

**LAKE LURE TOWN COUNCIL  
WORK SESSION/ACTION MEETING  
PACKET**

Wednesday, October 25, 2023  
8:30 a.m.



**Mayor Carol C. Pritchett  
Mayor Pro Tem David DiOrio  
Commissioner Patrick Bryant  
Commissioner Scott Doster  
Commissioner Jim Proctor**

# TOWN OF LAKE LURE

## Town Council Work Session/Action Meeting

Wednesday, October 25, 2023 - 8:30 AM

Lake Lure Municipal Center



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### Agenda

- I. **Call to Order**
- II. **Agenda Adoption**
- III. **Public Comment**
- IV. **Discuss Proposed Amendments to Speed Limit Ordinances – Page 1**
- V. **Review and Consider Taking Action on Duke Energy Power Purchase Agreement and Renewable Energy Certifications Transaction Agreement – Staff recommends taking action as the current agreement expires at the end of October\* – Page 3**
- VI. **Continue Discussions Regarding Lake Lure Tours Off-Season Beach Hours – Page 70**
- VII. **Review Job Description for the Hydro Utilities Technician Position – Page 73**
- VIII. **Review Proposed Schnabel Work Order No. 12, Proposal for Professional Engineering Services for Dam and Spillway Gate Inspections – Page 77**
- IX. **Discuss Capital Reserve for Buildings, Land, and Parks – Page 90**
- X. **Review Recommended Personnel Policy Changes – Page 92**
- XI. **Continue Discussions Regarding Boys Camp Road/Parks and Recreation trust Fund (PARTF) – Page 97**
- XII. **Review Maintenance Agreement for New Electric Vehicle Chargers and Discuss Charging for use of Chargers to Cover Town Costs – Page 98**
- XIII. **Review the Zoning and Planning Board’s Recommendation Regarding Chickens and Chapter 4 (“Animals”) of the Code of Ordinances – Page 115**
- XIV. **Review the Zoning and Planning Board’s Recommendation Regarding Alcohol Sales in Lake Lure – Page 122**
- XV. **Continue Review of Proposals for the Lease of the Former ABC Store Property – Page 126**
- XVI. **SRF Loan Updates – Page 137**
- XVII. **Discuss Internships – Page 140**
- XVIII. **Discuss Nelon Garbage Services Agreement – Page 141**

**XIX. Project Manager Updates – Page 143**

**XX. Town Manager Updates – Page 144**

**XXI. Adjournment**

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Discuss Proposed Amendments to Speed Limit Ordinances

**AGENDA INFORMATION:**

**Item Number:** IV  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

Town staff has received various questions in regard to speed limit signs. There signs located at town entrances that instruct that the town-wide speed limit is 25 unless otherwise posted. However, this is not stated in the Town's Code of Ordinances. Town staff is proposing the addition subsections B and C to Code of Ordinances Section 30-95 (Schedule I Speed Limits) which addresses streets in town limits that are not a part of the state highway system and specifies that nothing in the section shall be interpreted to permit any person to drive a vehicle at a speed greater than is reasonable and prudent under the existing conditions. Following the addition of such verbiage, Town staff will work towards addressing signage.

**ATTACHMENTS:**

Proposed Amendments to Code of Ordinances Sec. 30-95

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(Additions are underlined, removals are ~~struck through~~)

**Sec. 30-95. Schedule I speed limits.**

- (a) Based upon an engineering and traffic investigation pursuant to authority granted by G.S. 20-141(f), the town does hereby declare the following speed limit modifications on the following described portion of a state highway system street:

<i>Speed Limit</i>	<i>Ordinance Number</i>	<i>Description</i>
25	1073278	Between a point 0.34 miles east of SR 1304 and a point 0.93 miles east of SR 1304
35	800200032	SR 1306 from a point 0.50 miles west of the eastern corporate limits eastward to the eastern corporate limits

(Code 1989, ch. 72, sched. I; Ord. of 4-24-1991; Ord. of 11-13-2018)

- (b) Streets in town that are not a part of the state highway system:

<u><i>Speed Limit</i></u>	<u><i>Ordinance Number</i></u>	<u><i>Description</i></u>
<u>25</u>		<u>All streets unless otherwise posted</u>
<u>15</u>		

- (c) Nothing in this section shall be interpreted to permit any person to drive a vehicle at a speed greater than is reasonable and prudent under the conditions then existing.

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Review and Consider Taking Action on Duke Energy Power Purchase Agreement and Renewable Energy Certifications Transaction Agreement

**AGENDA INFORMATION:**

**Item Number:** V  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

The current Power Purchase Agreement (PPA) and Renewable Energy Certifications (REC) Transaction Agreement between Duke Energy and the Town of Lake Lure will be expiring at the end of October 2023 and new agreements will be necessary. At the October 10<sup>th</sup> regular meeting, Town Council reviewed the options for terms and there was consensus to opt for a 2-year term. Duke Energy has provided the Town with a draft PPA and REC Transaction Agreement. Staff recommends that Council take action on this item during the October 25<sup>th</sup> meeting due to the expiration of the current agreement on October 31<sup>st</sup>.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

To approve the 2023-2025 Duke Energy Power Purchase Agreement and Renewable Energy Certifications Transaction Agreement.

**ATTACHMENTS:**

PPA Rates; Draft PPA; Draft REC Transaction Agreement

**STAFF COMMENTS AND RECOMMENDATIONS:**

Staff recommends adoption at the October 25<sup>th</sup> Work Session/Action Meeting.

	CAPACITY PRICING			ENERGY PRICING								
	Summer Months PM	Winter Months AM	Winter Months PM	Summer Prem Pk	Summer On-Peak	Summer Off-Peak	Winter Prem Pk	Winter On-Peak AM	Winter On-Peak PM	Winter Off-Peak	Shoulder On-Peak AM/PM	Shoulder Off-Peak
	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh	\$/MWh
2 year	\$ 20.38	\$ 200.52	\$ -	\$ 44.28	\$ 38.69	\$ 35.43	\$ 51.24	\$ 48.87	\$ 40.58	\$ 33.91	\$ 39.59	\$ 28.98
5 year	\$ 20.69	\$ 203.53	\$ -	\$ 43.78	\$ 41.43	\$ 36.14	\$ 56.57	\$ 49.49	\$ 44.46	\$ 35.77	\$ 40.52	\$ 28.27
10 year	\$ 21.16	\$ 208.22	\$ -	\$ 46.46	\$ 44.69	\$ 38.23	\$ 60.12	\$ 50.32	\$ 46.52	\$ 37.80	\$ 41.61	\$ 30.72

REC Price =            2 year      \$3.75/REC  
                              5 year      \$4.00/REC

**Period Definitions**

For Energy Credit purposes, Summer months are defined as calendar months June through September, Winter months are defined as calendar months December through February, and Shoulder months are defined as March through May and October through November. Summer on-peak hours shall be Monday through Friday from 12:00 p.m. noon to 4:00 p.m. and 8:00 p.m. to 10:00 p.m. Winter on-peak hours shall be Monday through Friday with morning hours from 5:00 a.m. to 6:00 a.m. and 9:00 a.m. to 10:00 a.m., plus evening hours from 5:00 p.m. to 10:00 p.m. Shoulder on-peak hours shall be Monday through Friday with morning hours from 6:00 a.m. to 10:00 a.m. plus evening hours from 4:00 p.m. to 11:00 p.m. Summer premium peak hours shall be Monday through Friday from 4:00 p.m. to 8:00 p.m. Winter premium peak hours shall be Monday through Friday from 6:00 a.m. to 9:00 a.m. There are no premium peak hours for Shoulder months. All other hours, plus the following holidays, shall be offpeak: New Year’s Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the day after, and Christmas Day. When a holiday falls on a Saturday, the Friday before the holiday will be considered off-peak; when the holiday falls on a Sunday, the following Monday will be considered off-peak.

Capacity Credit shall only be applicable in Summer months defined as the calendar months of July and August and Winter months defined as calendar months of December through March. Summer on-peak hours shall be 5:00 p.m. to 9:00 p.m. during all Summer days. During Winter months, the on-peak hours shall be all Winter days from 5:00 a.m. to 10:00 a.m. Capacity credits are not applicable in all other months



## **POWER PURCHASE AGREEMENT**

**Buyer:** Duke Energy Carolinas, LLC  
525 South Tryon Street  
DE Plaza 12th Floor  
Charlotte, North Carolina 28202  
Attn: Contract Administrator  
Email: [PPA@duke-energy.com](mailto:PPA@duke-energy.com)

*With Additional Notices of Events of Default  
Or Potential Event of Default to:*

525 South Tryon Street, MC: DEP-09B  
Charlotte, North Carolina 28202  
Attn.: VP Transactional Legal Support

**Seller:** Town of Lake Lure  
PO Box 255  
Lake Lure, NC 28746  
Attn.: Town Manager  
[whperkins@townoflakelure.com](mailto:whperkins@townoflakelure.com)

This Power Purchase Agreement, including Exhibits 1-7 hereto, which are incorporated into and made part hereof (collectively, the "Agreement"), is made and entered into by and between Town of Lake Lure ("Seller") and Duke Energy Carolinas, LLC ("Buyer") under the terms specified herein. Buyer and Seller may be referred to herein individually as a "Party" and collectively as the "Parties." Notwithstanding anything set forth herein, neither this Agreement nor any transaction contemplated hereunder will be effective **unless and until both Parties have executed** and delivered this Agreement, and the later of such date shall be the "Effective Date" of this Agreement.

NOW THEREFORE, IN CONSIDERATION OF THE PROMISES AND MUTUAL COVENANTS SET FORTH HEREIN, FOR GOOD AND VALUABLE CONSIDERATION, THE SUFFICIENCY OF WHICH IS ACKNOWLEDGED, AND INTENDING TO BE BOUND HEREBY, THE PARTIES AGREE AS FOLLOWS:

### 1. **Definitions**

Unless defined in the body of the Agreement, any capitalized term herein shall have the meaning set forth below:

- 1.1. "AAA" is defined in Section 23.2.1.
- 1.2. "Abandon(s)" means the relinquishment of control or possession of the Facility and/or cessation of operations of or at the Facility by Seller. "Abandon" excludes cessation of generation to comply with Prudent Utility Practices, Permitted Excuse to Perform, or due to maintenance or repair of the Facility (including Maintenance Outages and Planned Outages), provided that such maintenance or repair activities are being performed in a Commercially Reasonable Manner and with Prudent Utility Practice.
- 1.3. "Affiliate" means, with respect to any entity, each entity that directly or indirectly controls, is



controlled by, or is under common control with, such designated entity, with "control" meaning the possession, directly or indirectly, of the power to direct management and policies, or otherwise have control of an entity, whether through the ownership of voting securities or by contract or otherwise. Notwithstanding the foregoing, with respect to Buyer the term Affiliate does not include any subsidiaries or affiliates whose activities are subject to the oversight or regulation of any state commission(s) and/or federal energy regulatory commission.

- 1.4. "Agreement" is defined in the introductory paragraph hereof.
- 1.5. "Assignment" is defined in Section 24.1.
- 1.6. "Back-Up Tapes" is defined in Section 16.3.
- 1.7. "Bankrupt" means, with respect to a Party or any Affiliate of such Party that is currently acting as its credit support provider, that such Party or Affiliate acting as credit support provider: (a) makes an assignment or any general arrangement for the benefit of creditors; (b) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors; (c) has such a petition filed against it as debtor and such petition is not stayed, withdrawn, or dismissed within sixty (60) Business Days of such filing; (d) seeks or has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets; (e) has a distress, execution, attachment, sequestration or other legal process levied or enforced on or against all or substantially all of its assets; (f) is unable to pay its debts as they fall due or admits in writing of its inability to pay its debts generally as they become due; and/or (g) otherwise becomes bankrupt or insolvent (however evidenced).
- 1.8. "Billing Meter" is defined in Section 10.
- 1.9. "Billing Period" is defined in Section 11.
- 1.10. "Business Day" means any day on which the Federal Reserve member banks in New York City are open for business. A Business Day shall run from 8:00 a.m. to 5:00 p.m. Eastern Prevailing Time.
- 1.11. "Buyer" shall have the meaning specified in the first paragraph of this Agreement.
- 1.12. "Capacity" means and includes the electric generation capability and ability of the Facility and all associated characteristics and attributes, inclusive of the ability to contribute to peak system demands, as well as reserve requirements.
- 1.13. "Change of Control" means a transaction or series of related transactions (by way of merger, consolidation, sale of stock or assets, or otherwise) with any person, entity or "group" (within the meaning of Section 13(d)(3) of the U.S. Securities Exchange Act of 1934) of persons pursuant to which such person, entity, or group would directly or indirectly acquire (i) 50% or more of the voting interests in Seller or (ii) substantially all of the assets of Seller. Notwithstanding the foregoing, a Change of Control shall not be deemed to occur based on an internal reorganization where the ultimate parent of the Seller (as of the Effective Date) directly or indirectly retains 50% or more of the voting interests in Seller or substantially all of its assets and provided that Seller has provided Buyer no less than thirty (30) days prior written notice of such reorganization.
- 1.14. "Commercially Reasonable Manner" or "Commercially Reasonable" means, with respect to a given goal or requirement, the manner, efforts and resources a reasonable person in the position of the promisor would use, in the exercise of its reasonable business discretion and industry practice, so as to achieve that goal or requirement, which in no event shall be less than the level of efforts and resources standard in the industry for comparable companies with respect to comparable products. Factors used to determine whether a goal or requirement has been performed in a "Commercially Reasonable Manner" may include, but shall not be limited to, any specific factors or considerations identified in the Agreement as relevant to such goal or requirement.
- 1.15. "Commission" means the North Carolina Utilities Commission, or any successor thereto.
- 1.16. "Contract Price" is defined in Section 4.3.

- 1.17. "Contract Quantity" is defined in Section 4.2.
- 1.18. "Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions, and other similar third party transaction costs and expenses, and other costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the terminated transaction(s), and all reasonable attorneys' fees and other legal expenses incurred by the Non-Defaulting Party in connection with the termination.
- 1.19. "Credit Rating" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as a corporate or issuer rating.
- 1.20. "Creditworthy" or "Creditworthiness" - means (i) a Person with an investment grade Credit Rating from two (2) of the three (3) Rating Agencies such that its senior unsecured debt (or issuer rating if such Person has no senior unsecured debt rating) is rated at least (A) BBB- by S&P, if rated by S&P, (B) Baa3 by Moody's, if rated by Moody's, and (C) BBB- by Fitch, if rated by Fitch, respectively, or (ii) has satisfactory and verifiable creditworthiness determined in Buyer's reasonable discretion.
- 1.21. "Defaulting Party" is defined in Section 19.1.
- 1.22. "Delivery Period" is defined in Section 4.1.
- 1.23. "Delivery Point" means the point of interconnection between the Facility and the System on the high side (Buyer or Transmission Provider side) of the System.
- 1.24. "Dispatch Down" is defined in Section 8.6.
- 1.25. "Dispatch Down Payment Event" is defined in Section 8.6.
- 1.26. "Disputes" is defined in Section 23.1.
- 1.27. "Early Termination Date" is defined in Section 20.1.
- 1.28. "Effective Date" is defined in the introductory paragraph hereto.
- 1.29. "Emergency Condition" means, no matter the cause: (a) any urgent, abnormal, operationally unstable, dangerous, or public safety condition that is existing on the System or any portion thereof; (b) any urgent, abnormal, operationally unstable, dangerous, and/or public safety condition that is likely to result in any of the following: (i) loss or damage to the Facility or the System, (ii) disruption of generation by the Facility, (iii) disruption of service or stability on the System, or (iv) condition that may result in endangerment to human life or public safety; or, (c) any circumstance that requires action by the System Operator to comply with standing NERC regulations or standards, including without limitation actions to respond to, prevent, limit, or manage loss or damage to the Facility, loss or damage to the System, disruption of generation by the Facility, disruption of service on the System, an abnormal condition on the System, and/or endangerment to human life or safety. An Emergency Condition will be an excuse to Seller's performance only if such condition is not due to Seller's negligence, willful misconduct, and/or Seller's failure to perform as required under this Agreement.
- 1.30. "Energy" means three-phase, 60-cycle alternating current electric power and energy, expressed in either kWh or MWh, as the case may be.
- 1.31. "EPT" or "Eastern Prevailing Time" means the time in effect in the Eastern Time Zone of the United States of America, whether it be Eastern Standard Time or Eastern Daylight Savings Time.
- 1.32. "Estimation Methodology" is defined in Section 8.6.2.
- 1.33. "Event of Default" is defined in Section 19.1.
- 1.34. "Facility" means Seller's Lake Lure Hydro Facility located in Rutherford County NC as further identified in Exhibit 3.

- 1.35. "FERC" means the Federal Energy Regulatory Commission or any successor thereto.
- 1.36. "Fitch" means Fitch Ratings Ltd. or its successor.
- 1.37. "Force Majeure" is defined in Section 14.1.
- 1.38. "GAAP" is defined in Section 9.1.
- 1.39. "Gains" means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic benefit to the Non-Defaulting Party, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a Commercially Reasonable Manner. Factors used in determining the economic benefit may include, without limitation, reference to information available either internally or supplied by third parties, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, or other relevant market data, comparable transactions, settlement prices or market prices for comparable transactions, forward price curves, production by comparable facilities, expected and historical production, all calculated for the remaining Term of the Agreement for the Product (inclusive of all components).
- 1.40. "Governmental Authority" means any federal, state or local government, legislative body, court of competent jurisdiction, administrative agency or commission or other governmental or regulatory authority or instrumentality or authorized arbitral body, including, without limitation, the Commission.
- 1.41. "Guarantor" means any Creditworthy Person having the authority and agreeing to guarantee a Party's obligations under this Agreement and is otherwise acceptable to Buyer in its reasonable discretion.
- 1.42. "Guaranty" means a parent company guaranty, in substantially the form set forth in Exhibit 5 attached hereto, provided by a Guarantor in favor of Buyer guaranteeing the obligations of Seller under this Agreement.
- 1.43. "Interconnection Agreement" means the separate interconnection and transmission service agreement (or agreements) to be negotiated and executed between Seller and the Transmission Provider concerning the interconnection of the Facility with the System and the requirements for transmission service.
- 1.44. "Interconnection Instruction" means any order, action, signal, requirement, demand, and/or direction, howsoever provided or implemented by the System Operator due to, in response to, or to address any condition relating to any service and/or obligation occurring under the Interconnection Agreement.
- 1.45. "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%); and, (b) the maximum rate permitted by applicable law.
- 1.46. "kW" means kilowatt.
- 1.47. "kWh" means kilowatt-hour.
- 1.48. "Letter(s) of Credit" means one or more irrevocable standby letters of credit substantially in the form of Exhibit 6 attached hereto (with only such changes as the issuing bank may reasonably require and as may be acceptable to Buyer in its reasonable discretion), issued by a U.S. commercial bank or other financial institution reasonably acceptable to Buyer,, which is not an Affiliate of Seller, which has and maintains a Credit Rating of at least A- from S&P and A3 from Moody's, for the Security Period, permitting Buyer to draw the entire amount if either such amount is owed or such Letter of Credit is not renewed or replaced at least thirty (30) Business Days prior to its stated expiration date.
- 1.49. "Lien" means any mortgage, deed of trust, lien, pledge, charge, claim, security interest, easement, covenant, right of way, restriction, equity, or encumbrance of any nature whatsoever.

- 1.50. "Losses" means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic loss to the Non-Defaulting Party, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a Commercially Reasonable Manner. Factors used in determining the economic loss or loss of economic benefit may include, without limitation, reference to information available either internally or supplied by third parties, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, or other relevant market data, comparable transactions, settlement prices or market prices for comparable transactions, forward price curves, production by comparable facilities, expected and historical production, all calculated for the remaining Term of the Agreement for the Product (inclusive of all components).
- 1.51. "Maintenance Outage" means the temporary operational removal of the Facility from service to perform work on specific components of the Facility, at a time when the Facility must be removed from service before the next Planned Outage in the interest of safety or the prevention of injury or damage to or undue wear and tear on the Facility or any component thereof.
- 1.52. "Moody's" means Moody's Investors Service, Inc. or any successor-rating agency thereto.
- 1.53. "MW" means megawatt.
- 1.54. "MWh" means megawatt-hour.
- 1.55. "Nameplate Capacity Rating" means the maximum generating capability of the Facility as measured at the Delivery Point (AC) as set forth in Exhibit 3.
- 1.56. "NERC" means the North American Electric Reliability Corporation. For purposes of this Agreement, NERC includes any applicable regional entity with delegated authority from NERC, such as the SERC Reliability Corporation (SERC).
- 1.57. "Non-Defaulting Party" is defined in Section 20.
- 1.58. "Party" or "Parties" is defined in the introductory paragraph hereto.
- 1.59. "Performance Assurance" means collateral in the form of either cash, Letter(s) of Credit, or a Guaranty that is acceptable to Buyer in its sole discretion, in each case that meets the requirements set forth in this Agreement (including, without limitation, Section 5) provided by Seller to Buyer for the benefit of Buyer pursuant to this Agreement, as credit support, adequate assurances, and security to secure Seller's performance under this Agreement.
- 1.60. "Permit" means any permit, license, registration, filing, certificate of occupancy, certificate of public convenience and necessity, approval, variance or any authorization from or by any Governmental Authority and pursuant to any Requirements of Law.
- 1.61. "Permitted Excuse to Perform" means that Seller's obligation to generate, deliver, and sell and Buyer's obligation to receive and purchase is excused and no damages will be payable by either Party to the other Party, if and to the extent such failure is due solely to any of the following occurrences: (a) an Emergency Condition and/or (b) a Force Majeure event.
- 1.62. "Person" means any individual, entity, corporation, general or limited partnership, limited liability company, joint venture, estate, trust, association or other entity or Governmental Authority.
- 1.63. "Planned Outage" means the temporary operational removal of the Facility from service to perform work on specific components in accordance with a pre-planned operations schedule, such as for a planned annual overhaul, inspections, or testing of specific equipment of the Facility.
- 1.64. "Product" means the Capacity of the Facility and Energy generated by the Facility.
- 1.65. "Protected Information" is defined in Section 16.1
- 1.66. "Prudent Utility Practice" means those practices, methods, equipment, specifications, standards of safety, and performance, as the same may change from time to time, as are commonly used in the construction, interconnection, operation, and maintenance of electric power facilities similar to the Facility, inclusive of delivery, transmission, and generation

facilities and ancillaries, which in the exercise of good judgment and in light of the facts known at the time of the decision being made and activity being performed are considered: (i) good, safe, and prudent practices; (ii) are in accordance with generally accepted standards of safety, performance, dependability, efficiency, and economy in the United States; (iii) are in accordance with generally accepted standards of professional care, skill, diligence, and competence in the United States; and, (iv) are in compliance with applicable regulatory requirements and/or reliability standards. Prudent Utility Practices are not intended to be limited to the optimum practices, methods or acts to the exclusion of others, but rather are intended to include acceptable practices, methods and acts generally accepted in the energy generation and utility industry.

