, counsel fees (including reasonably allocated costs of in-house counsel) and disbursements that may be imposed on Agent or incurred by Agent in connection with the performance of its duties under this Agreement. Agent shall have a first lien on the Cash Deposit for such compensation and expenses.

12. Agent Resignation. It is understood that Agent reserves the right to resign at any time by giving written notice of its resignation, specifying the effective date thereof, to the Secured Party and the Depositor. Within thirty (30) days after receiving the aforesaid notice, the Secured Party and the Depositor agree to appoint a successor escrow agent to which Agent may transfer the Cash Deposit then held in the Account, less its unpaid fees, costs and expenses. If a successor escrow agent has not been appointed and has not accepted such appointment by the end of such thirty (30) day period, Agent may apply to a court of competent jurisdiction for the appointment of a successor escrow agent, and the costs, expenses and reasonable attorney's fees which Agent incurs in connection with such a proceeding shall be paid by the Secured Party and the Depositor.

13. Escrow Termination. If this Agreement shall not have previously terminated, then it shall terminate on [\_\_\_\_\_], as provided in Schedule II, at which time the Cash

Deposit then held in the Account, less Agent's unpaid fees, costs and expenses shall be distributed in the following manner:  
[\_\_\_\_\_]

14. Governing Law. This Agreement shall be construed, enforced, and administered in accordance with the laws of the State of [New Jersey].

15. Automatic Succession. Any company into which the Agent may be merged or with which it may be consolidated, or any company to whom Agent may transfer a substantial amount of its Escrow business, shall be the Successor to the Agent without the execution or filing of any paper or any further act on the part of any of the Parties, anything herein to the contrary notwithstanding.

16. Disclosure: The Parties hereby agree not to use the name of *[insert name of Agent]* to imply an association with the transaction other than that of a legal escrow agent.

17. Counterparts: This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which, when taken together, shall constitute and be one and the same instrument. The exchange of copies of this Agreement and of signature pages by facsimile transmission shall constitute effective execution and delivery of this Agreement as to the Parties and may be used in lieu of the original Agreement for all purposes. Signatures of the Parties transmitted by facsimile shall be deemed to be their original signatures for all purposes.

The undersigned Agent hereby agrees to hold, deal with and dispose of the Cash Deposit at any time deposited to the Account in accordance with the foregoing Agreement.

*[Signature page follows]*

February 28, 2011

NRG COMMENTS

IN WITNESS WHEREOF, the undersigned have affixed their signatures and hereby adopt as part of this instrument Schedules I, II, III and IV, which are incorporated by reference.

SECURED PARTY:

By:

Its:

(Address)

(City, State and Zip Code)

(Telephone)

(Facsimile Number)

Tax I.D.

DEPOSITOR:

By:

Its:

(Address)

(City, State and Zip Code)

(Telephone)

(Facsimile Number)

Tax I.D.

as Agent

By:

Its:

Notices to Agent shall be sent to:

[Name]

[Address]

[City, State, Zip]

With Fax Copy to:

[Name]

[Facsimile Number]



**SCHEDULE I  
TO CASH ESCROW AGREEMENT**

**PURPOSE AND MANNER OF DEPOSITS**

Credit Support provided by Depositor in the form of Cash under the SOCA, all investments of such Cash, and all proceeds of such investments.

All Credit Support in the form of Cash provided by the Depositor shall be deposited in the Account promptly upon receipt by the Agent.

Instructions for transfer of funds into the Account:

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**SCHEDULE II  
TO CASH ESCROW AGREEMENT  
INSTRUCTIONS OF DEPOSITORS**

1. Upon written notice signed by the Secured Party to the Agent that one or more of the following events has occurred, Agent shall withdraw Cash in the amount specified in such notice from the Account (as described on Schedule I) and shall transfer such Cash in accordance with the Secured Party's instructions.

- (a) The Depositor has failed to pay an amount presently due and owing under Section 4.1.2 of the Agreement, which amount remains outstanding.
- (b) An Event of Default (as defined in the SOCA) or a Termination Event (as defined in the SOCA) with respect to the Depositor has occurred and is continuing, and the Depositor owes the Secured Party a specified amount in respect of such Event of Default, which amount remains outstanding.
- (c) An Early Termination Date (as defined in the SOCA) has occurred or been designated as a result of an Event of Default or a Termination Event (as defined in the Agreement) and a specified amount of the Termination Payment (as defined in the SOCA) owed by the Depositor to the Secured Party remains outstanding.

2. Upon written notice signed by both the Secured Party and the Depositor that the Depositor has replaced a specified amount of Cash in the Account with a Letter of Credit (as defined in the SOCA), the Agent shall withdraw such amount of Cash from Depositor's Subaccount and transfer such Cash in accordance with the Depositor's instructions.

3. The Agent shall liquidate such Cash Deposit from the Account as may be necessary to meet the withdrawal instructions under paragraphs 1 through 2 of this Schedule II.

7. Authorized persons referred to in Sections 1 and 7 of the Agreement are as specified below, as such names may be amended from time to time by notice to the Agent:

For Depositor:

For Secured Party:

**SCHEDULE III  
TO CASH ESCROW AGREEMENT  
PERMITTED INVESTMENTS**

**SCHEDULE IV  
TO CASH ESCROW AGREEMENT**

**ATTACHMENT F****SCHEDULE OF APPROVED STANDARD OFFER CAPACITY PRICES**

Delivery Year (ending May 31 <sup>st</sup> )	Standard Offer Capacity Price (\$/MW-day)
2015	
2016	
2017	
2018	
2019	
2020	
2021	
2022	
2023	
2024	
2025	
2026	
2027	
2028	
2029	
2030	
2031	
2032	
2033	