- 1.67. "PURPA" means the Public Utility Regulatory Policies Act of 1978, as amended, and as may be amended from time to time.
- 1.68. "PURPA Fuel Requirements" means the requirements set forth in 18 C.F.R. § 292.204 OR 205, as may be amended and/or restated.
- 1.69. "Qualifying Facility" means an electric generating facility that has been registered and certified by FERC as generator that qualifies for and meets the requirements set forth in PURPA, as it may be amended, and associated rules, regulations, orders.
- 1.70. "Rating Agency" or "Rating Agencies" - means the rating entities of S&P, Moody's or Fitch.
- 1.71. "Regulatory Event" is defined in Section 15.1.
- 1.72. "Required Approval" is defined in Section 6.1.
- 1.73. "Requirements of Law" means any applicable federal, state, and local law, statute, regulation, rule, code, ordinance, resolution, order, writ, judgment, decree or Permit enacted, adopted, issued or promulgated by any Governmental Authority, including, without limitation, (i) PURPA, (ii) those pertaining to the creation and delivery of the Product, (iii) those pertaining to electrical, building, zoning, occupational safety, health requirements or to pollution or protection of the environment, and (iv) principles of common law under which a person may be held liable for the release or discharge of any hazardous substance into the environment or any other environmental damage.
- 1.74. "Security Period" is defined in Section 5.7.
- 1.75. "Seller" shall have the meaning specified in the first paragraph of this Agreement.
- 1.76. "S&P" means Standard & Poor's Ratings Services, Inc. or any successor-rating agency thereto.
- 1.77. "Station Power" means the Energy generated by the Facility and, whether metered or unmetered, used on-site to supply the Facility's auxiliary load and parasitic load and/or for powering the electric generation equipment. Station Power shall not include any Energy generated by the Facility and stored for later delivery to the Buyer under this Agreement.
- 1.78. "System" means the transmission, distribution, and generation facilities that are owned, directed, managed, interconnected, controlled, and/or operated by Buyer and/or the Transmission Provider, including, without limitation, facilities to provide retail and/or wholesale service, substations, circuits, reinforcements, meters, extensions, and equipment associated with or connected to any interconnected facility or customer.
- 1.79. "System Operator" means the operators of the System that have the responsibilities for ensuring that the System as a whole or any part thereof operates safely, efficiently and reliably, including without limitation, the responsibilities to comply with any applicable operational or reliability requirements, the responsibilities to balance generation supply with customer load, the responsibilities to comply with any other regulatory obligation and the responsibilities to provide dispatch and curtailment instructions to generators supplying Energy to the System, and includes any person or entity delivering any such instruction to Seller.
- 1.80. "System Operator Instruction" means any order, action, requirement, demand, or direction, from the System Operator in accordance with Prudent Utility Practice, and delivered to Seller in a non-discriminatory manner, to operate, manage, and/or otherwise maintain safe and

reliable operations of the System, including, without limitation those undertaken and implemented by the System Operator, in its sole discretion based on relevant System factors and considerations, including any and all operating characteristics, maintenance requirements, operational limitations, reliability (including, without limitation, standing NERC regulations or standards), safety, dispatch, constraints, discharge, emissions limitations, compliance requirements, communications, resource ramp-up and ramp-down constraints and implementation, and any other System considerations, which may include, without limitation, an order or action to: (i) interconnect, disconnect, integrate, operate in parallel, or synchronize with the System, (ii) increase (based on generator characteristics and Prudent Utility Practices), reduce, or cease generation output to comply with standing NERC regulations or standards; (iii) respond to any transmission, distribution, or delivery limitations or interruptions; (iv) perform or cease performing any activity so as to operate in accordance with System limitations, including, without limitation, operational constraints that would require the System Operator to force offline or reduce generation output from reliability generators to accommodate generation by the Facility; and, (v) suspend or interrupt any operational activity for an Emergency Condition or Force Majeure event; provided however, a System Operator instruction in response to an Emergency Condition, Force Majeure event, or operational condition relating specifically to or created by the Facility shall not be deemed or considered discriminatory.

- 1.81. "Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, together with any interest and penalties thereon.
- 1.82. "Term" is defined in Section 3.1.
- 1.83. "Transmission Provider" means the entity or division within Duke Energy Carolinas, LLC that will provide interconnection and/or electric distribution or transmission service to enable delivery of Energy generated by the Facility to Buyer, and any such entity or division will include any successor or replacement thereto, including without limitation, a consolidated control area or a regional transmission organization.

## 2. **Interpretation**

- 2.1. **Intent**. Unless a different intention clearly appears, the following terms and phrases shall be interpreted as follows: (a) the singular includes the plural and vice versa; (b) the reference to any Person includes such Person's legal and/or permitted successors and assignees, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually; (c) the reference to any gender includes the other gender and the neuter; (d) reference to any document, including this Agreement, refers to such document as it may be amended, amended and restated, modified, replaced or superseded from time to time in accordance with its terms, or any successor document(s) thereto; (e) reference to any section or exhibit means such section or exhibit of this Agreement unless otherwise indicated; (f) "hereunder", "hereof", "hereto", "herein", and words of similar import shall be deemed references to this Agreement as a whole and not to any particular section or other provision; (g) "including" (and with correlative meaning "include") means "including without limitation" and, when following any general statement or term, is not to be construed as limiting the general statement or term to the specific items or matters set forth or to similar items or matters, but rather as permitting the general statement or term to refer to all other items or matters that could reasonably fall within its broadest possible scope; (h) relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including"; (i) reference to any Requirements of Law refers to such Requirements of Law as it may be amended, modified, replaced or superseded from time to time, or any successor Requirements of Law thereto; and (j) all exhibits and attachments to this Agreement are hereby incorporated into this Agreement. Other terms used, but not defined in Section 1 or in the body of the Agreement, shall have meanings as commonly used in the English language and, where applicable, in the electric utility industry. Words not otherwise defined herein that have well known and generally accepted technical or trade meanings are used herein in accordance with such recognized meanings.

### 3. **Term and Termination**

- 3.1. **Term**. This Agreement shall be effective on the Effective Date and shall remain in full force and effect until October 31, 2025 ("Term"), unless terminated earlier pursuant to the provisions of this Agreement.
- 3.2. **Termination and Survival**. This Agreement may be terminated as provided for herein prior to the expiration of the Term. If this Agreement is terminated earlier than the expiration of the Term for any reason, including, without limitation, whether by its terms, mutual agreement, early termination, and/or event of default, such termination shall not relieve any Party of any obligation accrued or accruing prior to the effectiveness of such termination. Furthermore, any obligations, limitations, exclusions and duties which by their nature or the express terms of this Agreement extend beyond the expiration or termination of this Agreement, including, without limitation, provisions relating to compliance requirements, accounting, billing, billing adjustments, limitations or liabilities, dispute resolution, Performance Assurance, and any other provisions necessary to interpret or enforce the respective rights and obligations of the Parties hereunder, shall survive the expiration or early termination of this Agreement.

### 4. **Purchase and Sale Obligations**

- 4.1. **Delivery Period**. The "Delivery Period" for the Product to be generated by the Facility and sold by Seller to Buyer shall be for all hours starting at 12:00:01 AM EPT on November 1, 2023 through 11:59:59 PM EPT on the last day of the Term, unless this Agreement is terminated earlier pursuant to its terms and conditions.
- 4.2. **Contract Quantity**. The "Contract Quantity" will be one hundred percent (100%) of the Capacity, output of Energy (including stored Energy) produced by the Facility, less that associated with Station Power.
  - 4.2.1. Seller shall sell and deliver the Contract Quantity of the Product exclusively and solely to Buyer. Seller's failure to generate, sell, and deliver the Contract Quantity of the Product to Buyer will be excused with no damages payable to Buyer solely to the extent such failure is due to a Permitted Excuse to Perform.
  - 4.2.2. Buyer shall have no obligation to receive, purchase, pay for, or pay any damages associated with not receiving the Product due to a Permitted Excuse to Perform. Buyer shall have full and exclusive rights to the Product (inclusive of all components) and will be entitled to full and exclusive use of the Product (inclusive of all components) for its purposes and in its sole and exclusive discretion.
  - 4.2.3. The estimated monthly and annual Energy production of the Facility during the Delivery Period are set forth in Exhibit 1 and Exhibit 4 hereto.
- 4.3. **Contract Price**. The "Contract Price" for the Product shall be the price corresponding to the relevant portion of the Delivery Period as set forth in Exhibit 2.
- 4.4. **Energy Delivery**. Seller shall deliver the Contract Quantity of the Product at the Delivery Point, and Seller shall be fully responsible for all costs, charges, expenses, and requirements associated with delivering the Product to the Delivery Point. Buyer will have no obligation to pay for any Product not delivered to the Delivery Point.
- 4.5. **Payment for Product**. During the Term of this Agreement, Buyer agrees to pay Seller the product of (i) the Contract Price for the Product, as applicable, multiplied by (ii) the amount of Energy delivered by Seller to Buyer at the Delivery Point during the Delivery Period.
- 4.6. **Transfer**. In no event will Seller procure or have the right to procure the Product or any component of the Product from any source other than the Facility for sale and delivery pursuant to this Agreement. Title to and risk of loss to the Product sold and delivered hereunder shall transfer from Seller to Buyer after completion of delivery at the Delivery Point. Seller shall be responsible for any costs and charges imposed on or associated with the Product and the delivery of the Product at the Delivery Point. Buyer shall be responsible for any costs or charges imposed on or associated with the Product after the Delivery Point.

5. **Credit and Related Provisions.**

5.1. Performance Assurance. Subject to Section 5.2 below Seller shall provide Buyer with Performance Assurance in the amount set forth in the below table corresponding to the applicable period during the Term of this Agreement. Performance Assurance shall be calculated by Buyer in a Commercially Reasonable Manner and shall equal the estimated year end overpayment balance for each calendar year of the Term taking into account the Contract Price relative to Buyer’s projected avoided cost for the Term of the Agreement, calculated as of the Effective Date. Seller may request and Buyer may, subject to this Section 5.1, adjust the amount of such Performance Assurance within fifteen (15) Business Days of Seller’s written request to coincide with the amount set forth in the below table. Seller’s failure to provide the Performance Assurance and/or to maintain the Performance Assurance in the required amount and in full force and effect throughout the Term of this Agreement will be an Event of Default under this Agreement.

PERFORMANCE ASSURANCE	
Contract Year	Amount
1	\$0
2	\$0

5.2. Unsecured Credit for Creditworthy Sellers. If Seller is Creditworthy and is not in default of any provisions under this Agreement the Seller shall be excused from the requirement to post Performance Assurance as required under Sections 5.1 as long as it remains Creditworthy. If at any time during the Term of this Agreement, Seller, or its Guarantor, ceases to be Creditworthy due to a change in its Credit Rating, then Seller will notify Buyer of such change in its credit status and shall provide (or replace) Performance Assurance to Buyer in the amounts required under Section 5.1 within five (5) Business Days after such change in its Credit Rating

5.3. Financial Disclosures. If requested by Buyer, Seller shall timely provide to Buyer financial information of Seller as follows: (i) a copy of Seller’s most recent quarterly report containing unaudited consolidated financial statements for such fiscal quarter signed and verified by an authorized officer of Seller attesting to their accuracy; and, (ii) within 120 days after the end of each fiscal year that this Agreement is effective a copy of Seller’s annual report containing audited consolidated financial statements for such fiscal year. If Seller does not have audited financial statements, Seller shall deliver to Buyer financial statements in a form reasonably acceptable to Buyer and certified by a financial officer of Seller. All financial statements required hereunder shall be prepared in accordance with generally accepted accounting principles or other procedures with which Seller is required to comply with under applicable law. If information required under this Section 5.3 is available on a publicly available web site, then the delivery requirement shall be deemed to be satisfied.

5.4. Netting. If an Event of Default has not occurred and a Party is required to pay an amount to the other Party under this Agreement, then such amounts shall be netted, and the Party owing the greater aggregate amount shall pay to the other Party any difference between the amounts owed. All outstanding obligations to make payment under this Agreement may be netted, offset, set off, or recouped therefrom, and payment shall be owed as set forth above. Unless Buyer notifies Seller in writing (except in connection with a liquidation and termination) all amounts netted pursuant to this section shall not take into account or include any credit support, which may be in effect to secure Seller’s performance under this Agreement. The netting set forth above, shall be without prejudice and in addition to any and all rights, liens, setoffs, recoupments, counterclaims and other remedies and defenses (to the extent not expressly herein waived or denied) that such Party has or to which such Party may be entitled arising from or out of this Agreement.

5.5. Set-off. In addition to any rights of set-off a Party may have as a matter of law or otherwise and subject to applicable law, upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right (but shall not be obligated to) without prior notice to the Defaulting



Party or any other person to set-off any obligation of the Defaulting Party owed to the Non-Defaulting Party under this Agreement (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation) against any obligations of the Non-Defaulting Party owing to the Defaulting Party under this Agreement (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation). If any such obligation is unascertained, the Non-Defaulting Party may in a Commercially Reasonable Manner estimate that obligation and set-off in respect of the estimate, subject to the relevant Party providing an accounting and true-up to the other Party after the amount of the obligation is ascertained.

5.6. **Performance Assurance Requirements.** Seller shall ensure that the Performance Assurance in the required amount remains in full force and effect and outstanding for the duration required by this Agreement. All applicable Performance Assurance, in the amount required pursuant to the terms of this Agreement, shall remain in full force and effect and outstanding for the benefit of Buyer until sixty (60) days following the later of (a) the end of the Term or (b) the date on which Seller has fully satisfied all obligations to Buyer under this Agreement (the "Security Period"). If at any time any Performance Assurance fails to meet any of the requirements under this Agreement, Seller shall replace such Performance Assurance with alternative Performance Assurance that meets each of the requirements under this Agreement. Seller will be solely responsible for any and all costs incurred with providing and maintaining any Performance Assurance to the full amount required by this Agreement. If Seller fails to replace, renew, or otherwise maintain the required Performance Assurance as and when required by this Agreement, then Buyer: (a) shall be entitled to draw and retain hereunder the full amount of the Performance Assurance; (b) shall not be obligated to make any further payments to Seller until Seller shall have provided Buyer with the replacement Performance Assurance; and, (c) shall be entitled to give Seller notice of an Event of Default and pursue the termination rights and remedies provided for in this Agreement.

5.7. **Grant of Security Interest.** To secure its obligations and liabilities under this Agreement to Buyer, Seller hereby grants to Buyer a present and continuing first priority security interest in, and lien on (and right of netting and set-off against), and assignment of, all present and future Performance Assurance, including, without limitation, cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, Buyer; and, furthermore Seller agrees to take such actions as Buyer reasonably requires to perfect Buyer's first-priority security interest in, and lien on (and right of netting, recoupment, and set-off against), such Performance Assurance and any and all products and proceeds resulting therefrom or from the liquidation thereof, including without limitation proceeds of insurance. Upon or any time after the occurrence or deemed occurrence of an Event of Default or upon an Early Termination Date, Buyer (if it is the Non-Defaulting Party) may do any one or more of the following with respect to Seller (if it is the Defaulting Party): (i) exercise any of the rights and remedies of a secured party with respect to all Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of netting, recoupment, and set-off against any and all property of Seller in the possession of Buyer or its agent; (iii) draw on any outstanding applicable forms of Performance Assurance provided for the benefit of Buyer; and, (iv) liquidate all Performance Assurance then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.

## 6. **Seller Compliance Requirements.**

6.1. **Required Approvals.** Seller shall at its sole cost and expense timely obtain, maintain, and comply with all Required Approvals (definition follows) during the Term of this Agreement. "Required Approvals" means all of the following:

6.1.1. All approvals and certifications that the Facility is a Qualifying Facility.

6.1.2. All required Permits, authorizations, certifications, and/or approvals from any Governmental Authority and under any Requirements of Law, including, without limitation, from the Commission or FERC, for Seller to construct, build, own, operate, and maintain the Facility and sell and deliver the Product to Buyer in accordance with

the requirements under this Agreement.

- 6.2. Seller Covenants. Seller covenants and represents and warrants to Buyer as of the Effective Date of this Agreement and throughout the Term of this Agreement that: (a) Seller has obtained an approved and valid certificate of public convenience and necessity for the Facility from the Commission; (b) Seller has obtained an Interconnection Agreement for the Facility; (c) Seller has secured from the Transmission Provider(s) the firm transmission required to deliver the Product to the Delivery Point; and (d) Seller has obtained all applicable certifications and/or approvals for the Facility from FERC. Seller agrees and acknowledges that Buyer has entered into this Agreement in reliance upon the covenants and warranties set forth above in this section, and in the event of a breach or failure of or relating to any of the foregoing covenants and warranties, including without limitation for being false or misleading in any respect, then this Agreement will terminate upon Buyer providing Seller with thirty (30) day's written notice, unless such breach or failure has been cured before the end of such thirty (30) day period. Seller will indemnify and hold Buyer harmless for any breach or failure relating to any of the foregoing covenants and warranties, notwithstanding anything else to the contrary in this Agreement.
- 6.3. Seller Requirements. Within twenty (20) Business Days of a written request from Buyer, Seller agrees to provide Buyer with all information, documents, and affidavits from a duly authorized representative of Seller certifying that the Facility fully complies with PURPA, including, without limitation, the PURPA Fuel Requirements.

## 7. Seller's Facility Requirements.

- 7.1. Seller Requirements. Seller covenants (except to the extent expressly set forth in this Agreement) that: the Facility shall be designed, constructed, operated, controlled, maintained, and tested at Seller's sole cost and expense; the Facility shall be designed, constructed, operated (inclusive, without limitation, of control, metering equipment, and personnel and staffing levels), controlled, maintained, and tested by Seller to perform as required by this Agreement and in compliance with all applicable Requirements of Law and Prudent Utility Practice; the Facility shall be capable of supplying the Product in a safe and reliable manner consistent with the requirements of each applicable Requirements of Law and Prudent Utility Practice; and, that all contracts, agreements, arrangements, and/or Permits (including, without limitation, those necessary or prudent for the construction, ownership and operation of the Facility, such as land use permits, site plan approvals, real property titles and easements, environmental compliance and authorizations, grading and building permits, and contracts and/or licenses to obtain the underlying fuel, install and operate the Facility, and deliver and sell the Product of the Facility) shall be timely obtained and maintained by Seller, at Seller's sole cost and expense. Seller shall be responsible for arranging and obtaining, at its sole risk and expense, any station service required by the Facility. Seller shall construct, interconnect, operate, and maintain the Facility in accordance with Prudent Utility Practice. Seller shall be responsible for all costs, charges, and expenses associated with generating, scheduling, and delivering the Energy to Buyer.
- 7.2. Seller Responsibilities. Notwithstanding any provision of this Agreement to the contrary, the Seller agrees that: (a) Buyer shall have no responsibility whatsoever for any costs and/or Taxes relating to the design, development, construction, maintenance, ownership, or operation of the Facility (including but not limited to any financing costs, and any costs and/or Taxes imposed by any Governmental Authority on or with respect to emissions from or relating to the Facility, and including but not limited to costs and/or Taxes related to any emissions allowances *inter alia* for oxides for sulfur dioxide or nitrogen, carbon dioxide, and mercury), all of which shall be entirely at Seller's sole cost and expense; and, (b) any risk as to the availability of production tax benefits, investment tax credits, grants or any other incentives relating to the design, development, construction, maintenance, ownership, or operation of the Facility shall be borne entirely by Seller.
- 7.2.1. No Exclusions. If any production or investment tax credit, grants, subsidy, or any other similar incentives or benefit relating, directly or indirectly, to the Facility is unavailable or becomes unavailable at any time during the Term of this Agreement, Seller agrees that such event or circumstance will not: (a) constitute a Force Majeure

or Regulatory Event; (b) excuse or otherwise diminish Seller's obligations hereunder in any way; and, (c) give rise to any right by Seller to terminate or avoid performance under this Agreement. Seller agrees that it will solely and fully bear all risks, financial and otherwise throughout the Term, associated with Seller's or the Facility's eligibility to receive any such tax treatment or otherwise qualify for any preferential or accelerated depreciation, accounting, reporting, or tax treatment.

- 7.3. Transmission Provider. Seller agrees and acknowledges that the Interconnection Agreement is (and will be) a separate agreement (or agreements) between Seller and Transmission Provider and will exclusively govern all requirements and obligations between Seller and Transmission Provider. Only the Interconnection Agreement will govern all obligations and liabilities set forth in the Interconnection Agreement, and Seller shall be solely and fully responsible for all costs and expenses for which Seller is responsible for under the Interconnection Agreement. Seller shall comply with all Interconnection Instructions. Nothing in the Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider on the other hand, nor any alleged event of default thereunder, shall affect, alter, or modify the Parties' rights, duties, obligation, and liabilities under this Agreement. This Agreement shall not be construed to create any rights between Seller and the Transmission Provider, and the terms of this Agreement are not (and will not) be binding upon the Transmission Provider. Seller agrees and acknowledges that Seller's performance under this Agreement depends on Seller's performance under the Interconnection Agreement, and Seller hereby grants Buyer the right and entitlement to obtain information from the Transmission Provider in regard to Seller's performance under the Interconnection Agreement.
- 7.4. System Operations. Seller agrees and acknowledges that the System Operator will be solely responsible for its functions, and that nothing in this Agreement will be construed to create any rights between Seller and the System Operator. Seller agrees that it is obligated to engage in interconnected operations with Buyer and the System, and Seller agrees to fully comply with all System Operator Instructions.
- 7.5. Insurance Obligations. Throughout the Term of this Agreement,, and at no additional cost to Buyer, Seller shall maintain or cause to be maintained by contracted parties at the Facility, occurrence form insurance policies as follows: (a) Workers' Compensation in accordance with the statutory requirements of the state in which the Services are performed and Employer's Liability Insurance of not less than \$500,000 each accident/employee/disease; (b) Commercial General Liability Insurance having a limit of at least \$1,000,000 per occurrence/\$2,000,000 in the aggregate for contractual liability, personal injury, bodily injury to or death of persons, and damage to property, premises and operations liability and explosion, collapse, and underground hazard coverage; (c) Commercial/Business Automobile Liability Insurance (including owned (if any), non-owned or hired autos) having a limit of at least \$1,000,000 each accident for bodily injury, death, property damage and contractual liability; (d) Property Damage insurance on the Facility written on an all risk of loss basis; and, (e) if Seller will be handling or the Facility will have present environmentally regulated or hazardous materials, Pollution Legal Liability, including coverage for sudden/accidental occurrences for bodily injury, property damage, environmental damage, cleanup costs and defense with a minimum of \$1,000,000 per occurrence (claims-made form acceptable with reporting requirements of at least one (1) year). All insurance policies provided and maintained by Seller or applicable party shall: (i) be underwritten by insurers which are rated A.M. Best "A- VII" or higher; (ii) specifically include Buyer as additional insured's, excluding, however, for Worker's Compensation/Employer's Liability and Property Damage insurance; (iii) be endorsed to provide, where permitted by law, waiver of any rights of subrogation against Buyer; and (iv) provide that such policies and additional insured provisions are primary and without right of contribution from any other insurance, self-insurance or coverage available to Buyer. Any deductibles or retentions shall be the sole responsibility of Seller or the applicable party. Seller's compliance with these provisions and the limits of insurance specified herein shall not constitute a limitation of Seller's liability pursuant to this Agreement. Any failure to comply with and these provisions shall not be deemed a waiver of any rights of Buyer under this Agreement or with respect to any insurance coverage required hereunder. Buyer at its sole discretion may request Seller to provide a copy of any or all of its required insurance policies, including endorsements in which Buyer is included as an additional insured

for any claims filed relative to the Facility or this Agreement.

## 8. **Facility Performance Requirements**

- 8.1. **Planned Outages.** Seller shall determine the number and extent of Planned Outages in a Commercially Reasonable Manner recognizing that it is the intent of the Parties to maximize production of the Facility and to such extent Seller shall be excused from providing the Product during such Planned Outage(s).
- 8.2. **Maintenance Outages.** Subject to its operational and maintenance needs, Seller may schedule Maintenance Outages in a Commercially Reasonable Manner recognizing that it is the intent of the Parties to maximize production of the Facility and to such extent Seller shall be excused from providing the Product during such Planned Outage(s).
- 8.3. **Notice.** Seller shall promptly provide to Buyer an oral report of all major outages, Emergency Conditions, de-ratings, major limitations, or restrictions affecting the Facility, which report shall include the cause of such restriction, amount of generation from the Facility that will not be available because of such restriction, and the expected date that the Facility will return to normal operations. Seller shall update such report as necessary to advise Buyer of any material changed circumstances relating to the aforementioned restrictions.
- 8.4. **Performance.** Seller shall act in a Commercially Reasonable Manner to maximize the output of the Facility in a safe manner to generate the Product and to minimize the occurrence, extent, and duration of any event adversely affecting the generation of the Product, in each case consistent with Prudent Utility Practice.
- 8.5. **System Operator Instructions and Payments.** Seller shall cooperate with Buyer to immediately and fully comply with all System Operator Instructions. If the System Operator requires the Facility to reduce or stop the generation of Energy pursuant to a System Operator Instruction (such reductions or cessations of Energy, the "Dispatch Down" of production by the Facility), Buyer shall pay Seller the amount set forth below if, and only if: (i) the Facility was operating at the time of the Dispatch Down instruction, and was required to and actually reduced Energy production pursuant to a Dispatch Down instruction; (ii) the actual reduction of Energy generation by the Facility due to Dispatch Down instructions exceeds two hundred and thirty five (235) MWh (the "Dispatch Down Payment Threshold") in a calendar year (January – December); and, (iii) the Dispatch Down instruction was not due to an Emergency Condition or Force Majeure event (the foregoing items (i)-(iii), collectively, the "Dispatch Down Payment Event").
  - 8.5.1. For each calendar year, after a Dispatch Down Payment Event occurs during that calendar year, Buyer shall pay Seller starting with the two hundred thirty-sixth (236th) MWh, at the Contract Price for the Product multiplied by the units of Product not generated due to the Dispatch Down instruction(s).
  - 8.5.2. **Estimation Methodology.** Buyer shall determine in a Commercially Reasonable Manner the quantity of Energy that could not be generated due to compliance with and implementation of the Dispatch Down instruction(s) based on: (i) the duration of the Dispatch Down; (ii) the amount of the generating capability of the Facility that is curtailed by the applicable Dispatch Down (e.g. 10% generation capability is curtailed); and (iii) the Facility design, performance capability, and historic performance (the "Estimation Methodology").
  - 8.5.3. In the event Seller demonstrates that a Dispatch Down instruction issued by the System Operator does not fall within the definition of a System Operator Instruction and that the Facility actually reduced Energy production pursuant to such Dispatch Down instruction, Seller shall be entitled to a compensatory payment from Buyer, calculated using the Estimation Methodology, in the amount of the Contract Price for the Product not generated due to compliance with the Dispatch Down instruction (starting with the first MWh of Product not generated) as Seller's sole and exclusive payment and remedy for its compliance with such instruction.

## 9. **Information Requirements**

- 9.1. **Accounting Information.** Generally Accepted Accounting Principles ("GAAP") and SEC rules

can require Buyer to evaluate various aspects of its economic relationship with Seller, e.g., whether or not Buyer must consolidate Seller's financial information. To evaluate if certain GAAP requirements are applicable, Buyer may need access to Seller's financial records and personnel in a timely manner. In the event that Buyer determines that consolidation or other incorporation of Seller's financial information is necessary under GAAP, Buyer shall require the following for each calendar quarter during the term of this Agreement, within 90 days after quarter end: (a) complete financial statements, including notes, for such quarter on a GAAP basis; and, (b) financial schedules underlying the financial statements. Seller shall grant Buyer access to records and personnel to enable Buyer's independent auditor to conduct financial audits (in accordance with GAAP standards) and internal control audits (in accordance with Section 404 of the Sarbanes-Oxley Act of 2002). Any information provided to Buyer pursuant to this section shall be considered confidential in accordance with the terms of this Agreement and shall only be disclosed, as required by GAAP, on an aggregate basis with other similar entities for which Buyer has power purchase agreements.

9.2. Facility Information. Seller shall promptly provide to Buyer information requested by Buyer to verify any amounts of delivered Product, or to otherwise audit the Product delivered to Buyer. Seller shall, within ten (10) Business Days of electronic or written request provide Buyer with any other information germane to this Agreement and/or Seller's performance under and compliance with this Agreement, requested by Buyer in its Commercially Reasonable discretion.

9.3. Other Information. Seller shall provide to Buyer all information, instruments, documents, statements, certificates, and records relating to this Agreement and/or the Facility as reasonably requested by Buyer concerning any administrative, regulatory, compliance, or legal requirements reasonably determined by Buyer to fulfill any Requirements of Law, regulatory reporting requirements or otherwise relating to any request by any Governmental Authority.

## 10. Metering

10.1. Billing Meter. In the Interconnection Agreement between Seller and Transmission Provider, Seller shall arrange with the Transmission Provider to construct and install such meters and metering equipment as are necessary to measure the Energy delivered and received in accordance with the terms and conditions of this Agreement (the "Billing Meter"). Buyer shall provide to Seller the reasonable allowable accuracy limits relating to the performance of the Billing Meter, and Seller shall arrange with Transmission Provider to install and operate a Billing Meter that meets the allowable accuracy limits. Seller shall be responsible for paying the Transmission Provider for all costs relating to the Billing Meter, including, without limitation, its procurement, installation, operation, calibration, and maintenance. Seller shall ensure in its arrangement with the Transmission Provider for the Billing Meter to include communication equipment that enables Buyer to access and read the meter from a remote location. Seller hereby grants Buyer with rights to physically access the Billing Meter. Seller shall provide Buyer (at Seller's cost) with appropriate telephonic/electronic communication to allow Buyer to remotely read the meter. Seller may, at its own expense, install and maintain additional metering equipment for purposes of monitoring, recording or transmitting data relating to its sale of Energy from the Facility, so long as such equipment does not interfere with the Billing Meter. Seller shall arrange with the Transmission Provider to test the Billing Meter at regular intervals. Seller shall also arrange for either Party to have the right to request and obtain, at reasonable intervals and under reasonable circumstances, additional/special tests of the Billing Meter. The Party making such request for the test shall incur the costs associated with such test.

## 11. Billing Period and Payment

11.1. Billing Period. Subject to Seller authorizing Transmission Provider to provide Buyer with electronic access to the Billing Meter, Buyer shall read/obtain data from the Billing Meter at regular intervals, which shall be not less than twenty-seven (27) consecutive days and not more than thirty-three (33) consecutive days (each, a "Billing Period") except for the initial and final billing periods hereunder which may be shorter to permit the readings to otherwise coincide with calendar months. Within twenty-five (25) days after reading/obtaining data

from the Billing Meter, Buyer shall provide Seller with an invoice detailing the amount of Product delivered during the relevant Billing Period and the associated amount owed by Buyer to Seller for the Product, subject to Seller cooperating with Buyer and providing Buyer with such information and/or data that Buyer may request to accurately prepare the invoice. Buyer shall pay Seller the invoiced amounts for each Billing Period. Payment by Buyer shall be due thirty (30) days after the invoice date. If such amounts are not paid by the deadline, they shall accrue interest at the Interest Rate from the applicable due date until the date paid. Amounts not paid by such deadline shall accrue interest at the Interest Rate from the original due date until the date paid in accordance with this Agreement.

- 11.2. Meter Malfunction. In the event the Billing Meter fails to register accurately within the allowable accuracy limits as set forth above, then for purposes of preparing (or adjusting) any affected invoice Buyer shall adjust the amount of measured Energy for the period of time the Billing Meter was shown to be in error. If the time the Billing Meter became inaccurate can be determined, then the adjustment to the amount of measured Energy shall be made for the entire time from the time that the Billing Meter became inaccurate until the recalibration of the Billing Meter. If the time the Billing Meter became inaccurate cannot be determined, then the Billing Meter shall be deemed to have failed to register accurately for fifty percent (50%) of the time since the date of the last calibration of the Billing Meter.
- 11.3. Out-of-Service. If the Billing Meter is out of service, then for purposes of preparing any affected invoice, the Parties shall negotiate in good faith to determine an estimate of the amount of Energy delivered during the relevant Billing Period. Seller's meter (if any), may be used to establish such estimate, if both Parties agree. If, within twenty (20) days after the date that the Billing Meter is read as set forth above, the Parties have not reached agreement regarding an estimate of the amount of Energy delivered during the relevant Billing Period, then the amount of Energy delivered during the relevant Billing Period shall be determined using the Estimation Methodology.
- 11.4. Errors. If any overcharge or undercharge in any form whatsoever shall at any time be found for an invoice, and such invoice has been paid, the Party that has been paid the overcharge shall refund the amount of the overcharge to the other Party, and the Party that has been undercharged shall pay the amount of the undercharge to the other Party, within forty-five (45) days after final determination thereof; provided, however, that no retroactive adjustment shall be made for any overcharge or undercharge unless written notice of the same is provided to the other Party within a period of twenty-four (24) months from the date of the invoice in which such overcharge or undercharge was first included. Any such adjustments shall be made with interest calculated at the Interest Rate from the date that the undercharge or overcharge actually occurred.
- 11.5. Invoice/Payment Dispute. If a Party in good faith reasonably disputes the amount set forth in an invoice, charge, statement, or computation, or any adjustment thereto, such Party shall provide to the other Party a written explanation specifying in detail the basis for such dispute. The Party disputing the invoice, if it has not already done so, shall pay the undisputed portion of such amount no later than the applicable due date. If the Parties are thereafter unable to resolve the dispute through the exchange of additional documentation, then the Parties shall pursue resolution of such dispute according to the dispute resolution and remedy provisions set forth in the Agreement. Notwithstanding any other provision of this Agreement to the contrary, if any invoice, statement charge, or computation is found to be inaccurate, then a correction shall be made and payment (with applicable interest) shall be made in accordance with such correction; provided, however, no adjustment shall be made with respect to any invoice, statement, charge, computation or payment hereunder unless a Party provides written notice to the other Party questioning the accuracy thereof within twenty-four (24) months after the date of such invoice, statement, charge, computation, or payment.

## 12. **Audit Rights**

- 12.1. Process. Buyer shall have the right, at its sole expense and during normal business hours, without Seller requiring any compensation from Buyer, to examine and copy the records of Seller to verify the accuracy of any invoice, statement, charge or computation made

hereunder or to otherwise verify Seller's performance under this Agreement, including, without limitation, verifying that the delivered Product complies with the Agreement.

- 12.2. Survival. All audit rights shall survive the expiration or termination of this Agreement for a period of twenty-four (24) months after the expiration or termination. Seller shall retain any and all documents (including, without limitation, paper, written, and electronic) and/or any other records relating to this Agreement and the Facility for a period of twenty-four (24) months after the termination or expiration of this Agreement.

### 13. **Taxes**

- 13.1. Seller. Seller shall be liable for and shall pay Buyer, or Seller shall reimburse Buyer if Buyer has paid or cause to be paid, all Taxes imposed by a Governmental Authority on or with respect to the Product delivered hereunder and arising prior its delivery to and at the Delivery Point (including ad valorem, franchise or income taxes which are related to the sale of the Product by Seller to Buyer and are, therefore, the responsibility of Seller). Seller shall indemnify, defend, and hold harmless Buyer from any liability for such Taxes, including related audit and litigation expenses.
- 13.2. Buyer. Buyer shall be liable for and shall pay Seller, or Buyer shall reimburse Seller if Seller has paid or caused to be paid, all Taxes imposed by a Governmental Authority on or with respect to the Product delivered hereunder and arising after the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product by Seller to Buyer and are, therefore, the responsibility of Seller). Buyer shall indemnify, defend, and hold harmless Seller from any liability for such Taxes, including related audit and litigation expenses.
- 13.3. Remittances. In the event Seller is required by any Requirements of Law to remit or pay Taxes that are Buyer's responsibility hereunder, Seller may request reimbursement of such payment from Buyer by sending Buyer an invoice, and Buyer shall include such reimbursement in the next monthly invoice and remit payment thereof. Conversely, if Buyer is required by any Requirements of Law to remit or pay Taxes that are Seller's responsibility hereunder; Buyer may deduct the amount of any such Taxes from the sums otherwise due to Seller under this Agreement. Any refunds or remittances associated with such Taxes shall be administered in accordance with Section 11.1.
- 13.4. Documentation. A Party, upon written request of the other Party, shall promptly provide a certificate of exemption or other reasonably satisfactory evidence of exemption if such Party is exempt from any Tax. Nothing herein shall obligate a Party to pay or be liable to pay any Taxes from which it is exempt pursuant to applicable law.

### 14. **Force Majeure**

- 14.1. Definition. "Force Majeure" means: (A) war, riots, floods, hurricanes, tornadoes, earthquakes, lightning, ice-storms, excessive winds, and other such extreme weather events and natural calamities; (B) explosions or fires arising from lightning or other natural causes unrelated to acts or omissions of the Party; (C) insurrection, rebellion, nationwide strikes; (D) an act of god or other such significant and material event or circumstance which prevents one Party from performing a material and significant obligations hereunder, which such event or circumstance was not anticipated as of the Effective Date, is not within the Commercially Reasonable control of, or the result of the negligence of such claiming Party, and which, by the exercise of Commercially Reasonable Efforts, the claiming Party is unable to overcome or avoid or cause to be avoided; and (E) delays in obtaining goods or services from any subcontractor or supplier to the extent caused by the occurrence of any of the events described in the immediately preceding subparts (A) through (D). The acts, events or conditions listed in subparts (A) through (E) above shall only be deemed a Force Majeure if and to the extent they actually and materially delay or prevent the performance of a Party's obligations under this Agreement and: (i) are beyond the reasonable control of the Party, (ii) are not the result of the willful misconduct or negligent act or omission of such Party (or any person over whom that Party has control), (iii) are not an act, event or condition that reasonably could have been anticipated, or the risk or consequence of which such Party has assumed under the Agreement; and, (iv) cannot be prevented, avoided, or

otherwise overcome by the prompt exercise of Commercially Reasonable diligence by the Party (or any Person over whom that Party has control).

14.1.1. Notwithstanding anything to the contrary herein, Force Majeure will *not* include the following: (a) any strike or labor dispute of the employees of either Party or any subcontractor that is not part of a regional or nationwide strike or labor dispute; (b) any difficulty in obtaining or maintaining sufficient, or appropriately skilled, personnel to perform the work in accordance with the requirements of this Agreement; (c) normal wear and tear or obsolescence of any equipment; (d) Buyer's inability to economically use or resell the Product delivered and purchased hereunder; (e) Seller's ability to sell the Product (or any component of the Product) at a more advantageous price; (f) loss by Seller of any contractual arrangement; (g) any Regulatory Event; (h) loss or failure of Seller's supply of the Product or inability to generate the Product that is not caused by an independent Force Majeure event; (i) the cost or availability or unavailability of fuel, solar energy, wind, or motive force, as applicable, to operate the Facility; (j) economic hardship, including, without limitation, lack of money or financing or Seller's inability to economically generate the Product or operate the Facility; (k) any breakdown or malfunction of Facility equipment (including any serial equipment defect) that is not directly caused by an independent event of Force Majeure; (l) the imposition upon Seller of costs or taxes allocated to Seller hereunder or Seller's failure to obtain or qualify for any tax incentive, preference, or credit; (m) delay or failure of Seller to obtain or perform any Permit; (n) any delay, alleged breach of contract, or failure under any other agreement or arrangement between Seller and another entity, including without limitation, an agent or sub-contractor of Seller (except as a direct result of an event of Force Majeure defined in 14.1(E)); (o) Seller's failure to obtain, or perform under, the Interconnection Agreement, or its other contracts and obligations to Transmission Provider; or (p) increased cost of electricity, steel, materials, equipment, labor, or transportation.

14.2. Event. If either Party is rendered unable by Force Majeure to carry out, in whole or in part, any material obligation hereunder, such Party shall provide notice and reasonably full details of the event to the other Party as soon as reasonably practicable after becoming aware of the occurrence of the event (but in no event later than three (3) Business Days of the initial occurrence of the event of Force Majeure). Such notice may be given orally but shall be confirmed in writing as soon as practicable thereafter (and in any event within ten (10) days of the initial occurrence of the event of Force Majeure); provided however, a reasonable delay in providing such notice shall not preclude a Party from claiming Force Majeure but only so long as such delay does not prejudice or adversely affect the other Party.

14.3. Effect. Subject to the terms and conditions of Section 14, for so long as the event of Force Majeure is continuing, the specific obligations of the Party that are demonstrably and specifically adversely affected by the Force Majeure event, shall be suspended to the extent and for the duration made necessary by the Force Majeure and will not be deemed to be an Event of Default to the extent resulting therefrom. The burden of proof for demonstrating that an event of Force Majeure has occurred shall be on the Party claiming relief under this Agreement based on an event of Force Majeure.

14.4. Remedy. The Party claiming Force Majeure shall act in a Commercially Reasonable Manner to remedy the Force Majeure as soon as practicable and shall keep the other Party advised as to the continuance of the Force Majeure event. If a bona fide Force Majeure event persists for a continuous period of one hundred eighty (180) days, then the Party not claiming Force Majeure shall have the right, in its sole and unfettered discretion, to terminate this Agreement upon giving the other Party ten (10) Business Days advance written notice; provided, however, that where the Force Majeure event cannot be remedied within one hundred eighty (180) days and the claiming Party can demonstrate to the non-claiming Party its intention and ability to implement a Commercially Reasonable plan to remedy such Force Majeure event within an additional one hundred eighty (180) days after the initial one hundred eighty (180) day period and the claiming Party uses Commercially Reasonable efforts to implement such plan, the non-claiming Party shall not have the right to terminate the Agreement until the expiration of such



additional one hundred eighty (180) day period.

- 14.5. Termination. Unless otherwise agreed upon by the Parties in writing and in each Party's sole discretion, upon the expiration of the periods set forth above in Sections 14.4, this Agreement may be terminated without any further notice and further opportunity to cure any non-performance. Upon termination becoming effective pursuant to a Force Majeure under Section 14, neither Party will have any liability to the other Party or recourse against the other Party, other than for amounts arising prior to termination. Notwithstanding the claimed existence of a Force Majeure event or any other provisions of this Agreement, nothing herein shall relieve any Party from exercising any right or remedy provided under this Agreement with respect to any liability or obligation of the other Party that is not excused or suspended by the Force Majeure event, including, without limitation, the right to liquidate and early terminate the Agreement for any Event of Default not excused by the Force Majeure event. Nothing herein shall be construed so as to obligate any Party to settle any strike, work stoppage or other labor dispute or disturbance or to make significant capital expenditures, except in the sole discretion of the Party experiencing such difficulty.

## 15. Change in Law

- 15.1. Regulatory Event. A "Regulatory Event" means one or more of the following events:
- 15.1.1. Illegality. After the Effective Date, due to the adoption of, or change in, any applicable Requirements of Law or in the interpretation thereof by any Governmental Authority with competent jurisdiction, it becomes unlawful for a Party to perform any material obligation under this Agreement.
- 15.1.2. Adverse Government Action. After the Effective Date, there occurs any adverse material change in any applicable Requirements of Law (including material change regarding a Party's obligation to sell, deliver, purchase, or receive the Product) and any such occurrence renders illegal or unenforceable any material performance or requirement under this Agreement.
- 15.2. Process. Upon the occurrence of a Regulatory Event the Party affected by the Regulatory Event may notify the other Party in writing of the occurrence of a Regulatory Event, together with details and explanation supporting the occurrence of a Regulatory Event. Upon receipt of such notice, the Parties agree to undertake, during the thirty (30) days immediately following receipt of the notice, to negotiate such modifications to reform this Agreement to remedy the Regulatory Event and attempt to give effect to the original intention of the Parties. Upon the expiration of the 30-day period, if the Parties are unable to agree upon modifications to the Agreement that are acceptable to each Party, in each Party's reasonable discretion, then either Party shall have the right, in such Party's sole discretion, to terminate this Agreement with a 30-day advance written notice.

## 16. Confidentiality

- 16.1. Protected Information. Except as otherwise set forth in this Agreement, neither Party (the "Receiving Party") shall, without the other Party's (the "Disclosing Party") prior written consent, disclose any Protected Information (as defined below) of the Disclosing Party to any third person (other than the Party's employees, affiliates, advisors, counsel, accountants, and current and prospective lenders and investors in the Facility who have a need to know such information, have agreed to keep such terms confidential, and for whom the Party shall be liable in the event of a breach of such confidentiality obligation), at any time during the Term or for five (5) years after the expiration or early termination of this Agreement. As used herein the term "Protected Information" means (a) this Agreement, (b) any proprietary information of the Disclosing Party disclosed in connection with this Agreement, including without limitation, proposals and negotiations whether disclosed prior to or after the date hereof that have been clearly marked as confidential or proprietary. Notwithstanding anything to the contrary herein, in no event will Protected Information include the concept of constructing or providing energy from a power plant, using any specific fuel source, in any specific location. Each Party shall be entitled to all remedies available at law or in equity (including but not limited to specific performance and/or injunctive relief,) to enforce, or seek relief in connection with, this confidentiality obligation. Notwithstanding any other provision

of this Agreement, any claim related to or arising out of any confidentiality obligations herein may be brought directly in any state or federal court of competent jurisdiction in Mecklenburg County, North Carolina, in accordance with Section 26.5 of this Agreement, and shall not be subject to dispute resolution or arbitration pursuant to Section 23 of this Agreement.

- 16.2. Non-Confidential Information. Protected Information does not include information: (i) that is or becomes available to the public other than by disclosure of Receiving Party in breach of this Agreement; (ii) known to Receiving Party prior to its disclosure; (iii) available to Receiving Party from a third party who is not bound to keep such information confidential; or, (iv) independently developed by the Receiving Party without reliance upon the Protected Information. Notwithstanding anything to the contrary herein, in no event will Protected Information include the concept of constructing or providing energy from a power plant, using any specific fuel source, in any specific location.
- 16.3. Return of Confidential Information. Upon request of Disclosing Party, Receiving Party shall either (i) return the Protected Information, including all copies, or (ii) destroy the Protected Information, including all copies, and present written assurances of the destruction to Disclosing Party. Notwithstanding the foregoing, both Parties acknowledge that Protected Information transferred and maintained electronically (including e-mails) may be automatically archived and stored by Receiving Party on electronic devices, magnetic tape, or other media for the purpose of restoring data in the event of a system failure (collectively, "Back-Up Tapes"). Notwithstanding the terms of this Agreement, in no event shall Receiving Party be required to destroy Protected Information stored on Back-Up Tapes; provided, however, any Protected Information not returned or destroyed pursuant to this Section shall be kept confidential for the duration of its existence. Furthermore, the Receiving Party may retain one (1) copy of such Protected Information in Receiving Party's files solely for audit and compliance purposes for the duration of its existence; provided, however, such Protected Information shall be kept confidential for the duration of its existence in accordance with the terms of this Agreement.
- 16.4. Required Disclosures. Notwithstanding the confidentiality requirements set forth herein, a Party may disclose Protected Information to comply with PURPA, request of any Governmental Authority, applicable Requirements of Law, or any exchange, control area or System operator rule, in response to a court order, or in connection with any court or regulatory proceeding. Such disclosure shall not terminate the obligations of confidentiality unless the Protected Information falls within one of the exclusions of this Agreement. To the extent the disclosure of Protected Information is requested or compelled as set forth above, the Receiving Party agrees to give Disclosing Party reasonable notice of any discovery request or order, subpoena, or other legal process requiring disclosure of any Protected Information. Such notice by the Receiving Party shall give Disclosing Party an opportunity, at Disclosing Party's discretion and sole cost, to seek a protective order or similar relief, and the Receiving Party shall not oppose such request or relief. If such protective order or other appropriate remedy is not sought and obtained within at least thirty (30) days of Receiving Party's notice, Receiving Party shall disclose only that portion of the Protected Information that is required or necessary in the opinion of Receiving Party's legal counsel; provided, however, Receiving Party shall use reasonable efforts to obtain assurances that confidential treatment will be accorded to any Protected Information so disclosed.
- 16.5. Regulatory Disclosures by Buyer. This Section 16.5 will apply notwithstanding anything to the contrary in this Agreement. Seller understands and acknowledges that Buyer is regulated by various regulatory and market monitoring entities. Buyer is permitted, in its sole discretion, to disclose or to retain and not destroy (in case of a future disclosure need as determined by Buyer in its sole discretion) any information (including Protected Information) to any regulatory commission (inclusive of the NCUC, SCPSC, FERC), NERC, market monitor, office of regulatory staff, and/or public staff, or any other regulator or legislative body without providing prior notice to the Seller or having obtained the consent from the Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for any such disclosures or retentions in its sole discretion. In the event of the establishment of any docket or proceeding before any regulatory commission, public service commission, public utility commission, or other agency, tribunal, or court having jurisdiction over Buyer, the Protected Information shall automatically be governed solely by the rules and procedures

governing such docket or proceeding to the extent such rules or procedures are additional to, different from, or inconsistent with this Agreement. In regulatory proceedings in all state and federal jurisdictions in which Buyer does business, Buyer will from time-to-time be required to produce Protected Information, and Buyer may do so without prior notice to Seller or consent from Seller, using Buyer's business judgment, and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion. When a request for disclosure of information, including Protected Information, is made to Buyer, Buyer may disclose the information, including Protected Information, without prior notice to the Seller or consent from the Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion. Seller further acknowledges that Buyer is required by law or regulation to report certain information that could embody Protected Information from time-to-time, and Buyer may from time-to-time make such reports, without providing prior notice to Seller or consent from Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion.

## **17. Mutual Representations and Warranties**

- 17.1. As of the Effective Date and throughout the Term, each Party represents and warrants to the other Party that:
  - 17.1.1. It is duly organized, validly existing and in good standing under the Requirements of Law of the jurisdiction of its organization or formation and has all requisite power and authority to execute and enter into this Agreement;
  - 17.1.2. It has all authorizations under the Requirements of Law (including but not limited to the Required Approvals), necessary for it to legally perform its obligations and consummate the transactions contemplated hereunder or will obtain such authorizations in a timely manner prior to the time that performance by such Party becomes due;
  - 17.1.3. The execution, delivery, and performance of this Agreement will not conflict with or violate any Requirements of Law or any contract, agreement or arrangement to which it is a party or by which it is otherwise bound;
  - 17.1.4. This Agreement constitutes a legal, valid, and binding obligation of such Party enforceable against it in accordance with its terms, and such Party has all rights necessary to perform its obligations to the other Party in accordance with the terms and conditions of this Agreement;
  - 17.1.5. It is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether or not this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the representations, advice or recommendations of the other Party in so doing, is capable of assessing the merits of this Agreement, and understands and accepts the terms, conditions, and risks of this Agreement for fair consideration on an arm's length basis;
  - 17.1.6. No Event of Default or event which with notice or lapse of time, or both, would become an Event of Default, has occurred with respect to such Party, and that such Party is not Bankrupt and there are no proceedings pending or being contemplated by it, or to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
  - 17.1.7. There is no pending, or to its knowledge, threatened legal proceeding at law or equity against it or any Affiliate, that materially adversely affects its ability to perform its obligations under this Agreement;
  - 17.1.8. It is a "forward contract merchant" and this Agreement constitutes a "forward contract" as such terms are defined in the United States Bankruptcy Code;
  - 17.1.9. It is an "eligible commercial entity" within the Commodity Exchange Act;
  - 17.1.10. It is an "eligible contract participant" within the Commodity Exchange Act; and;
  - 17.1.11. Each person who executes this Agreement on behalf of such Party has full and

complete authority to do so, and that such Party will be bound by such execution.

#### **18. Seller Representations and Warranties to Buyer**

- 18.1. For all Product and every aspect thereof, Seller represents, warrants, and reaffirms to Buyer as a continuing warranty and representation that:
  - 18.1.1. All Product will meet the specifications and requirements in this Agreement, including without limitation, compliance with PURPA;
  - 18.1.2. Seller has provided and conveyed and will provide and convey to Buyer all Capacity rights associated with the Facility and Energy Produced by the Facility;
  - 18.1.3. Seller holds all the rights to all the Product from the Facility, Seller has the right to sell the Product to Buyer, and Seller agrees to convey and does convey to Buyer all rights and good title to the Product free and clear of any Liens, encumbrances, or title defects;
  - 18.1.4. Seller has not and will not double claim or double count the Product (including, without limitation, any Capacity of the Facility) in any manner (including, for example, by issuing a press release or otherwise claiming that Seller is creating any Capacity benefit, or selling the Product to any person other than exclusively to and for Buyer); and
  - 18.1.5. Seller has not and will not in any manner interfere with, encumber or otherwise impede Buyer's use, transfer, and sale of the Product.

#### **19. Events of Default**

- 19.1. An "Event of Default" means with respect to the non-performing Party (such Party, the "Defaulting Party"), the occurrence of any one or more of the following events set forth below in this Section 19, each of which, individually, shall constitute a separate Event of Default:
- 19.2. The failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after the Defaulting Party's receipt of written notice; *provided, however*, a Party will have two (2) Business Days to remedy any failure to make payment required under Section 21;
- 19.3. Any covenant or warranty made by Seller under Section 6.2 (Seller Covenant) is false or misleading in any respect when made or when deemed made or repeated.
- 19.4. Any representation or warranty made by a Party under Section 17 and elsewhere in this Agreement (except Section 18 which is a separate Event of Default) is false or misleading in any material respect when made or when deemed made or repeated;
- 19.5. Any representation or warranty made by Seller under Section 18 (Seller Representations and Warranties to Buyer) is false or misleading in any respect when made or when deemed made or repeated;
- 19.6. The actual Nameplate Capacity Rating of the Facility is higher than the Nameplate Capacity Rating set forth in Exhibit 3, or is lower than the Nameplate Capacity Rating by more than five (5) percent of the Nameplate Capacity Rating set forth in Exhibit 3.
- 19.7. Seller Abandons the Facility for more than sixty (60) consecutive days;
- 19.8. Seller fails to provide, replenish, renew, or replace the Performance Assurance and/or otherwise fails to fully comply with the credit related requirements of this Agreement, including without limitation, Section 5, and any such failure is not cured within five (5) Business Days.
- 19.9. Seller adds an energy storage device to the Facility without obtaining Buyer's prior written consent.
- 19.10. Seller fails to fully meet all the insurance requirements set forth in Section 7.5, and such failure is not cured within five (5) Business Days.

- 19.11. Seller fails to obtain or maintain the Facility's registration or certification as a Qualifying Facility under PURPA.
- 19.12. Seller fails to fully comply with the PURPA Fuel Requirements.
- 19.13. Seller delivers or attempts to deliver to Buyer any Product (or any component thereof) that was not generated by the Facility.
- 19.14. Seller fails to promptly and fully comply with a System Operator Instruction.
- 19.15. Seller consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and: (i) at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of Seller under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party; or (ii) the resulting, surviving, transferee or successor entity fails to assume all the obligations of Seller under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party;
- 19.16. An assignment by or Change of Control with respect to Seller, other than in compliance with Section 24;
- 19.17. A Party becomes Bankrupt;
- 19.18. Seller transfers or assigns or otherwise conveys any of its rights or obligations under this Agreement to another Person in violation of the terms and conditions of this Agreement; and
- 19.19. Except to the extent constituting a separate Event of Default (in which case the provisions applicable to that separate Event of Default shall apply) the failure to perform any material covenant or obligation set forth in this Agreement, if such failure is not remedied within thirty (30) days after the Defaulting Party's receipt of written notice.

## 20. **Early Termination.**

- 20.1. **Early Termination Date.** If an Event of Default with respect to a Defaulting Party has occurred and is continuing, then the other Party (such Party, the "Non-Defaulting Party") shall have the right, in its sole discretion and upon written notice to the Defaulting Party, to pursue any or all of the following remedies: (a) withhold payments due to the Defaulting Party under this Agreement; (b) suspend performance under this Agreement; and/or (c) designate a day (which day shall be no earlier than the day such notice is effective and shall be no later than twenty (20) days after the delivery of such notice is effective) as an early termination date to accelerate all amounts owing between the Parties, liquidate, net, recoup, set-off, and early terminate this Agreement and any other agreement between the Parties (such day, the "Early Termination Date").
- 20.2. **Effectiveness of Default and Remedies.** Where an Event of Default is specified herein and is governed by a system of law which does not permit termination to take place upon or after the occurrence of the relevant Event of Default in accordance with the terms of this Agreement an Event of Default and Early Termination Date shall be deemed to have occurred immediately upon any such event and no prior written notice shall be required. All of the remedies and provisions set forth in this section shall be without prejudice to any other right of the Non-Defaulting Party to accelerate amounts owed, net, recoup, setoff, liquidate, and early terminate this Agreement.
- 20.3. **Net Settlement Amount.** If the Non-Defaulting Party establishes an Early Termination Date, then the Non-Defaulting Party shall calculate its Gains or Losses and Costs resulting from the termination as of the Early Termination Date, in a Commercially Reasonable Manner. The Non-Defaulting Party shall aggregate such Gains or Losses and Costs with respect to the liquidation of the termination and any other amounts due under this Agreement and any other agreement between the Parties into a single net amount expressed in U.S. dollars (the "Net Settlement Amount"). The Non-Defaulting Party shall then notify the Defaulting Party of the Net Settlement Amount. The Defaulting Party shall pay the Non-Defaulting Party the full amount of the Net Settlement Amount within five (5) Business Days of delivery to the

Defaulting Party of the notice of the Net Settlement Amount that the Defaulting Party is liable for.

- 20.4. Payment. Any Net Settlement Amount will only be due and payable only to the Non-Defaulting Party from and by the Defaulting Party. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the Net Settlement Amount will be deemed to be zero and no payment will be due or payable. The Non-Defaulting Party shall under no circumstances be required to account for or otherwise credit or pay the Defaulting Party for economic benefits accruing to the Non-Defaulting Party as a result of the Defaulting Party's default. The Non-Defaulting Party shall be entitled to recover any Net Settlement Amount by netting or set-off or to otherwise pursue recovery of damages. Additionally, Buyer will be entitled to recover any Net Settlement Amount by drawing upon any Performance Assurance or by netting or set-off, or to otherwise pursue recovery of damages. Any calculation and payment of the Net Settlement Amount will be independent of and in addition to Seller's obligation to reimburse Buyer for overpayments pursuant to Section 20.6.
- 20.5. Overpayment Reimbursement. Notwithstanding anything else in this Agreement to the contrary, including without limitation the Net Settlement Amount calculation and payment provisions set forth in Sections 20.1 through 20.4, and without limiting any of Buyer's other rights or remedies hereunder, Seller agrees and acknowledges that in the event this Agreement is terminated prior to the expiration of the Term for any reason other than an Event of Default by Buyer, that Seller will reimburse Buyer for all amounts paid by Buyer to Seller under this Agreement in excess of Buyer's avoided cost for energy and capacity over the period starting from the commencement of the Delivery Period through the date of termination of this Agreement plus interest on such amount calculated at the rate of 2.78% to be adjusted annually until repaid (the "Overpayment Amount"). Seller agrees to reimburse Buyer for the Overpayment Amount notwithstanding anything to the contrary in this Agreement and without regard to whether Seller is or may be liable to Buyer for any additional amounts under this Agreement, including, without limitation, any Net Settlement Amount, Gains, and/or Losses determined or to be determined pursuant to this Agreement. The Seller will pay Buyer the Overpayment Amount no later than three (3) Business Days after the Early Termination Date.
- 20.6. Survival. This Section 20 will survive any expiration or termination of this Agreement.

## 21. Cover Costs.

- 21.1. Exclusive Remedies. Except where a specific and exclusive remedy is otherwise set forth in this Agreement, the remedies set forth in this Section shall be a Party's exclusive remedies prior to termination for the other Party's failure to deliver the Product or to receive the Product pursuant to and in accordance with this Agreement.
- 21.2. Seller's Failure to Deliver. If Seller fails to deliver Product that complies with the requirements set forth in this Agreement or fails to deliver all or part of the Contract Quantity (each will be deemed as a failure to deliver for purposes of calculating damages), and such failure is not excused by a Permitted Excuse to Perform or Buyer's failure to perform, then Buyer shall elect in its sole discretion: (i) to terminate and liquidate this Agreement if such failure is an Event of Default as set forth herein, and in which case Buyer shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party; or, (ii) to require Seller to pay Buyer within three (3) Business Days of invoice receipt, liquidated damages in the amount obtained by multiplying the number of units of Product (or component thereof) that Seller failed to deliver to Buyer multiplied by two (2) times the per unit Contract Price (or component thereof).
- 21.3. Buyer's Failure to Accept Delivery. If Buyer fails to receive all or part of the Contract Quantity that Seller attempted to deliver to Buyer in accordance with this Agreement, and such failure by Buyer is not excused by a Permitted Excuse to Perform or Seller's failure to perform, then Seller shall elect in its sole discretion either to: (i) terminate and liquidate this Agreement if such failure is an Event of Default as set forth herein, and in which case Seller shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party; or, (ii) require Buyer to pay Seller within three (3) Business Days of invoice

receipt, liquidated damages in the amount obtained by multiplying the number of units of Product (or component thereof) that Buyer failed to receive multiplied by two (2) times the per unit Contract Price (or component thereof).

21.4. Event of Default. Any failure by Seller to pay amounts due under this Section 21 will be an Event of Default under Section 19.2.

21.5. Survival. This Section 21 will survive any expiration or termination of this Agreement.

## 22. **Limitation of Liabilities & Liquidated Damages.**

22.1. Reasonableness. THE EXPRESS REMEDIES AND MEASURES OF DAMAGES, INCLUDING WITHOUT LIMITATION DETERMINATION OF LIQUIDATED DAMAGES, COVER COSTS, AND NET SETTLEMENT AMOUNT DAMAGES PROVIDED FOR IN THIS AGREEMENT (i) ARE REASONABLE AND SATISFY THE ESSENTIAL PURPOSES HEREOF FOR BREACH OF ANY PROVISION FOR WHICH THE EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, AND (ii) UNLESS OTHERWISE STATED IN SUCH PROVISIONS, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISIONS, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. TO THE EXTENT ANY PROVISION OF THIS AGREEMENT PROVIDES FOR, OR IS DEEMED TO CONSTITUTE OR INCLUDE, LIQUIDATED DAMAGES, THE PARTIES STIPULATE AND AGREE THAT THE ACTUAL DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO ESTIMATE OR DETERMINE, THE LIQUIDATED AMOUNTS ARE A REASONABLE APPROXIMATION OF AND METHODOLOGY TO DETERMINE THE ANTICIPATED HARM OR LOSS TO THE PARTY, AND OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT. THE PARTIES FURTHER STIPULATE AND AGREE THAT ANY PROVISIONS FOR LIQUIDATED DAMAGES ARE NOT INTENDED AS, AND SHALL NOT BE DEEMED TO CONSTITUTE, A PENALTY, AND EACH PARTY HEREBY WAIVES THE RIGHT TO CONTEST SUCH PROVISIONS AS AN UNREASONABLE PENALTY OR AS UNENFORCEABLE FOR ANY REASON.

22.2. Limitation. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY HEREIN PROVIDED, (i) THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED; AND (ii) NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, EVEN IF SUCH DAMAGES ARE ALLOWED OR PROVIDED BY STATUTE, STRICT LIABILITY, ANY TORT, CONTRACT, OR OTHERWISE.

22.3. Damages Stipulation. Each Party expressly agrees and stipulates that the terms, conditions, and payment obligations set forth in Sections 20 and 21 are a reasonable methodology to approximate or determine harm or loss, each Party acknowledges the difficulty of determining actual damages or loss, and each Party hereby waives the right to contest such damages and payments as unenforceable, as an unreasonable penalty, or otherwise for any reason. The Parties further acknowledge and agree that damages and payments determined under Sections 20 and 21 are direct damages, will be deemed to be a direct loss, and will not be excluded from liability or recovery under the Limitations of Liabilities provisions of this Section 22.

22.4. Survival. This Section 22 will survive any expiration or termination of this Agreement.

## 23. **Disputes and Arbitration**

23.1. Resolution by the Parties. The Parties shall attempt to resolve any claims, disputes and other controversies arising out of or relating to this Agreement (collectively, "Dispute(s)") promptly by negotiation between executives who have authority to settle the Dispute and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. A Party may give the other Party written notice of a Dispute that has not been resolved in the normal course of business. Such notice shall include: (a) a statement of that Party's position and a summary of arguments supporting such position, and (b) the name and title of the executive who will be representing that Party and of any other person who will accompany the executive. Within ten (10) Business

Days after delivery of the notice, the receiving Party shall respond with (a) a statement of that Party's position and a summary of arguments supporting such position, and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within twenty (20) Business Days after delivery of the initial notice, the executives of both Parties shall meet at Buyer's offices, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute. At the request of either Party, the Parties shall enter into a confidentiality agreement to cover any Dispute and discussions related thereto.

23.2. Demand for Arbitration.

23.2.1. If a Dispute has not been resolved by negotiation within thirty (30) Business Days of the disputing Party's initial notice, the Parties shall fully and finally settle the Dispute by binding arbitration administered by the American Arbitration Association ("AAA"), or such other nationally recognized arbitration association or organization as the Parties may mutually agree. The Arbitration shall be conducted in accordance with the AAA Commercial Arbitration Rules then in effect, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. To the extent the AAA Rules conflict with any provision of Section 23 of this Agreement, the terms of this Agreement shall govern and control.

23.2.2. Either Party may serve the demand for arbitration on the other Party; provided, however, no demand for arbitration shall be made or permitted after the date when the institution of a civil action based on the Dispute would be barred by the applicable statute of limitations or repose.

23.2.3. All arbitration proceedings shall take place in Charlotte, North Carolina.

23.2.4. A single arbitrator will arbitrate all Disputes where the amount in controversy is less than five-hundred thousand U.S. dollars (\$500,000), and will be selected by the Parties or by the AAA if the Parties cannot agree to the arbitrator. Such arbitrator shall be a licensed attorney with at least ten (10) years of experience in the electric utility industry. The cost of the arbitrator(s) shall be borne equally by the Parties.

23.2.5. A panel of three (3) arbitrators will conduct the proceeding when the amount in controversy is equal to or more than five hundred thousand U.S. dollars (\$500,000). If the Parties have not so agreed on such three (3) arbitrator(s) on or before thirty (30) days following the delivery of a demand for Arbitration to the other Party, then each Party, by notice to the other Party, may designate one arbitrator (who shall not be a current or former officer, director, employee or agent of such Party or any of its Affiliates). The two (2) arbitrators designated as provided in the immediately preceding sentence shall endeavor to designate promptly a third (3<sup>rd</sup>) arbitrator.

23.2.6. If either Party fails to designate an initial arbitrator on or before forty five (45) days following the delivery of an arbitration notice to the other Party, or if the two (2) initially designated arbitrators have not designated a third (3<sup>rd</sup>) arbitrator within thirty (30) days of the date for designation of the two (2) arbitrators initially designated, any Party may request the AAA to designate the remaining arbitrator(s) pursuant to its Commercial Arbitration Rules. Such third (3<sup>rd</sup>) arbitrator shall be a licensed attorney with at least ten (10) years of experience in the electric utility industry.

23.2.7. If any arbitrator resigns, becomes incapacitated, or otherwise refuses or fails to serve or to continue to serve as an arbitrator, the Party entitled to designate that arbitrator shall designate a successor.

23.3. Discovery. Either Party may apply to the arbitrators for the privilege of conducting discovery. The right to conduct discovery shall be granted by the arbitrators in their sole discretion with a view to avoiding surprise and providing reasonable access to necessary information or to information likely to be presented during the course of the arbitration, provided that such discovery period shall not exceed sixty (60) Business Days.

23.4. Binding Nature. The arbitrator(s)' decision shall be by majority vote (or by the single



arbitrator if a single arbitrator is used) and shall be issued in a writing that sets forth in separately numbered paragraphs all of the findings of fact and conclusions of law necessary for the decision. Findings of fact and conclusions of law shall be separately designated as such. The arbitrator(s) shall not be entitled to deviate from the construct, procedures or requirements of this Agreement. The award rendered by the arbitrator(s) in any arbitration shall be final and binding upon the Parties, and judgment may be entered on the award in accordance with applicable law in any court of competent jurisdiction.

- 23.5. Consolidation. No arbitration arising under the Agreement shall include, by consolidation, joinder, or any other manner, any person not a party to the Agreement unless (a) such person is substantially involved in a common question of fact directly relating to the Dispute; provided however, such person will not include any Governmental Authority, (b) the presence of the person is required if complete relief is to be accorded in the arbitration, and (c) the person has consented to be included.
- 23.6. Mediation. Any time prior or subsequent to a Party initiating arbitration, the Parties may mutually agree to (but are not obligated to) attempt to resolve their Dispute by non-binding mediation, using a mediator selected by mutual agreement. The mediation shall be completed within thirty (30) Business Days from the date on which the Parties agree to mediate. Unless mutually agreed by the parties, any mediation agreed to by the Parties shall not delay arbitration. The Parties shall pay their own costs associated with mediation and shall share any mediator's fee equally. The mediation shall be held in [Raleigh][Charlotte], North Carolina, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court of competent jurisdiction.
- 23.7. Remedies. Except for Disputes regarding confidentiality arising under Section 16 of this Agreement, the procedures specified in this Section 23 shall be the sole and exclusive procedures for the resolution of Disputes between the Parties arising out of or relating to this Agreement; provided, however, that a Party may file a judicial claim or action on issues of statute of limitations or repose or to seek injunctive relief, sequestration, garnishment, attachment, or an appointment of a receiver, subject to and in accordance with the provisions of Section 26.5 (Venue/Consent to Jurisdiction). Preservation of these remedies does not limit the power of the arbitrator(s) to grant similar remedies, and despite such actions, the Parties shall continue to participate in and be bound by the dispute resolution procedures specified in Section 23.
- 23.8. Settlement Discussions. All negotiations and discussion concerning Disputes between the Parties pursuant to Section 23 of this Agreement are to be deemed confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and settlement privilege. No statement of position or offers of settlement made in the course of the dispute resolution process can be or will be offered into evidence for any purpose, nor will any such statements or offers of settlement be used in any manner against any Party. Further, no statement of position or offers of settlement will constitute an admission or waiver of rights by either Party. At the request of either Party, any such statements or offers, and all copies thereof, shall be promptly returned to the Party providing the same.
- 23.9. Survival. This Section 23 will survive any expiration or termination of this Agreement.

#### 24. Assignment

- 24.1. Limitation. Except as set forth below in Section 24.2 with respect to pledging as collateral security, Seller shall not assign or encumber (collectively, the "Assignment") this Agreement, any rights or obligations under the Agreement, or any portion hereunder, without Buyer's prior written consent. Seller shall give Buyer at least thirty (30) days prior written notice of any requested Assignment. Subject to Seller providing Buyer with information demonstrating to Buyer, in Buyer's Commercially Reasonable Discretion, that Seller's proposed assignee has the technical, engineering, financial, and operational capabilities to perform under this Agreement, Buyer may not unreasonably withhold its consent; *provided, however*, that any such assignee shall agree in writing to be bound by the terms and conditions hereof and shall deliver to Buyer Performance Assurance in the

amount required under this Agreement, and such enforceability assurance as the Buyer may request in its Commercially Reasonable discretion. Notwithstanding anything to the contrary herein, Buyer may pledge, encumber, or assign this Agreement without the consent of Seller to any Person that is Creditworthy, or that has provided Seller with a guaranty substantially in the form of Exhibit 5 from a Creditworthy credit support provider guaranteeing the assignee's obligations hereunder, and that has agreed in writing to assume the obligations of Buyer hereunder.

- 24.2. Pledge. Seller may, without prior consent of Buyer but with no less than ten (10) Business Days prior written notice to Buyer, pledge as collateral security this Agreement to a financing party in connection with any loan, lease, or other debt or equity financing arrangement for the Facility. Any pledge of this Agreement as collateral security will not relieve Seller of any obligation or liability under this Agreement or compromise, modify or affect any rights, benefits or risks of Buyer under this Agreement, and it will not create any rights, including any third party beneficiary rights, for any Person under this Agreement.
- 24.3. Acknowledgement of Non-Default. Provided that Seller is not in default of its obligations under this Agreement, upon reasonable request by Seller, Buyer will execute a written acknowledgement of non-default in the form of Exhibit 7 attached hereto (the "Acknowledgement") which shall be based on the actual knowledge of Buyer's personnel responsible for administering the Agreement at the time of the execution of the Acknowledgement and after due inquiry of Buyer's internal records only. Notwithstanding any provision to the contrary set forth in the Acknowledgement, Buyer reserves all rights and defenses available to it under the Agreement, and nothing stated therein shall be deemed to have waived, amended or modified any such rights or defenses. In no event shall the issuance of any Acknowledgement introduce any third party to this Agreement or create any rights, including third party beneficiary rights for any Person under this Agreement.
- 24.4. Change of Control. Any Change of Control of Seller (however this Change of Control occurs) shall require the prior written consent of Buyer, which shall not be unreasonably withheld or delayed. Seller shall give Buyer at least thirty (30) days prior written notice of any such requested consent to a Change of Control.
- 24.5. Delivery of Assurances & Voidable. Any Assignment or Change of Control will not relieve Seller of its obligations hereunder, unless Buyer agrees in writing in advance to waive the Seller's continuing obligations under this Agreement. In case of a permitted Assignment, such requesting party or parties shall agree in writing to assume all obligations of Seller and to be bound by the terms and conditions of this Agreement and shall deliver to Buyer such tax, credit, performance, and enforceability assurances as Buyer may request, in its Commercially Reasonable discretion. Further, Buyer's consent to any Assignment may be conditioned on and subject to Seller's proposed assignee having first obtained all approvals that may be required by any Requirements of Law and from all applicable Governmental Authorities. Any sale, transfer, Change of Control, and/or Assignment of any interest in the Facility or in the Agreement made without fully satisfying the requirements of this Agreement shall be null and void and will be an Event of Default hereunder with Seller as the Defaulting Party.
- 24.6. Cost Recovery. Without limiting Buyer's rights under this Section 24, to the extent Buyer agrees to a request from Seller for one or more consent(s) to an Assignment or Change of Control under this Agreement, Seller shall pay Buyer ten thousand dollars (\$10,000) prior to Buyer processing Seller's request.

## 25. **Notices**

- 25.1. Process. All notices, requests, or invoices shall be in writing and shall be sent to the address of the applicable Party as specified on the first page of this Agreement. A Party may change its information for receiving notices by sending written notice to the other Party. Notices shall be delivered by hand, certified mail (postage prepaid and return receipt requested), or sent by overnight mail or courier, or sent via email. This section shall be applicable whenever words such as "notify," "submit," "give," or similar language are used in the context of giving notice to a Party.

- 25.2. Receipt of Notices. Hand delivered notices shall be deemed delivered by the close of the Business Day on which it was hand delivered. Notices provided by certified mail (postage prepaid and return receipt requested), mail delivery or courier service, or by overnight mail or courier service will be deemed received on the date of delivery recorded by the delivery service or on the tracking receipt, as applicable. Notices sent via e-mail will be deemed received on the date they are sent. Notwithstanding anything to the contrary, if the day on which any notice is delivered or received is not a Business Day or is after 5:00 p.m. EPT on a Business Day, then it shall be deemed to have been received on the next following Business Day.

**26. Miscellaneous.**

- 26.1. Costs. Each Party shall be responsible for its own costs and fees associated with negotiating or disputing or taking any other action with respect to this Agreement, including, without limitation, attorney costs, except that the cost of the arbitrator(s) will be allocated equally between the Parties as provided in Section 23.
- 26.2. Access. Upon reasonable prior notice, Seller shall provide to Buyer and its authorized agents (including contractors and sub-contractors), employees, auditors, and inspectors reasonable access to the Facility to: (i) tour or otherwise view the Facility; (ii) ascertain the status of the Facility with respect to construction, start-up and testing, or any other obligation of Seller under this Agreement; and, (iii) read meters and perform all inspections, maintenance, service, and operational reviews as may be appropriate to facilitate the performance of this Agreement or to otherwise audit and/or verify Seller's performance under this Agreement. Upon reasonable prior notice, Seller shall provide to Buyer and its guests or customers reasonable access to the Facility to only tour or otherwise view the Facility. While at the Facility, the foregoing agents, employees, auditors, inspectors, guests, and customer shall observe such reasonable safety precautions as may be required by Seller, conduct themselves in a manner that will not interfere with the operation of the Facility, and adhere to Seller's reasonable rules and procedures applicable to Facility visitors. Seller shall have the right to have a representative of Seller present during such access.
- 26.3. Safe Harbor and Waiver of Section 366. Each Party agrees that it will not assert, and waives any right to assert, that the other Party is performing hereunder as a "utility," as such term is used in 11 U.S.C. Section 366. Further, each Party hereby waives any right to assert and agrees that it will not assert that 11 U.S.C. Section 366 applies to this Agreement or any transaction hereunder in any bankruptcy proceeding. In any such proceeding each Party further waives the right to assert and agrees that it will not assert that the other Party is a provider of last resort with respect to this Agreement or any transaction hereunder or to otherwise limit contractual rights to accelerate amounts owed, net, recoup, set-off, liquidate, and/or early terminate. Without limiting the generality of the foregoing or the binding nature of any other provision of this Agreement on permitted successors and assigns, this provision is intended to be binding upon all successors and assigns of the Parties, including, without limitation, judgment lien creditors, receivers, estates in possession, and trustees thereof.
- 26.4. Governing Law. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED, AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NORTH CAROLINA, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW, AND, IF APPLICABLE, BY THE FEDERAL LAW OF THE UNITED STATES OF AMERICA.
- 26.5. Venue/Consent to Jurisdiction. Except for Disputes that are subject to Arbitration as provided herein, any judicial action, suit, or proceedings arising out of, resulting from, or in any way relating to, this Agreement, or any alleged breach or default under the same or the warranties and representations contained in the same, shall be brought only in a state or federal court of competent jurisdiction located in Mecklenburg County, North Carolina. The Parties hereto irrevocably consent to the jurisdiction of any federal or state court within Mecklenburg County, North Carolina and hereby submit to venue in such courts. Without limiting the generality of the foregoing, the Parties waive and agree not to assert by way of motion, defense, or otherwise in such suit, action, or proceeding, any claim that (i) such Party is not subject to the jurisdiction of the state or federal Courts within North Carolina;

or (ii) such suit, action, or proceeding is brought in an inconvenient forum; or (iii) the venue of such suit, action, or proceeding is improper. The exclusive forum for any litigation between them under this Agreement that is not subject to Arbitration shall occur in federal or state court within Mecklenburg County, North Carolina.

- 26.6. Limitation of Duty to Buy. If this Agreement is terminated due to a default by Seller, neither Seller, nor any affiliate and/or successor of Seller, nor any affiliate and/or successor to the Facility, including without limitation owner and/or operator of the Facility will require or seek to require Buyer to purchase any output (Energy or otherwise) from the Facility under any Requirements of Law (including without limitation PURPA) or otherwise for any period that would have been covered by the Term of this Agreement had this Agreement remained in effect at a price that exceeds the Contract Price. Seller, on behalf of itself and on behalf of any other entity on whose behalf it may act, and on behalf of any successor to the Seller or successor to the Facility, hereby agrees to the terms and conditions in the above sentence, and hereby waives its right to dispute the above sentence. Seller authorizes the Buyer to record notice of the foregoing in the real estate records.
- 26.7. Entire Agreement and Amendments. This Agreement represents the entire agreement between the Parties with respect to the subject matter of this Agreement, and supersedes all prior negotiations, binding documents, representations and agreements, whether written or oral. No amendment, modification, or change to this Agreement shall be enforceable unless agreed upon in a writing that is executed by the Parties.
- 26.8. Drafting. Each Party agrees that it (and/or its counsel) has completely read, fully understands, and voluntarily accepts every provision, term, and condition of this Agreement. Each Party agrees that this Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties, and no Party shall have any provision hereof construed against such Party by reason of such Party drafting, negotiating, or proposing any provision hereof, or execution of this Agreement. Each Party irrevocably waives the benefit of any rule of contract construction that disfavors the drafter of a contract or the drafter of specific language in a contract.
- 26.9. Headings. All section headings in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.
- 26.10. Publicity.
- 26.10.1. Limitation on Seller. Seller shall not make any announcement or release any information concerning or otherwise relating to this Agreement to any member of the public, press, Person, official body, or otherwise without Buyer's prior written consent, which shall not be unreasonably withheld; provided, however, any content approved by Buyer shall be limited to the non-confidential facts of the Agreement and will not imply, directly or indirectly, any endorsement, partnership, support, or testimonial of Seller by Buyer.
- 26.10.2. Limitation on the Parties. Neither Party shall make any use of the other Party's name, logo, likeness in any publication, promotional material, news release, or similar issuance or material without the other Party's prior review, approval, and written consent. Seller agrees and acknowledges that any reference or likeness to "Duke" shall be a prohibited use of Buyer's name, logo, likeness. Seller agrees and acknowledges that any direct or indirect implication of any endorsement, partnership, support, or testimonial of Seller by Buyer is prohibited, and any such use, endorsement, partnership, support, and/or testimonial will be an Event of Default under this Agreement. Subject to the foregoing, either Party may disclose to the public general information in connection with the Party's respective business activities; *provided, however*, no such disclosure or publicity by Seller will directly or indirectly imply any endorsement, partnership, support, or testimonial of Seller by Buyer.
- 26.11. Waiver. No waiver by any Party of any of its rights with respect to the other Party or with respect to any matter or default arising in connection with this Agreement shall be construed as a waiver of any subsequent right, matter or default whether of a like kind or different

nature. Any waiver under this Agreement will be effective only if it is in writing that has been duly executed by an authorized representative of the waiving Party.

- 26.12. Partnership and Beneficiaries. Nothing contained in this Agreement shall be construed or constitute any Party as the employee, agent, partner, joint venture, or contractor of any other Party. This Agreement is made and entered into for the sole protection and legal benefit of the Parties, and their permitted successors and assigns. No other person or entity, including, without limitation, a financing or collateral support provider, will be a direct or indirect beneficiary of or under this Agreement, and will not have any direct or indirect cause of action or claim under or in connection with this Agreement.
- 26.13. Severability. Any provision or section hereof that is declared or rendered unlawful by any applicable court of law, or deemed unlawful because of a statutory change, shall not, to the extent practicable, affect other lawful obligations under this Agreement.
- 26.14. Counterparts. This Agreement may be executed in counterparts, including facsimiles hereof, and each such executed document will be deemed to be an original document and together will complete execution and effectiveness of this Agreement.

*[Remainder of page intentionally left blank. Signature page follows.]*

**IN WITNESS WHEREOF**, Seller and Buyer have caused this Agreement to be executed by their respective duly authorized officers as of the Effective Date.

DUKE ENERGY CAROLINAS, LLC

BY: \_\_\_\_\_  
NAME: David Johnson  
TITLE: Director of Business Development &  
Compliance  
DATE: \_\_\_\_\_

TOWN OF LAKE LURE

BY: \_\_\_\_\_  
NAME: \_\_\_\_\_  
TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_

Exhibit 1

Estimated Monthly Energy Production of the Facility

<u>Month</u>	<u>Estimated Facility Energy Production (MWh)</u>
January	<u>218</u>
February	<u>101</u>
March	<u>660</u>
April	<u>704</u>
May	<u>468</u>
June	<u>379</u>
July	<u>269</u>
August	<u>319</u>
September	<u>349</u>
October	<u>453</u>
November	<u>505</u>
December	<u>277</u>
Total	<u>4,702</u>

Exhibit 2  
Contract Price

**Capacity Pricing (\$/MWh)**

Summer On-Peak	\$20.38
Winter On-Peak AM	\$200.52

**Energy Pricing (\$/MWh)**

Summer On-Peak	\$38.69
Winter On-Peak AM	\$48.87
Winter On-Peak PM	\$40.58
Summer Premium Peak	\$44.28
Winter Premium Peak	\$51.24
Shoulder On-Peak AM/PM	\$39.59
Summer Off-Peak	\$35.43
Winter Off-Peak	\$33.91
Shoulder Off-Peak	\$28.98

**note – distribution level**

**Capacity Credits**

Capacity Credit shall only be applicable in Summer months defined as the calendar months of July and August and Winter months defined as calendar months of December through March.

Summer on-peak hours shall be from 5:00 p.m. to 9:00 p.m. during all Summer days.

During Winter months, the on-peak hours shall be all Winter days from 5:00 a.m. to 10:00 a.m..

Capacity credits are not applicable in all other months.

**Energy Credits**

Summer months are defined as calendar months June through September, Winter months are defined as calendar months December through February, and Shoulder months are defined as March through May and October through November.

Summer on-peak hours shall be Monday through Friday from 12:00 p.m. noon to 4:00 p.m. and 8:00 p.m. to 10:00 p.m.

Winter on-peak hours shall be Monday through Friday with morning hours from 5:00 a.m. to 6:00 a.m. and 9:00 a.m. to 10:00 a.m., plus evening hours from 5:00 p.m. to 10:00 p.m.

Shoulder on-peak hours shall be Monday through Friday with morning hours from 6:00 a.m. to 10:00 a.m. plus evening hours from 4:00 p.m. to 11:00 p.m.

Summer premium peak hours shall be Monday through Friday from 4:00 p.m. to 8:00 p.m. Winter premium peak hours shall be Monday through Friday from 6:00 a.m. to 9:00 a.m. There are no premium peak hours for Shoulder months.

All other hours, plus the following holidays shall be off-peak: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the day after, and Christmas Day. When a holiday falls on a Saturday, the Friday before the holiday will be considered off-peak; when the holiday falls on a Sunday, the following Monday will be considered off-peak.



Exhibit 3

Facility Information

1. Facility Name: Lake Lure Hydro Facility
2. Facility Address: 198 Buffalo Shoals Road, Lake Lure, NC 28746
3. Description of Facility: Consisting of a powerhouse including two vertical shaft Francis-type hydroelectric turbines and generators with a total nameplate capacity of approximately 3,400 kilowatts, control equipment, electric power delivery facilities and the Lake Lure dam and reservoir, which are located on the Broad River in the Town of Lake Lure, North Carolina.

Delivery of power is made at the 12,470 volt bushings on the Duke Energy Carolinas side of Lake Lure's vacuum fault interrupter adjacent to Duke Energy Carolinas Lake Lure Retail Substation near the Facility where Duke Energy Carolina's 12,470 volt conductors connect to the bushings.

4. Nameplate Capacity Rating (MW): 3.4 MW
5. DC/AC Ratio: n/a
6. Fuel Type/Generation Type: Hydroelectric
7. System Operator Instruction Dispatch Control Equipment: n/a

UPON EXECUTION OF THE AGREEMENT TO WHICH THIS EXHIBIT IS ATTACHED, ANY MATERIAL MODIFICATION TO THE FACILITY SHALL REQUIRE BUYER'S PRIOR APPROVAL AND SHALL BE MEMORIALIZED IN WRITING IN AN AMENDMENT TO THE AGREEMENT.

Exhibit 4

Expected Annual Output

4,702 MWh

Exhibit 5  
Form of Guaranty

**THIS GUARANTY AGREEMENT** (this "Guaranty"), dated as of [date], is issued and delivered by [ **enter corporate legal name** ], a [state] [form of entity] (the "Guarantor"), for the account of [ **enter corporate name** ], a [state] [form of entity] (the "Obligor"), and for the benefit of [ **enter corporate name** ], a [state] [form of entity] (the "Beneficiary").

**Background Statement**

WHEREAS, the Beneficiary and Obligor entered into that certain \_\_\_\_\_ dated (the "Agreement"); and

WHEREAS, Beneficiary has required that the Guarantor deliver to the Beneficiary this Guaranty as an inducement to enter into the Agreement.

**Agreement**

**NOW, THEREFORE**, in consideration of the foregoing and for good and valuable consideration, the Guarantor hereby agrees as follows:

1. Guaranty; Limitation of Liability. Subject to any rights, setoffs, counterclaims and any other defenses that the Guarantor expressly reserves to itself under this Guaranty, the Guarantor absolutely and unconditionally guarantees the timely payment of the Obligor's payment obligations under the Agreement (the "Guaranteed Obligations"); provided, however, that the Guarantor's aggregate liability hereunder shall not exceed [amount] **U. S. Dollars (U.S. [\$xx,xxx,xxx])**.

Subject to the other terms of this Guaranty, the liability of the Guarantor under this Guaranty is limited to payments expressly required to be made under the Agreement, and except as specifically provided therein, the Guarantor shall not be liable for or required to pay any consequential or indirect loss (including but not limited to loss of profits), exemplary damages, punitive damages, special damages, or any other damages or costs.

2. Effect of Amendments. The Guarantor agrees that the Beneficiary and the Obligor may modify, amend and supplement the Agreement and that the Beneficiary may delay or extend the date on which any payment must be made pursuant to the Agreement or delay or extend the date on which any act must be performed by the Obligor thereunder, all without notice to or further assent by the Guarantor, who shall remain bound by this Guaranty, notwithstanding any such act by the Beneficiary.

3. Waiver of Rights. The Guarantor expressly waives (i) protest, (ii) notice of acceptance of this Guaranty by the Beneficiary, and (iii) demand for payment of any of the Guaranteed Obligations.

4. Reservation of Defenses. Without limiting the Guarantor's own defenses and rights hereunder, the Guarantor reserves to itself all rights, setoffs, counterclaims and other defenses that the Obligor may have to payment of all or any portion of the Guaranteed Obligations except defenses arising from the bankruptcy, insolvency, dissolution or liquidation of the Obligor and other defenses expressly waived in this Guaranty.

5. Settlements Conditional. This guaranty shall remain in full force and effect or shall be reinstated (as the case may be) if at any time any monies paid to the Beneficiary in reduction of the indebtedness of the Obligor under the

Agreement have to be repaid by the Beneficiary by virtue of any provision or enactment relating to bankruptcy, insolvency or liquidation for the time being in force, and the liability of the Guarantor under this Guaranty shall be computed as if such monies had never been paid to the Beneficiary

6. Notice. The Beneficiary will provide written notice to the Guarantor if the Obligor defaults under the Agreement.

7. Primary Liability of the Guarantor. The Guarantor agrees that the Beneficiary may enforce this Guaranty without the necessity at any time of resorting to or exhausting any other security or collateral. This is a continuing Guaranty of payment and not merely of collection.

8. Representations and Warranties. The Guarantor represents and warrants to the Beneficiary as of the date hereof that:

- a. The Guarantor is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has full power and legal right to execute and deliver this Guaranty and to perform the provisions of this Guaranty on its part to be performed;
- b. The execution, delivery and performance of this Guaranty by the Guarantor have been and remain duly authorized by all necessary corporate action and do not contravene any provision of its certificate of incorporation or by-laws or any law, regulation or contractual restriction binding on it or its assets;
- c. All consents, authorizations, approvals, registrations and declarations required for the due execution, delivery and performance of this Guaranty have been obtained from or, as the case may be, filed with the relevant governmental authorities having jurisdiction and remain in full force and effect, and all conditions thereof have been duly complied with and no other action by, and no notice to or filing with, any governmental authority having jurisdiction is required for such execution, delivery or performance; and
- d. This Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable against it in accordance with its terms, except as enforcement hereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights or by general equity principles.

9. Nature of Guaranty. The Guarantor hereby agrees that its obligations hereunder shall be unconditional irrespective of the impossibility or illegality of performance by the Obligor under the Agreement; the absence of any action to enforce the Agreement; any waiver or consent by Beneficiary concerning any provisions of the Agreement; the rendering of any judgment against the Obligor or any action to enforce the

same; any failure by Beneficiary to take any steps necessary to preserve its rights to any security or collateral for the Guaranteed Obligations; the release of all or any portion of any collateral by Beneficiary; or any failure by Beneficiary to perfect or to keep perfected its security interest or lien in any portion of any collateral.

10. Subrogation. The Guarantor will not exercise any rights that it may acquire by way of subrogation until all Guaranteed Obligations shall have been paid in full. Subject to the foregoing, upon payment of all such Guaranteed Obligations, the Guarantor shall be subrogated to the rights of Beneficiary against the Obligor, and Beneficiary agrees to take at the Guarantor's expense such steps as the Guarantor may reasonably request to implement such subrogation.

11. Term of Guaranty. This Guaranty shall remain in full force and effect until the earlier of (i) such time as all the Guaranteed Obligations have been discharged, and (ii) [date] (the "Expiration Date"); provided however, the Guarantor will remain liable hereunder for Guaranteed Obligations that were outstanding prior to the Expiration Date.

12. Governing Law. This Guaranty shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to principles of conflicts of law.

13. Expenses. The Guarantor agrees to pay all reasonable out-of-pocket expenses (including the reasonable fees and expenses of the Beneficiary's counsel) relating to the enforcement of the Beneficiary's rights hereunder in the event the Guarantor disputes its obligations under this Guaranty and it is finally determined (whether through settlement, arbitration or adjudication, including the exhaustion of all permitted appeals), that the Beneficiary is entitled to receive payment of a portion of or all of such disputed amounts.

14. Waiver of Jury Trial. The Guarantor and the Beneficiary, through acceptance of this Guaranty, waive all rights to trial by jury in any action, proceeding or counterclaim arising or relating to this Guaranty.

15. Entire Agreement; Amendments. This Guaranty integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all oral negotiations and prior writings in respect to the subject matter hereof. This Guaranty may only be amended or modified by an instrument in writing signed by each of the Guarantor and the Beneficiary.

16. Headings. The headings of the various Sections of this Guaranty are for convenience of reference only and shall not modify, define or limit any of the terms or provisions hereof.

17. No Third-Party Beneficiary. This Guaranty is given by the Guarantor solely for the benefit of the Beneficiary, and is not to be relied upon by any other person or entity.

18. Assignment. Neither the Guarantor nor the Beneficiary may assign its rights or obligations under this Guaranty without the prior written consent of the other, which consent may not be unreasonably withheld or delayed. Notwithstanding the foregoing, the Beneficiary may assign this Guaranty, without the Guarantor's consent, provided such assignment is made to an affiliate or subsidiary of the Beneficiary

Any purported assignment in violation of this Section 18 shall be void and without effect.

19. Notices. Any communication, demand or notice to be given hereunder will be duly given when delivered in writing or sent by electronic mail to the Guarantor or to the Beneficiary, as applicable, at its address as indicated below:

If to the Guarantor, at:

**[Guarantor name]**  
[Address]  
Attention: [contact]  
Email:[email address]

With a copy to:

**[Seller name]**  
[Address]  
Attention: [contact]  
Email:[email address]

If to the Beneficiary, at:

**[Beneficiary name]**  
[Address]  
Attention: [contact]  
Email:[email address]

or such other address as the Guarantor or the Beneficiary shall from time to time specify. Notice shall be deemed given (a) when received, as evidenced by signed receipt, if sent by hand delivery, overnight courier or registered mail or (b) when received, as evidenced by email confirmation, if sent by email and received on or before 4 pm local time of recipient, or (c) the next business day, as evidenced by email confirmation, if sent by email and received after 4 pm local time of recipient.

**IN WITNESS WHEREOF**, the Guarantor has executed this Guaranty as of the day and year first above written

**[Guarantor name]**

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

Exhibit 6  
Form of Letter of Credit

[LETTERHEAD OF ISSUING BANK]

Irrevocable Standby Letter of Credit No.: \_\_\_\_\_

Date: \_\_\_\_\_

Beneficiary:

[Duke Energy Carolinas, LLC][Duke Energy Progress, LLC]  
550 S. Tryon Street, DEC 40C  
Charlotte, North Carolina 28202  
Attn: Chief Risk Officer

Ladies and Gentlemen:

By the order of:

Applicant:

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

We hereby issue in your favor our irrevocable standby letter of credit No.: \_\_\_\_\_ for the account of \_\_\_\_\_ for an amount or amounts not to exceed \_\_\_\_\_ US Dollars in the aggregate (US\$ \_\_\_\_\_) available by your drafts at sight drawn on [Issuing Bank] effective \_\_\_\_\_ and expiring at our office on \_\_\_\_\_ (the "Expiration Date").

The Expiration Date shall be deemed automatically extended without amendments for one year from the then current Expiration Date unless at least ninety (90) days prior to the then applicable Expiration Date, we notify you in writing by certified mail return receipt requested or overnight courier that we are not going to extend the Expiration Date. During said ninety (90) day period, this letter of credit shall remain in full force and effect

Funds under this letter of credit are available against your draft(s), in the form of attached Annex 1, mentioning our letter of credit number and presented at our office located at [Issuing Bank's address must be in US] and accompanied by a certificate in the form of attached Annex 2 with appropriate blanks completed, purportedly signed by an authorized representative of the Beneficiary, on or before the Expiration Date in accordance with the terms and conditions of this letter of credit. Partial drawings under this letter of credit are permitted.

Certificates showing amounts in excess of amounts available under this letter of credit are acceptable, however, in no event will payment exceed the amount available to be drawn under this letter of credit.

We engage with you that drafts drawn under and in conformity with the terms of this letter of credit will be duly honored on presentation if presented on or before the Expiration Date. Presentation at our office includes presentation in person, by certified, registered, or overnight mail.

Except as stated herein, this undertaking is not subject to any agreement, condition or qualification. The obligation of [Issuing Bank] under this letter of credit is the individual obligation of [Issuing Bank] and is in no way contingent upon reimbursement with respect hereto.

This letter of credit is subject to the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 ("ISP98"). Matters not addressed by ISP98 shall be governed by the laws of the state of New York.

We shall have a reasonable amount of time, not to exceed three (3) business days following the date of our receipt of drawing documents, to examine the documents and determine whether to take up or refuse the documents and to inform you accordingly.

Kindly address all communications with respect to this letter of credit to [Issuing Bank's contact information], specifically referring to the number of this standby letter of credit.

All banking charges are for the account of the Applicant.

This letter of credit may not be amended, changed or modified without our express written consent and the consent of the Beneficiary.

This letter of credit is transferable, and we agree to consent to its transfer, subject to our standard terms of transfer and your payment to us of our standard transfer fee.

Very truly yours  
[Issuing Bank]

---

Authorized Signer

---

Authorized Signer

This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX 1

FORM OF SIGHT DRAFT

[Insert date of sight draft]

To: *[Issuing Bank's name and address]*

For the value received, pay to the order of \_\_\_\_\_ by wire transfer of immediately available funds to the following account:

*[name of account]*

*[account number]*

*[name and address of bank at which account is maintained]*

*[aba number]*

*[reference]*

The following amount:

*[insert number of dollars in writing]* United States Dollars

(US\$ *[insert number of dollars in figures]*)

Drawn upon your irrevocable letter of credit No. *[irrevocable standby letter of credit number]*

dated *[effective date]*

*[Beneficiary]*

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

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



This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX 2

FORM OF CERTIFICATE

[Insert date of certificate]

To: *[issuing bank's name and address]*

*[check appropriate draw condition]*

[\_\_\_\_\_] An Event of Default (as defined in the [Name of Agreement between [Beneficiary's Name] and [Insert Counterparty's Name] dated as of \_\_\_\_\_ (the "Agreement")) has occurred with respect to [Counterparty's Name] and such Event of Default has not been cured within the applicable cure period, if any provided for in the Agreement.

Or

[\_\_\_\_\_] [Counterparty's Name] is required, pursuant to the terms of the Agreement, to maintain a letter of credit in favor of [Beneficiary's Name], has failed to renew or replace the Letter of Credit and the Letter of Credit has less than thirty (30) days until the expiration thereof.

*[Beneficiary]*

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

Exhibit 7  
Acknowledgement of Non-Default

[Print Duke Energy letterhead]

Date:

Address of Seller

Re: Acknowledgement of Non-Default (the "Acknowledgement") of the Power Purchase Agreement, between [Duke Energy Carolinas, LLC][Duke Energy Progress, LLC] ("Buyer") and [insert Seller name] dated as of \_\_\_\_\_ (the "Agreement").

Dear Sir or Madam:

The undersigned, a duly authorized representative of Buyer hereby acknowledges to Seller as follows:

1. The copy of the Agreement attached hereto as Exhibit A (including any amendments thereto) constitutes a true and complete copy of the Agreement;
2. Buyer has not transferred or assigned its interest in the Agreement; and
3. as of the date of this Acknowledgement based on the actual knowledge of Buyer's personnel responsible for administering the Agreement after due inquiry of Buyer's internal records only, there is no current Event of Default by Seller or Buyer under the Agreement, nor to Buyer's knowledge, has any event or omission occurred which, with the giving of notice or the lapse of time or both, would constitute an Event of Default under the Agreement and the Agreement is in full force and effect.

Notwithstanding any provision to the contrary set forth herein, Buyer reserves all rights and defenses available to it under the Agreement and nothing stated herein shall be deemed to have waived, amended or modified any such rights or defenses.

Except as specified herein to the contrary, capitalized terms used in this Acknowledgement shall have the meaning ascribed to such terms in the Agreement.

Sincerely,

[Duke Energy Carolinas, LLC][Duke Energy Progress, LLC]

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



**RENEWABLE ENERGY CERTIFICATES TRANSACTION AGREEMENT**

**Buyer:**

Duke Energy Carolinas, LLC  
525 South Tryon Street  
DE Plaza 12th Floor  
Charlotte, North Carolina 28202  
Attn: Contract Administrator  
Email: [PPA@duke-energy.com](mailto:PPA@duke-energy.com)

*With Additional Notices of Events of Default*

*Or Potential Event of Default to:*

Duke Energy Carolinas, LLC  
525 South Tryon Street, MC: DEP-09B  
Charlotte, North Carolina 28202  
Attn.: VP Transactional Legal Support

**Seller:**

Town of Lake Lure  
Attn: Hank Perkins, Town Manager  
PO Box 255  
Lake Lure, NC 28746  
[whperkins@townoflakelure.com](mailto:whperkins@townoflakelure.com)  
828-625-9983 Ext 101

This Renewable Energy Certificates Transaction Agreement, including Exhibits A-B hereto, which are incorporated into and made part hereof (collectively, the "Agreement") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2023 by and between **Duke Energy Carolinas, LLC** ("Buyer") and **Town of Lake Lure** ("Seller") under the terms specified in this Agreement. Buyer and Seller may be referred to herein individually as a "Party" and collectively as the "Parties." Notwithstanding anything set forth herein, neither this Agreement nor any transaction contemplated hereunder will be effective **unless and until both Parties have executed** and delivered this Agreement, and such date shall be the "**Effective Date**" of this Agreement.

WHEREAS, the Parties desire to engage in the transaction set forth in the Confirmation(s) attached hereto as Exhibit A, pursuant to the terms and conditions set forth in the main body of the Agreement.

**NOW THEREFORE**, IN CONSIDERATION OF THE PROMISES AND MUTUAL COVENANTS SET FORTH HEREIN, FOR GOOD AND VALUABLE CONSIDERATION, THE SUFFICIENCY OF WHICH IS ACKNOWLEDGED, AND INTENDING TO BE BOUND HEREBY, THE PARTIES AGREE AS FOLLOWS:

- 1) **Definitions**. Capitalized terms not defined in this section or otherwise in the main body of this Agreement shall have the meaning specified in the Confirmation(s).

"Account" shall mean a Party's electronic account with the Tracking System.

"Affiliate" means, in relation to any person, any entity controlled, directly or indirectly, by such person, any entity that controls, directly or indirectly, such person, or any entity directly or indirectly under common control with such person. For this purpose, "control" of any entity or person means ownership of fifty percent (50%) or more of the voting power of the entity or person. Further, in accordance with applicable rules and regulations, with respect to Buyer the term Affiliate shall not include any subsidiaries or affiliates that are entities whose activities generally are subject to the oversight of state or federal energy regulatory commissions.

"Assignment" shall have the meaning set forth in Section 14 (e) of this Agreement.

"Bankrupt" means with respect to a Party/entity, such Party/entity that: (a) makes an assignment or any general arrangement for the benefit of creditors; (b) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors, or has such a petition filed against it as debtor and such petition is not stayed, withdrawn, or dismissed within thirty (30) Business Days of such filing; (c) seeks or has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets; (d) has a secured party take possession of all or substantially all of its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all of its assets; (e) is unable to pay its debts as they fall due or admits in writing of its inability to pay its debts generally as they become due; and/or, (f) otherwise becomes bankrupt or insolvent (howsoever evidenced under any applicable statute and/or regulation, or otherwise).

"Business Day" means any day other than a Saturday or Sunday or legal holiday or a day on which Federal Reserve member banks in New York City are authorized or required by law or executive order to close, starting at 8:00 a.m. and closing at 5:00 p.m. Eastern Prevailing Time ("EPT").

"Buyer" means Duke Energy Carolinas, LLC, the party obligated to buy and receive, or cause to buy and receive, the Product in accordance with this Agreement.

"Change of Control" shall mean a transaction or series of related transactions (by way of merger, consolidation, sale of stock or assets, or otherwise) with any person, entity or "group" (within the meaning of Section 13(d)(3) of the U.S. Securities Exchange Act of 1934) of persons pursuant to which such person, entity, or group would acquire (I) 50% or more of the voting interests In Seller or (II) substantially all of the assets of Seller.

"Contract Quantity" means the amount set forth in the applicable Confirmation.

"Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions, third party transaction costs, and other costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the terminated transaction(s), and all reasonable legal costs incurred by the Non-Defaulting Party in connection with the termination of the transaction(s).

"Creditworthy" or "Creditworthiness" - means (i) a Person with an investment grade Credit Rating from two (2) of the three (3) Rating Agencies such that its senior unsecured debt (or issuer rating if such Person has no senior unsecured debt rating) is rated at least (A) BBB- by S&P, if rated by S&P, (B) Baa3 by Moody's, if rated by Moody's, and (C) BBB- by Fitch, if rated by Fitch, respectively, or (ii) has satisfactory and verifiable creditworthiness determined in Buyer's reasonable discretion.

"Effective Date" shall have the meaning set forth in the introductory paragraph of this Agreement.

"Gains" means, with respect to a Party, an amount equal to the present value of the economic benefit, if any, (exclusive of Costs) to it resulting from the termination of its obligations with respect to the terminated transaction(s), determined in a commercially reasonable manner.

"Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in The Wall Street Journal under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%) and (b) the maximum rate permitted by applicable law.

"Letter(s) of Credit" means one or more irrevocable, standby letters of credit in the form of Exhibit B, attached hereto (with only such changes as the issuing bank may reasonably require and as may be acceptable to Buyer in its reasonable discretion), issued by a U.S. commercial bank or other financial institution reasonably acceptable to Buyer, which is not an Affiliate of Seller and which has and maintains a Credit Rating of at least A- from S&P and A3 from Moody's.

"Losses" means, with respect to a Party, an amount equal to the present value of the economic loss, if any, (exclusive of Costs) to it resulting from the termination of its obligations with respect to the terminated transaction(s), determined in a commercially reasonable manner.

"Performance Assurance" means collateral in the form of either cash, one or more Letter of Credit, a guaranty from an entity having a credit rating of at least BBB- from Standard & Poor's Rating Group (or any successor rating agency

thereto) ("S&P") and Baa3 from Moody's Investor Service (or any successor rating agency thereto) ("Moody's") and reasonably acceptable to the Party requesting such Performance Assurance in its commercially reasonable discretion.

"Product" has the meaning set forth in the Confirmation.

"Seller" means the Seller, the party obligated to sell and deliver, or cause to sell and deliver the Product in accordance with this Agreement.

"Tracking System" has the meaning set forth in the Confirmation.

## 2) **Arrangement and Term**

- a) **Arrangement.** In accordance with the terms and conditions of this Agreement, Seller agrees to sell and deliver the Product to Buyer, and Buyer agrees to purchase and accept delivery of the Product from Seller. Delivery shall be deemed to have occurred when the transfer of the Product into Buyer's Account with the Tracking System is complete, at which time title to the Product will transfer from Seller to Buyer. Each Party will provide to the other any reasonably requested information or documentation required to effectuate delivery, cooperate to effectuate delivery, and comply with applicable Tracking System procedures and any other applicable requirement relating to the recording and transfer of the Product.
- b) **Delivery.** As set forth in the applicable Confirmation, Seller shall transfer the Product from Seller's Account to Buyer's Account with the Tracking System in accordance with the then-current procedures of the Tracking System, and Buyer shall take actions to receive the Product into its Account.
- c) **Term.** This Agreement shall be effective as of the Effective Date hereof, and shall terminate on the date on which both Parties have completed the performance of their respective obligations hereunder to sell and purchase the Contract Quantity of the Product, unless earlier terminated pursuant to the terms hereof.
  - i) Notwithstanding the foregoing or anything to the contrary in this Agreement, the expressly identified provisions, those intended by the Parties to continue, and the applicable provisions of this Agreement shall continue in effect after termination or expiration hereof to the extent necessary to provide for accountings, final billing, billing adjustments, and resolution of any billing dispute. Further, expiration or termination of this Agreement for any reason shall not relieve either Party of any right or obligation accrued or accruing hereunder prior to such expiration or termination, and no expiration or termination of this Agreement shall affect or excuse the performance of either Party under any provision of this Agreement that by its terms survives any expiration or termination.

## 3) **Billing and Payment**

- a) ***Billing. Following delivery of the Product by Seller, the Seller shall render an invoice to Buyer for an amount equal to the (i) Contract Price (as set forth in the Confirmation) multiplied by (ii) the quantity of the units of the Product delivered by Seller in accordance with this Agreement. If Buyer's meters are used to determine REC output, such as meters used to purchase capacity and energy from the Seller under a Purchased Power Agreement, a separate REC-ONLY invoice will not be required.***
- b) **Payment.** Following completion of delivery of the Product and Seller's delivery of the Product in accordance with this Agreement, Buyer shall pay the invoice within twenty (20) Business Days in accordance with the provisions set forth below. Any amounts not paid when due will be deemed delinquent and will accrue interest at the Interest Rate, calculated from and including the due date to but excluding the date the delinquent amount is paid in full. For the avoidance of doubt, Buyer will have no obligation to pay Seller for any Product that does not meet the requirements set forth in this Agreement. Further, in addition to any damages payable by Seller pursuant to this Agreement, Seller will reimburse to Buyer any payments previously made by Buyer for Product that Seller failed to deliver or Product that does not meet the specifications set forth in this Agreement.
- c) **Dispute.** If either Party disputes in good faith the accuracy of any invoice under this Agreement, it shall provide a written explanation specifying in detail the basis for the dispute and pay any undisputed portion no later than the due date. If any amount disputed is subsequently determined to be due, it shall be paid within five (5) Business Days after resolution along with interest accrued at the Interest Rate from and including the original due date to but excluding the date paid. Any dispute with respect to an invoice is waived unless the other Party is notified in

accordance with this Section within one (1) year after the invoice is rendered or any specific adjustment to the invoice is made. The provisions of this Section shall survive any intervening termination of this Agreement.

- d) Taxes. Seller will pay or cause to be paid all taxes imposed by any governmental authority on or with respect to the Product to be transacted upon hereunder arising prior to and up to delivery. Buyer will pay or cause to be paid all taxes on or with respect to the Product at and after delivery (other than ad valorem, franchise or income taxes which are related to the sale of the Product and are, therefore, the responsibility of the Seller). In the event Seller is required by law or regulation to remit or pay taxes that are Buyer's responsibility hereunder, Buyer promptly will reimburse Seller for such taxes, and vice versa. Nothing herein obligates or causes a Party to pay or be liable to pay any taxes for which it is exempt under the law.
- e) Wire Transfer. All payments made under this Agreement shall be rendered in the form of immediately available United States Dollars. Payment, as applicable, shall be made by wire transfer or in other form reasonably requested. Wire transfers shall be made to the account specified in the attached Seller Banking Instruction Request Form.

4) **Credit and Performance Assurances**.

- a) Credit Assurances. Notwithstanding anything to the contrary herein, Buyer may, from time to time, request, in writing, that Seller provide the Buyer with Performance Assurance in an amount determined by the Buyer in a commercially reasonable manner, if at any time the Buyer has reasonable grounds for insecurity concerning the Seller's ability to perform any of its obligations under this Agreement. Upon receipt of such notice, the Seller shall have three (3) Business Days to provide such Performance Assurance to the Buyer. In the event that the Seller fails to provide such Performance Assurance to the Buyer within three (3) Business Days of receipt of notice, then the Buyer may declare such failure an Event of Default and exercise any or all other remedies provided for hereunder or pursuant to law.
- b) Grant of Security Interest. To secure its obligations under this Agreement, to the extent the Seller delivers Performance Assurance hereunder, the Seller hereby grants to the Buyer a present and continuing security interest in, and lien on (and right of netting and set-off against), and assignment of, all Performance Assurance, including, without limitation, cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, the Buyer. The Seller agrees to promptly take all such actions as the Buyer reasonably requires to perfect the Buyer's first-priority security interest in, and lien on (and right of netting and set-off against), such Performance Assurance and any and all proceeds resulting therefrom or from the liquidation thereof.

Upon or any time after the occurrence or deemed occurrence and during the continuation of an Event of Default or an Early Termination Date, the Buyer (if it is the Non-Defaulting Party) may do any one or more of the following with respect to the Seller (if it is the Defaulting Party): (i) exercise any of the rights and remedies of a secured party with respect to all Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of netting and set-off against the Seller; (iii) draw on any outstanding applicable forms of Performance Assurance issued for the benefit of the Buyer; and, (iv) liquidate all Performance Assurance then held by or for the benefit of the Buyer free from any claim or right of any nature whatsoever of the Seller, including any equity or right of purchase or redemption by the Seller. The Buyer (if it is the Non-Defaulting Party) shall apply the proceeds of the Performance Assurance realized upon the exercise of any such rights or remedies to reduce the Seller's (if it is the Defaulting Party) obligations under the Agreement, with the Seller remaining liable for any amounts owing to the Buyer after such application, subject to the Buyer's obligation to return any surplus proceeds remaining after all such obligations are satisfied in full.

- c) Netting. If an Event of Default has not occurred and is not continuing, then if the Parties are required to pay any amounts to the other under this Agreement, such amounts shall be netted, and the Party owing the greater aggregate amount shall pay to the other Party any difference between the amounts owed. Additionally, all outstanding obligations to make payment under this Agreement or any such other agreement between the Parties may against each other be netted, offset, set off, or recouped therefrom, and payment shall be owed as set forth above. Unless otherwise notified in writing by the other Party, and except in connection with a liquidation and termination in accordance hereunder, all amounts netted pursuant to this section shall not take into account or include any such credit support which may be in effect to secure a Party's performance under this Agreement. The netting set forth above, shall be without prejudice and in addition to any and all rights, liens, setoffs, recoupments,

counterclaims and other remedies and defenses (to the extent not expressly herein waived or denied) that such Party has or to which such Party may be entitled under this Agreement.

- d) Set-off. The Parties agree that, in addition to any rights of set-off a Party may have as a matter of law, upon the occurrence of an Event of Default with respect to the Defaulting Party, the Non-Defaulting Party shall have the right (but shall not be obliged) without prior notice to the Defaulting Party or any other person to set-off any obligation of the Defaulting Party owed to the Non-Defaulting Party or its Affiliates (to the extent allowable under law or regulation) arising under this Agreement and any other agreement between the Parties (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation) against any obligations of the Non-Defaulting Party or its Affiliates (to the extent allowable under law or regulation) owing to the Defaulting Party arising under this Agreement and any other transaction between the Parties (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation). If any such obligation is unascertained, the Non-Defaulting Party may in good faith, and exercising commercially reasonable judgment, estimate that obligation and set-off in respect of the estimate, subject to the relevant Party accounting to the other Party when the obligation is ascertained.
- e) Survival. This Section shall survive any termination or expiration of this Agreement.

5) **Representations and Warranties**

- a) Mutual. Each Party hereby represents and warrants to the other Party as of the Effective Date and upon each delivery of the Product hereunder that:
  - i) It is duly organized, validly existing and in good standing under the requirements of law of the jurisdiction of its organization or formation and has all requisite power and authority to execute, enter into, and perform under this Agreement;
  - ii) It has all authorizations necessary for it to legally perform its obligations and consummate the transactions contemplated hereunder or will obtain such authorizations in a timely manner prior to the time that performance by such Party becomes due;
  - iii) The execution, delivery, and performance of this Agreement will not conflict with or violate any law, contract, agreement or arrangement to which it is a party or by which it is otherwise bound;
  - iv) This Agreement constitutes a legal, valid, and binding obligation of such Party enforceable against it in accordance with its terms, and such Party has all rights necessary to perform its obligations to the other Party in conformance with the terms and conditions of this Agreement, subject to bankruptcy, insolvency, reorganization and other laws affecting creditor's rights generally and general principles of equity;
  - v) It is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether or not this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, is capable of assessing the merits of this Agreement, and understands and accepts the terms, conditions, and risks of this Agreement for consideration and on an arm's length basis;
  - vi) No Event of Default or event which with notice or lapse of time, or both, would become an Event of Default, has occurred with respect to such Party, and that such Party is not Bankrupt and there are no proceedings pending or being contemplated by it, or to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
  - vii) There is no pending, or to its knowledge, threatened legal proceeding at law or equity against it or any Affiliate (if applicable and to the extent allowable under law or regulation), that could materially adversely affect its ability to perform its obligations under this Agreement;
  - viii) It is a "forward contract merchant" and this Agreement constitutes a "forward contract" as such terms are defined in the United States Bankruptcy Code;
  - ix) It is an "eligible contract participant" within the meaning of Section 1a (18) of the CEA;

- x) Each person who executes this Agreement on behalf of such Party has full and complete authority to do so, and that such Party will be bound by such execution.
- b) Seller. With respect to the Product delivered pursuant to this Agreement, Seller represents and warrants to Buyer with each delivery of the Product that each of the following are true and accurate:
  - i) Each unit of Product delivered hereunder has not been, nor will be, sold, retired, claimed, represented as part of or bundled with any energy (including, without limitation thermal energy), power and/or electricity output or sales, or otherwise used to satisfy any renewable energy, emissions, and/or energy efficiency obligation under any law, regulation, standard, marketplace, voluntary standard, or jurisdiction;
  - ii) Each unit of the Product complies with the Act (as defined in the Confirmation) and each unit of the Product can be used for compliance with the Act;
  - iii) Each unit of the Product meets the specifications set forth in the Confirmation(s).
  - iv) Seller has not, and will not, double count/claim/sell the Product; including, without limitation, for e.g., by issuing a press release or otherwise claiming it is generating, using, selling, or producing any renewable output (including, thermal energy and/or combined thermal energy), electricity, or renewable energy.
  - v) Each unit of the Product was generated during the calendar period set forth in the Confirmation; and,
  - vi) Seller has good and marketable title and the right to sell and conveys, without any reservation, such good and marketable title to each unit of the Product to Buyer free and clear of any liens, title defects, security interests, taxes, and/or any other encumbrance.
- c) Limitation on Representations. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE PARTIES EXPRESSLY DISCLAIM ANY OTHER REPRESENTATIONS OR WARRANTIES, WHETHER WRITTEN OR ORAL, AND WHETHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION, ANY REPRESENTATION OR WARRANTY WITH RESPECT TO CONFORMITY TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR ANY PARTICULAR PURPOSE, AND WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MAKE NO REPRESENTATION OR WARRANTY HEREUNDER REGARDING ANY ACTION OR FAILURE TO ACT, OR APPROVAL OR FAILURE TO APPROVE, OF ANY AGENCY OR GOVERNMENTAL ENTITY.
- d) Survival. This Section shall survive any termination or expiration of this Agreement.

6) **Events of Default**.

- a) Each of the following, one or more individually or collectively, shall constitute an event of default under this Agreement ("Event of Default") with respect to such Party that is in violation of this Agreement as set forth below (such Party, the "Defaulting Party"):
  - i) Failure by a Party to make, when due, any payment required under this Agreement, if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party.
  - ii) Other than events specifically covered as separate Events of Default, failure by a Party to perform any significant or material requirement set forth in this Agreement (other than the failure to deliver or receive, the exclusive remedy (cover costs) for which is provided for herein) and such failure is not cured within five (5) Business Days after written notice provided by the other Party to the Defaulting Party.
  - iii) A Party or its guarantor repudiates any material obligation under this Agreement.
  - iv) Except for the representations and warranties set forth in Section 5(b) (applicable to Seller), any representation or warranty made herein is not true and complete in any material respect, if such failure is not remedied within five (5) Business Days of written notice of failure given by the other Party.
  - v) Any representation or warranty set forth in Section 5(b) (applicable to Seller) is not true and complete.



- vi) The Party transfers or assigns or otherwise conveys any of its rights or obligations under this Agreement to another Person in violation of the terms and conditions of this Agreement;
  - vii) The Party consolidates, amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, (i) the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the Non-Defaulting Party, or (ii) the creditworthiness of the Party or the resulting, surviving, transferee or successor entity is materially weaker than that of the Party or such guarantor, as the case may be, immediately prior to such action; or (iii) the benefits of any guaranty fail to extend (without the consent of the other Party) to the performance by such resulting, surviving, transferee or successor entity of its obligations under this Agreement; and/or,
  - viii) A Party becomes Bankrupt.
- b) **Early Termination.** If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the "Non-Defaulting Party") shall have the right, in its sole discretion, to take any one or more of the following actions: (i) designate a day, no earlier than the day such notice is effective and no later than twenty (20) days after such notice is effective, as an early termination date (the "Early Termination Date," as defined below) to accelerate all amounts owing between the Parties and to liquidate and terminate this Agreement and any and any other agreement between the Parties; (ii) withhold any payments due to the Defaulting Party under this Agreement; and/or (iii) otherwise suspend its performance hereunder. Any of the foregoing actions undertaken by the Non-Defaulting Party shall be without prejudice to any other rights or remedies which such Party may have against the other Party, expressly subject to the waiver and limitations set forth in this Agreement.
- c) **Net Settlement Amount.** If the Non-Defaulting Party establishes an Early Termination Date, then the Non-Defaulting Party shall in a commercially reasonable manner (including, without limitation, as set forth below by reference to Cover Costs) calculate its Gains or Losses and Costs resulting from the termination of each terminated transaction as of the Early Termination Date, aggregate such Gains or Losses and Costs with respect to all terminated transactions and any other amounts due under this Agreement and any other agreement between the Parties into a single net amount (the "Net Settlement Amount") and then notify the Defaulting Party of the Net Settlement Amount owed or owing. The Net Settlement Amount shall be a net present value calculation determined in a commercially reasonable manner. The Net Settlement Amount will be due to the Non-Defaulting Party. Payment of the Net Settlement Amount shall be due within two (2) Business Days after the later of the Early Termination Date and the Defaulting Party's receipt of notice of the Net Settlement Amount.

## 7) **Cover Costs**

- a) **Exclusive Remedies.** The remedies set forth in this Section shall be a Party's exclusive monetary remedies for the other Party's failure to perform prior to the Non-Defaulting Party's early termination of the transaction(s) due to an Event of Default or other termination event.
- b) **Seller's Failure to Deliver.** If Seller fails to deliver all or part of the Contract Quantity pursuant to the Confirmation, and such failure is not excused by Force Majeure or Buyer's failure to perform, then Buyer may elect in its sole discretion to: (i) terminate and liquidate this transaction (in which case Buyer shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party); or, (ii) to require Seller to pay Buyer within three (3) Business Days of invoice receipt, cover costs for such deficiency in delivery, which shall be equal to the net present value of the positive difference, if any, obtained by subtracting the per unit Contract Price from the per unit Replacement Price (defined below). The invoice shall include a written statement explaining in commercially reasonable detail the calculation of such amount.

"Replacement Price" means the price at which Buyer, acting in a commercially reasonable manner, purchases substitute or replacement for the undelivered Product as those that are not delivered by Seller, plus costs reasonably incurred by Buyer in purchasing such substitute Product; or, the market price for the units of Product not delivered, as determined in a commercially reasonable manner; provided, however, in no event shall such price include any penalties, stranded costs, or similar charges, nor shall Buyer be required to utilize or change its utilization of its owned or controlled assets, or market positions to minimize Seller's liability.

Notwithstanding anything to contrary in this Agreement, Seller agrees and acknowledges that Buyer may not be able to secure any replacement Product (created by the same type of generation resource (e.g. hydro/solar) and equivalent calendar period as the Product that Seller failed to deliver), and if Buyer is unable to obtain such replacement Product within fifteen (15) days of Seller's failure to deliver, then Seller agrees that the per unit "Replacement Price" for purposes of calculating damages will be deemed to be equal to three times the Contract Price (Contract Price times three for each unit of Product). Seller will also reimburse to Buyer, as applicable, any payment(s) previously made by Buyer for Product that Seller failed to deliver.

- c) Buyer's Failure to Accept Delivery. If Buyer fails to receive all or part of the Contract Quantity pursuant to the Confirmation, and such failure is not excused by Force Majeure or Seller's failure to perform, then Seller may elect in its sole discretion to: (i) terminate and liquidate this transaction (in which case Seller shall calculate the termination payment in accordance with this Agreement as though it were the Non-Defaulting Party); or, (ii) require Buyer to pay Seller within three (3) Business Days of invoice receipt, cover costs for such deficiency in receiving delivery, which shall be equal to the net present value of the positive difference, if any, obtained by subtracting the per unit Sales Price (defined below) from the per unit Contract Price. The invoice shall include a written statement explaining in commercially reasonable detail the calculation of such amount.

"Sales Price" means the price at which Seller, acting in a commercially reasonable manner, resells any Product not received by Buyer, deducting from such proceeds any costs reasonably incurred by Seller in reselling such un-received Product, or the market price for the Product not received by Buyer, as determined in a good faith and commercially reasonable manner; provided, however, in no event shall such price include any penalties, stranded costs, or similar charges, nor shall Seller be required to utilize or change its utilization of its owned or controlled assets, or market positions to minimize Buyer's liability.

- d) Compliance. Seller agrees to promptly provide to Buyer any documentation related to the Product as may be requested by Buyer in connection with any compliance and/or renewable energy requirements. Such documentation may include, without limitation, affidavits or certifications required by the relevant governmental body or other entity promulgating the compliance and/or renewable energy standards. If, as a result of Seller's failure to provide Buyer with documentation, any or all of the Contract Quantity of the Product is disallowed (the "Disallowed Product"), then the Disallowed Product shall be deemed to have not been delivered and Seller shall pay to Buyer cover cost damages in accordance with this Agreement, together with reimbursement to Buyer for any payment previously made by Buyer for the Disallowed Product.

## 8) Limitation of Liabilities and Jury Trial

- a) Exclusive Remedy. THE PARTIES AGREE THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED FOR HEREIN ARE REASONABLE AND SATISFY THE ESSENTIAL PURPOSE HEREOF, AND EACH PARTY SHALL USE COMMERCIALY REASONABLE EFFORTS TO MITIGATE ANY DAMAGES INCURRED. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS MEASURE OF DAMAGES IS PROVIDED SUCH REMEDY OR MEASURE SHALL BE THE SOLE AND EXCLUSIVE REMEDY THEREFORE. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY AS THE SOLE AND EXCLUSIVE REMEDY. IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR INDIRECT, INCIDENTAL, PUNITIVE, EXEMPLARY, SPECIAL OR CONSEQUENTIAL DAMAGES, LOST PROFIT OR BUSINESS INTERRUPTION DAMAGES, WHETHER BY STATUTE, IN TORT, OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE EXCEPT TO THE EXTENT THAT ANY PAYMENTS REQUIRED TO BE MADE PURSUANT TO THIS AGREEMENT ARE DEEMED TO BE SUCH DAMAGES. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT, AND THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.
- b) Waiver of Jury Trial: THE PARTIES EACH HEREBY IRREVOCABLY WAIVE ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING HERETO, OR THE TRANSACTIONS CONTEMPLATED HEREBY. 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.
- c) Survival. This Article shall survive any termination or expiration of this Agreement.

## 9) Indemnification

- a) Indemnity. Each Party (the "Indemnifying Party") agrees to indemnify, defend and hold harmless the other Party, and each of the other Party's directors, officers, employees, agents and permitted assigns (the "Indemnified Party"), from and against any and all claims, losses, liabilities, damages, judgments, awards, fines, penalties, costs and

expenses (including reasonable attorneys' fees/disbursements) directly incurred in connection with or arising from or out of: (i) any breach of representation or warranty or failure to perform any covenant or agreement in this Agreement by said Party; (ii) any violation of applicable law, regulation or order by said Party relating to or in connection with this Agreement; and/or (iii) any claims by a third party arising out of any act or omission by said Party relating to or in connection with this Agreement.

- b) Process. The Indemnified Party shall promptly notify the Indemnifying Party of any claim or proceeding in respect of which it seeks to be indemnified. Such notice shall be given in writing as soon as reasonably practicable after the Indemnified Party becomes aware of such claim or proceeding. Failure to give such notice shall not excuse an indemnification obligation except to the extent failure to provide notice adversely affects or prejudices the Indemnifying Party's interests. The Indemnifying Party shall assume the defense thereof with counsel designated by the Indemnifying Party; provided, however, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party and the Indemnified Party reasonably concludes that in the context of such indemnification there may be legal defenses available to it that are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel; provided however, the foregoing shall not preclude the Indemnified Party from otherwise participating in any such proceeding at its own expense. If the Indemnifying Party fails to assume the defense of a claim, the indemnification of which is required under this Agreement, the Indemnified Party may, at the expense of the Indemnifying Party, contest, settle, or pay such claim; provided, however, that settlement or full payment of any such claim may be made only with the Indemnifying Party's consent or, absent such consent, written opinion of the Indemnified Party's counsel that such claim is meritorious or warrants settlement.
- c) Survival. All indemnity rights shall survive the expiration or any sooner termination of this Agreement in full for a period of twenty-four (24) months after the expiration date or effective date of such termination.

#### 10) **Confidentiality**

- a) Protected Information. Except as otherwise set forth in this Agreement, neither Party shall publish, disclose, or otherwise divulge any term or condition of this Agreement and, without limitation, any information relating to any transaction or documents exchanged between the Parties in connection with this Agreement (such information, the "Protected Information") to a third person (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential), at any time during or for two (2) years after the expiration or early termination of this Agreement, without the other Party's prior written consent. Each Party shall be entitled to all remedies available at law or in equity (including but not limited to specific performance and/or injunctive relief) to enforce, or seek relief in connection with, this confidentiality obligation.
- b) Non-Confidential Information. The following shall not be considered Protected Information, and receiving Party shall not be limited in the use or disclosure of the following information: (a) information which is or becomes part of the public domain through no act or omission of receiving Party; (b) information which demonstrably was known or was in the possession of receiving Party without obligation to maintain confidentiality prior to its disclosure to the receiving Party; (c) information which is subsequently rightly received by receiving Party from a third party who is not bound to maintain such information as confidential; (d) information independently developed by the receiving Party without reference to the Protected Information received under this Agreement; and/or, (e) information required to be disclosed by Buyer for its compliance obligations.
- c) Return of Confidential Information. Upon request of the Party that provided the Protected Information (such Party, the "Disclosing Party") to the other Party (such Party, the "Receiving Party") shall either (i) return the Protected Information, including all copies, or (ii) destroy the Protected Information, including all copies, and present written assurances of the destruction to Disclosing Party. Notwithstanding the foregoing, both Parties acknowledge that Protected Information transferred and maintained electronically (including e-mails) may be automatically archived and stored by Receiving Party on electronic devices, magnetic tape, or other media for the purpose of restoring data in the event of a system failure (collectively, "Back-Up Tapes"). Notwithstanding the terms of this Agreement, in no event shall Receiving Party be required to destroy Protected Information stored on Back-Up Tapes; provided, however, any Protected Information not returned or destroyed pursuant to this Section shall be kept confidential for the duration of its existence. Furthermore, the Parties agree that Receiving Party may retain one (1) copy of such Protected Information in Receiving Party's files for audit and compliance purposes for the duration of its existence; provided, however, such Protected Information shall be kept confidential for the duration of its existence

in accordance with the terms of this Agreement.

- d) **Required Disclosures.** A Party may, subject to the limitations set forth herein, disclose Protected Information in response to a court order, in connection with any court or regulatory proceeding, or as otherwise required by any requirement of law. Such disclosure shall not terminate the obligations of confidentiality unless the Protected Information thereafter falls within one of the exclusions of this Agreement. To the extent the disclosure of Protected Information is requested or compelled as set forth above, the receiving Party agrees to give disclosing Party reasonable notice of any discovery request or order, subpoena, or other legal process requiring disclosure of any Protected Information. Such notice by the Receiving Party shall give Disclosing Party an opportunity, at Disclosing Party's discretion and sole cost, to seek a protective order or similar relief. If such protective order or other appropriate remedy is not sought and obtained within at least thirty (30) days (or lesser applicable period) of Receiving Party's notice, Receiving Party shall disclose only that portion of the Protected Information that is required or necessary in the opinion of Receiving Party's legal counsel; provided, however, Receiving Party shall use reasonable efforts to obtain assurances that confidential treatment will be accorded to any Protected Information so disclosed. Notwithstanding the confidentiality requirements or anything to the contrary set forth herein, Seller agrees that Buyer may without prior notice to or consent from Seller disclose this Agreement (including any Confirmation and terms and conditions) to the North Carolinas Utilities Commission (NCUC), NCUC staff, public staff of the NCUC, or otherwise associated with its regulatory obligations in North Carolina.

#### 11) **Regulatory Event**

- a) **Process.** Upon the occurrence of a Regulatory Event (defined below), the Parties will use reasonable efforts to reform transaction(s) hereunder to give effect to the original intention of the Parties. If the Parties are unable, despite such efforts, to reform the transaction(s) or transfer the Contract Quantity of the Product within fifteen (15) Business Days following notice of the Regulatory Event, either Party may, at its sole option, terminate this Agreement with no further payment or performance obligation; provided that the Parties shall make any payments due in accordance with obligations already performed and Seller shall return to Buyer any payment for any quantity of Product not delivered hereunder.
- b) **Definition.** "Regulatory Event" means one or more of the following events:
- i) **Illegality.** Due to the adoption of, or change in, any applicable law (including, rule or regulation) or in the interpretation of the applicable law by any judicial, government authority, or standard-setting body with competent jurisdiction, it becomes unlawful for a Party to perform any obligation under this Agreement.
- ii) **Adverse Government Action.** After the effective date of the applicable transaction(s): (a) any federal or state governmental or regulatory or standard-setting authority with jurisdiction issues an order, or any court with jurisdiction issues an order, eliminating or discontinuing certification of the Product or the applicable underlying standard; or (b) there occurs any adverse material change (including promulgation, enactment, repeal and amendment by any state or federal governmental authority or court or standard-setting body with jurisdiction) in the application of the applicable law or standard, including any material change regarding a Party's authority to sell or purchase the Product and any such occurrence either: (i) renders any transaction(s) hereunder illegal or unenforceable, (ii) would render performance by a Party illegal or unenforceable, or (iii) eliminates, abolishes or makes illegal the trading or transferring of the Product under the applicable law or standard.

#### 12) **Force Majeure**

- a) **Force Majeure.** In the event any Party hereto is rendered unable, wholly or in part, by Force Majeure (defined below) to carry out its obligations hereunder, it is agreed that upon the claiming Party giving written notice and full particulars of such Force Majeure to the other Party as soon as reasonably practicable, that the claiming Party shall be excused from the performance of its obligations hereunder, only to the extent they are affected by such Force Majeure. The claiming Party shall use commercially reasonable efforts to resume and fulfill its obligations hereunder and to remove any disability caused by such Force Majeure event at the earliest practicable time.
- b) "Force Majeure" means an event or circumstance which prevents a Party from performing its obligations under this Agreement, which event or circumstance is not within the control of such claiming Party and which by the exercise of due diligence such Party could not have prevented or avoided. Force Majeure shall not include loss or failure of

the Seller's supply, Buyer's inability to use or resell the Product purchased hereunder or Seller's ability to sell the Product at a more advantageous price.

13) **Notices**

- a) **Process.** All notices, requests, or invoices shall be in writing and shall be sent to the address of the applicable Party as specified on the first page of this Agreement. A Party may change its information related to receiving notices by sending written notice to the other Party. Notices shall be delivered by hand, sent by certified mail postage prepaid return receipt requested, sent by overnight mail or courier, or sent by e-mail. Hand delivered notices shall be deemed delivered by the close of the Business Day on which it was hand delivered. Notices provided by certified mail, postage prepaid, return receipt requested, or by overnight mail or courier, shall be deemed to have been received on the date noted as delivered on the receipt or tracking registry, as applicable. Notices provided by e-mail will be deemed received on the date they are sent. If the day on which any notice is delivered or received is not a Business Day or is after 5:00 p.m. Eastern Prevailing Time on a Business Day, then it shall be deemed to have been received on the next following Business Day.

14) **Miscellaneous**

- a) **Safe Harbor.** The Parties acknowledge, agree, and intend for purposes of "safe harbor" under the United States Bankruptcy Code that, without limitation, as applicable: (a) all transactions hereunder constitute "forward contracts"; (b) all payments made or to be made by one Party to the other Party under this Agreement constitute "settlement payments" and/or "margin payments"; (c) all transfers of credit assurances, if any, by one Party to the other Party under this Agreement constitute "margin payments"; and, (d) without limitation, each Party's rights under this Agreement constitute a contractual rights to liquidate, early terminate, net, set-off, or accelerate as provided for herein.
- b) **Dispute Resolution.** Unless otherwise mutually agreed by the Parties in writing, and in addition to the dispute resolution procedure relating specifically to billing disputes, all dispute, controversy or claim arising out of, under, or relating to this Agreement shall be resolved by the Parties first attempting to resolve such dispute through good faith negotiations. If the Parties have not resolved the dispute within thirty (30) days of the date that written notice of the dispute was first provided by one Party to the other (or another period agreed upon by the Parties), then any Party may pursue any legal remedies available at law or in equity.
- c) **Governing Law.** This agreement shall be governed by and construed in accordance with the laws of the State of North Carolina without giving effect to principles of conflicts of law. Any judicial action, suit, or proceedings arising out of, resulting from, or in any way relating to, this Agreement shall be brought only in a state or federal court of competent jurisdiction located in North Carolina. This section shall survive any termination or expiration of this Agreement.
- d) **Entire Agreement/Amendments/Assignment.** This Agreement, including attachments hereto, contain all of the terms and conditions of the agreement reached by the Parties hereto, and supersede all prior oral or written agreements with respect to this Agreement. In the event of a conflict between a provision in this Agreement and a provision of any Confirmation, the provisions of this Agreement shall control; except that, in each case, a more specific commercial provision with respect to a Confirmation shall control. This Agreement may not be modified, amended, altered or supplemented, except by written agreement signed by the Parties hereto.
- e) **Assignment/Change in Control.**
- i) **Assignment.** Except as set forth below in Section 14(e) (ii) with respect to pledging as collateral security, Seller shall not assign or encumber (collectively, the "Assignment") this Agreement, any rights or obligations under the Agreement, or any portion hereunder, without Buyer's prior written consent. Seller shall give Buyer at least thirty (30) days prior written notice of any requested Assignment. Subject to Seller providing Buyer with information demonstrating to Buyer, in Buyer's Commercially Reasonable discretion, that Seller's proposed assignee has the technical, engineering, financial, and operational capabilities to perform under this Agreement, Buyer may not unreasonably withhold its consent; provided, however, that any such assignee shall agree in writing to be bound by the terms and conditions hereof and shall deliver to Buyer Performance Assurance in the amount required under this Agreement, and such enforceability assurance as the Buyer may request in its Commercially Reasonable discretion. Notwithstanding anything to the contrary herein, Buyer may pledge, encumber, or assign this Agreement without the consent of Seller to any Person that is Creditworthy, or that has provided Seller with a guaranty from a Creditworthy credit support provider

guaranteeing the assignee's obligations hereunder, and that has agreed in writing to assume the obligations of Buyer hereunder.

- ii) Pledge. Seller may, without prior consent of Buyer but with no less than ten (10) Business Days prior written notice to Buyer, pledge as collateral security this Agreement to a financing party in connection with any loan, lease, or other debt or equity financing arrangement for the Facility. Any pledge of this Agreement as collateral security will not relieve Seller of any obligation or liability under this Agreement or compromise, modify or affect any rights, benefits or risks of Buyer under this Agreement.
  - iii) Change of Control. Any Change of Control of Seller (however this Change of Control occurs) shall require the prior written consent of Buyer, which shall not be unreasonably withheld or delayed. Seller shall give Buyer at least thirty (30) days prior written notice of any such requested consent to a Change of Control.
  - iv) Delivery of Assurances & Voidable. Any Assignment or Change of Control will not relieve Seller of its obligations hereunder, unless Buyer agrees in writing in advance to waive the Seller's continuing obligations under this Agreement. In case of a permitted Assignment, such requesting party or parties shall agree in writing to assume all obligations of Seller and to be bound by the terms and conditions of this Agreement and shall deliver to Buyer such tax, credit, performance, and enforceability assurances as Buyer may request, in its Commercially Reasonable discretion. Further, Buyer's consent to any Assignment may be conditioned on and subject to Seller's proposed assignee having first obtained all approvals that may be required by any requirements of law and from all applicable governmental authorities. Any sale, transfer, Change of Control, and/or Assignment of any interest in the Renewable Energy Facility or in the Agreement made without fully satisfying the requirements of this Agreement shall be null and void and will be an Event of Default hereunder with Seller as the Defaulting Party.
  - v) Cost Recovery. Without limiting Buyer's rights under this Section 14, to the extent Buyer agrees to a request from Seller for one or more consent(s) to an Assignment or Change of Control under this Agreement, Seller shall pay Buyer five thousand dollars (\$5,000) prior to Buyer processing Seller's request.
- f) Drafting/Costs. Each Party agrees that it (its counsel) has completely read, fully understands, and voluntarily accepts every provision hereof. Each Party agrees that no Party shall have any provision hereof construed against such Party by reason of such Party drafting, negotiating, or proposing any provision hereof, or execution of this Agreement. Each Party irrevocably waives the benefit of any rule of contract construction that disfavors the drafter of a contract or the drafter of specific language in a contract. All section headings in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose. Each Party shall be responsible for its own costs and fees associated with negotiating or disputing or taking any other action with respect to this Agreement.
- g) Severability/Waiver/Third Parties. Any provision in this Agreement that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions or affecting the validity or enforceability of such provision in any other jurisdiction. The non-enforcement of any provision by either Party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or of the remainder of this Agreement. No waiver of any term, provision, or conditions of this Agreement, whether by conduct or otherwise, in any one or more instances, shall be deemed to be, or shall constitute a waiver of any other provision hereof, whether or not similar, nor shall such waiver constitute a continuing waiver, and no waiver shall be binding unless executed in writing by the Party making the waiver. Nothing contained in this Agreement shall be construed or constitute any Party as the employee, agent, partner, joint venture, or contractor of any other Party. This Agreement is made and entered into for the sole protection and legal benefit of the Parties, and their permitted successors and assigns, and no other person or entity shall be a direct or indirect legal beneficiary of or have any direct or indirect cause of action or claim in connection with this Agreement.
- h) Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original and all of which constitute one and the same instrument.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS WHEREOF, the Parties have each caused this Agreement to be executed by their duly authorized representatives.

**Town of Lake Lure**

Signature: \_\_\_\_\_

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

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

Date: \_\_\_\_\_

**Duke Energy Carolinas, LLC**

Signature: \_\_\_\_\_

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

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

Date: \_\_\_\_\_

## EXHIBIT A

### CONFIRMATION (HYDRO)

This Confirmation shall confirm the transaction agreed to between Seller and Buyer regarding the sale/purchase of the Product under the terms and conditions set forth below and in the main body of the Agreement:

1. Seller: **Town of Lake Lure**
2. Buyer: **Duke Energy Carolinas, LLC**
3. Definitions: In addition to any other terms defined herein, the following terms, when used in this Agreement, whether singular or plural, shall have the following meanings:
  - "Act" means the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard, N.C. Gen. Stat. 62-133.8, including all rules promulgated by the Commission associated therewith, as each may be amended or modified from time-to-time, and any successor renewable energy standards, statutes, regulations, or rules.
  - "Certificate" means a tradable instrument created and issued by the Tracking System representing the REC (as defined herein) created by the generation of Energy by the Renewable Energy Facility.
  - "Commission" means the North Carolina Utilities Commission.
  - "Energy" means physical electric energy, expressed in megawatt hours ("MWh") or kilowatt hours ("kWh"), of the character that passes through transformers and transmission wires, where it eventually becomes alternating current three-phase, sixty (60) hertz electric energy delivered at nominal voltage.
  - "Environmental Attributes" means, any and all claims, credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, resulting from the reduction and/or avoidance of the emission of any gas, chemical, or other substance to the air, soil or water, attributable to, resulting from, or associated with the generation of Energy by the facility and its displacement of conventional Energy generation, including any and all rights to the renewable and environmental characteristics and/or attributes of the underlying output, energy generation of the facility, and/or the fuel/energy used to generate the Energy, and including any and all rights arising out of any law, rule or regulation; *provided, however*, the term "Environmental Attributes" shall exclude any and all state and federal production tax credits, any investment tax credits, tax incentives or tax grants, and any other tax incentives which are or will be generated or earned by the **Renewable Energy Facility**, any matters that may be designated by Buyer from time to time as sources of liability, or any adverse wildlife or environmental impacts.
  - "EA Reporting Rights" means the right of the reporting person or entity (including Buyer) to report that it owns all the Environmental Attributes, including any and all rights to the renewable and environmental characteristics and attributes of the underlying output, Energy generation of the facility, and fuel/energy used to generate the Energy, to any person, agency, authority or other party under any emissions trading or reporting program (including without limitation the Act), public or private, or to customers or potential customers, for the purposes of compliance, marketing, advertising, or otherwise for any purpose.
  - "Firm" means, in the absence of a Force Majeure event the Party to whom performance is owed shall be entitled to receive from the Party that failed to deliver or receive, as the case may be, liquidated damages to the extent set forth in the Agreement.
  - "New Renewable Energy Facility" shall have the meaning specified in the Act.
  - "Product" means the Certificates representing the RECs generated by the Renewable Energy Facility that meet all of the applicable requirements set forth in the Act and specifications set forth herein. One (1) unit of the Product shall represent the applicable REC associated with one (1) megawatt hour (MWh) of Energy generated by the Renewable Energy Facility, which Energy giving rise to the Product shall be generated and physically metered within the applicable Reporting Year.
  - "Renewable Energy Certificate(s)" or "REC(s)" shall mean all of the Environmental Attributes and EA Reporting Rights associated with one (1) megawatt hour (MWh) of Energy generated by the Renewable Energy Facility. The REC(s) shall represent all title to and claim over all of the Environmental Attributes associated with the Energy generated by the Renewable Energy Facility.



- "Renewable Energy Facility" means the Seller's hydroelectric facility that: (i) is located at **198 Buffalo Shoals Road, Lake Lure, NC 28746** (ii) is generating Energy using water (hydro) resources as the generation fuel source; and (iii) is registered and certified by the Commission as a New Renewable Energy Facility.
  - "Reporting Year(s)" means the calendar period when the Energy associated with the Product, and therefore the Product, was generated, which for purposes of this Confirmation shall be the calendar year period starting January 1 of a calendar year through December 31 of the same calendar year.
  - "Tracking System" means the verification system that accounts for the generation, sale, purchase, and/or retirement of RECs, which for purposes of this Confirmation shall be the North Carolina Renewable Energy Tracking System (NCRETS).
4. Delivery Period:
- Starting with **November 1, 2023**, and continuing through **October 31, 2025**.
5. Applicable Reporting Year(s):
- Reporting Year beginning **November 1, 2023**, and continuing through and until the applicable Reporting Year when the Delivery Period ends on **October 31, 2025**.
6. Contract Price:
- **\$3.75** for each unit of the Product.
7. Contract Quantity:
- All (100%) of the Product associated with the Energy generated by the Renewable Energy Facility during the period beginning as of **November 1, 2023** through **October 31, 2025**.
  - No later than thirty (30) days prior to the start of each Reporting Year, Seller will provide Buyer with a reasonably accurate estimate of the amount of Product that Seller expects the Renewable Energy Facility to generate during the upcoming Reporting Year.
8. Delivery:
- Seller will have a Firm obligation to sell and deliver the Contract Quantity to Buyer.
  - Within ten (10) Business Days after the end of each calendar month, Seller shall sell and deliver to Buyer, and Buyer shall purchase from Seller the applicable Contract Quantity of the Product, to be performed by initiating an electronic order for transfer of the Product from the Seller's Account to the Buyer's Account. Within ten (10) Business Days of receiving electronic notification from the Tracking System confirming that such a transfer order has been initiated for the benefit of the Buyer by the Seller, Buyer shall receive and purchase the Product by confirming the receipt of the same into its Account.
9. Other Provisions:
- Seller is solely responsible for complying with all applicable laws, rules, and/or regulations necessary to perform its obligations under this Agreement, including without limitation, obtaining and maintaining its status as a New Renewable Energy Facility under the Act, interconnection requirements, and environmental permits, and any such failure will be an Event of Default under this Agreement.
10. Section not used.
11. Section not used.
12. As an essential condition to entering into this Confirmation, Seller agrees and acknowledges that nothing stated in this Confirmation shall affect and/or modify, nor will it affect and/or modify, any other agreement, transaction, and/or obligation between the Parties or affiliates of Buyer, including without limitation any other power purchase agreement.

Seller agrees that any claim/assertion to the contrary by Seller will be an Event of Default under this Agreement, without any opportunity to cure such Event of Default.

This Confirmation is being provided pursuant to and in accordance with the Renewable Energy Certificates Transaction Agreement dated\_\_\_\_\_, 2023 (the "Agreement") between **Duke Energy Carolinas, LLC** ("Buyer") and **Town of Lake Lure** ("Seller"), and constitutes part of and is subject to the terms and provisions of such Agreement. Terms used but not defined herein shall have the meanings ascribed to them in the Agreement.

**SIGNATURE PAGE TO FOLLOW**

IN WITNESS WHEREOF, the Parties have each caused this Agreement to be executed by their duly authorized representatives.

**Town of Lake Lure**

Signature: \_\_\_\_\_

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

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

Date: \_\_\_\_\_

**Duke Energy Carolinas, LLC**

Signature: \_\_\_\_\_

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

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

Date: \_\_\_\_\_

**Exhibit B**  
**Form of Letter of Credit**

[LETTERHEAD OF ISSUING BANK]

Irrevocable Standby Letter of Credit No.: \_\_\_\_\_

Date: \_\_\_\_\_

Beneficiary:  
Duke Energy Carolinas, LLC  
550 S. Tryon Street, DEC 40C  
Charlotte, North Carolina 28202  
Attn: Chief Risk Officer

Ladies and Gentlemen:

By the order of:

Applicant:

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

We hereby issue in your favor our irrevocable standby letter of credit No.: \_\_\_\_\_ for the account of \_\_\_\_\_ for an amount or amounts not to exceed \_\_\_\_\_ US Dollars in the aggregate (US\$ \_\_\_\_\_) available by your drafts at sight drawn on [Issuing Bank] effective \_\_\_\_\_ and expiring at our office on \_\_\_\_\_ (the "Expiration Date").

The Expiration Date shall be deemed automatically extended without amendments for one year from the then current Expiration Date unless at least ninety (90) days prior to the then applicable Expiration Date, we notify you in writing by certified mail return receipt requested or overnight courier that we are not going to extend the Expiration Date. During said ninety (90) day period, this letter of credit shall remain in full force and effect

Funds under this letter of credit are available against your draft(s), in the form of attached Annex 1, mentioning our letter of credit number and presented at our office located at [Issuing Bank's address must be in US] and accompanied by a certificate in the form of attached Annex 2 with appropriate blanks completed, purportedly signed by an authorized representative of the Beneficiary, on or before the Expiration Date in accordance with the terms and conditions of this letter of credit. Partial drawings under this letter of credit are permitted.

Certificates showing amounts in excess of amounts available under this letter of credit are acceptable, however, in no event will payment exceed the amount available to be drawn under this letter of credit.

We engage with you that drafts drawn under and in conformity with the terms of this letter of credit will be duly honored on presentation if presented on or before the Expiration Date. Presentation at our office includes presentation in person, by certified, registered, or overnight mail.

Except as stated herein, this undertaking is not subject to any agreement, condition or qualification. The obligation of [Issuing Bank] under this letter of credit is the individual obligation of [Issuing Bank] and is in no way contingent upon reimbursement with respect hereto.

This letter of credit is subject to the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 ("ISP98"). Matters not addressed by ISP98 shall be governed by the laws of the state of New York.

We shall have a reasonable amount of time, not to exceed three (3) business days following the date of our receipt of drawing documents, to examine the documents and determine whether to take up or refuse the documents and to inform you accordingly.

Kindly address all communications with respect to this letter of credit to [Issuing Bank's contact information], specifically referring to the number of this standby letter of credit.

All banking charges are for the account of the Applicant.

This letter of credit may not be amended, changed or modified without our express written consent and the consent of the Beneficiary.

This letter of credit is transferable, and we agree to consent to its transfer, subject to our standard terms of transfer and your payment to us of our standard transfer fee.

Very truly yours  
[Issuing Bank]

\_\_\_\_\_  
Authorized Signer

\_\_\_\_\_  
Authorized Signer

This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX 1

FORM OF SIGHT DRAFT

[Insert date of sight draft]

To: *[Issuing Bank's name and address]*

For the value received, pay to the order of \_\_\_\_\_ by wire transfer of immediately available funds to the following account:

*[name of account]*  
*[account number]*  
*[name and address of bank at which account is maintained]*  
*[aba number]*  
*[reference]*

The following amount:

*[insert number of dollars in writing]* United States Dollars  
(US\$ *[insert number of dollars in figures]*)

Drawn upon your irrevocable letter of credit No. *[irrevocable standby letter of credit number]* dated *[effective date]*

*[Beneficiary]*

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

This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX 2

FORM OF CERTIFICATE

[Insert date of certificate]

To: *[issuing bank's name and address]*

*[check appropriate draw condition]*

[\_\_\_\_\_] An Event of Default (as defined in the [Name of Agreement between [Beneficiary's Name] and [Insert Counterparty's Name] dated as of \_\_\_\_\_ (the "Agreement")) has occurred with respect to [Counterparty's Name] and such Event of Default has not been cured within the applicable cure period, if any provided for in the Agreement.

Or

[\_\_\_\_\_] [Counterparty's Name] is required, pursuant to the terms of the Agreement, to maintain a letter of credit in favor of [Beneficiary's Name], has failed to renew or replace the Letter of Credit and the Letter of Credit has less than thirty (30) days until the expiration thereof.

*[Beneficiary]*

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

Exhibit 1  
Estimated Annual REC Production of the Facility

Estimated Annual REC Production (MWh)
4,700



**LAKE LURE TOWN COUNCIL**  
**AGENDA ITEM REQUEST FORM**  
**Meeting Date: October 25, 2023**

**SUBJECT:** Continue Discussions Regarding Lake Lure Tours Off-Season Beach Hours

**AGENDA INFORMATION:**

**Item Number:** VI  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

During the October 10<sup>th</sup> regular Council meeting, a motion was made to table discussions regarding Lake Lure Tours (LLT) off-season beach hours prior to making a decision. Council will resume discussions on LLT off-season beach hours request. The off-season beach hours request from LLT is as follows:

1. The beach remain closed from the day following Labor Day Weekend until and through the day following commencement of lake drawdown.
2. The beach be re-opened the day following commencement of drawdown for complimentary, unsupervised, “no swimming” public access until the day following commencement of lake refilling or until the lake is returned to full pond, whichever comes first.
3. At the day of commencement of refilling, the beach then be re-closed until re-opened by LLT for the year’s season, beginning Memorial Day Weekend.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

10-10-2023 Council (Draft) Minutes Discussing the LLT Off-Season Beach Hours Request; Request from LLT

**STAFF COMMENTS AND RECOMMENDATIONS:**

Police staff have reported various incidents since re-opening the beach for unsupervised access. Staff recommends that if approved by Council, the requested hours should remain in place for more than a one year period.

**Lake Lure Tours, Inc.  
P.O. Box 10043  
Fleming Island, FL 32006**

Lake Lure Town Manager  
Lake Lure Town Council  
Lake Lure Mayor

September 21, 2023

As requested of and approved by Council over the past two years, Lake Lure Tours, Inc. (LLT) respectfully requests a change in the Beach Concession Agreement regarding closing and opening the beach to unsupervised public access.

Our rationale for this requested change is two-fold: One, a safety issue focused upon persons choosing to swim in a full pond at the beach during warm weather (in violation of signage at the beach prohibiting swimming without lifeguards present); and, Two, freeing the Lake Lure Police Department's officers to concentrate on duties other than policing the beach.

Hence, we request that Lake Lure Town Council approve an amendment to the post-season, opening / closing caveats of LLT's Concession Agreement to affect the following:

1. The beach remain closed from the day following Labor Day Weekend until and through the day following commencement of lake drawdown.
2. The beach be re-opened the day following commencement of drawdown for complimentary, unsupervised, "no swimming" public access until the day following commencement of lake refilling or until the lake is returned to full pond, whichever comes first.
3. At the day of commencement of refilling, the beach then be re-closed until re-opened by LLT for the year's season, beginning Memorial Day Weekend.

Should there be questions regarding this request, please feel free to contact Sonya Ledford, General Manager, LLT at 828-395-7230 or me, at 828-625-2019.

Respectfully,  
LAKE LURE TOURS, INC.

George Wittmer  


**IX. NEW BUSINESS**

**C. LAKE LURE TOURS OFF-SEASON BEACH SCHEDULE REQUEST**

Manager Perkins noted that the off-season beach schedule request from Lake Lure Tours (LLT) was briefed during the September work session meetings. Manager Perkins explained that LLT sent similar off-season beach schedule requests in previous years prior to Labor Day, but did submit one prior to Labor Day this year due to error of omission. It was detailed that this was brought to the Town's attention because a citizen expressed concern that the beach had closed following Labor Day and was not operating according to the Concession Agreement. Manager Perkins added that LLT opened the beach since it was brought to the Town's attention, but they are now requesting to close it until the lake drawdown when it would be opened for unsupervised access, then re-close when lake drawdown ends until it is opened for the season beginning on Memorial Day. Manager Perkins noted that the request does not list specific dates due to uncertainties surrounding future drawdown dates. Manager Perkins recommended that if Council desires to approve the request, they should considering approval for multiple years.

Commissioner DiOrio explained that the Lake Lure Police Department (LLPD) has responded to a number of calls from people in distress on the beach during off seasons and expressed that it is a public safety issue. Commissioner DiOrio noted that the Town owns the lake, so rules may be different for Lake Lure than those at an unsupervised beach. Commissioner DiOrio expressed that public safety is responsible for monitoring the beach because it is Town owned and LLT does not have that responsibility in their concession agreement. It was noted that adding this responsibility would cost more. Commissioner Doster explained that the liability is huge and even if the Town puts a large number of "no swimming" signs up there will still be people who disregard the rules. Commissioner Doster expressed that the Town should take preemptive measures to mitigate liabilities.

Commissioner DiOrio noted that when the lake is drawn-down people like to go on the backshore, which is also a problem. Sergeant Carl Umphlett detailed that the LLPD and emergency management have responded to multiple calls regarding people getting stuck in the backshore area during drawdowns. Mayor Pritchett noted that it is the Town's responsibility to protect people. Commissioner Proctor asked what the difference is between the beach backshore and the backshore in Morse Park. Commissioner Bryant responded that a difference is that both public and private owned assets are enclosed in the beach area. Manager Perkins agreed and noted that the use of LLT's slides, lifeguard stands, and other assets has also been an issue. Mayor Pritchett noted that safety is the main concern.

Mrs. Kathie Hatfield expressed that if the request is approves, it would prevent events from occurring on the beach during the off-season. Commissioner Doster noted that it is a good point. Commissioner Bryant explained that events are supervised and the request is specific to unsupervised access. Manager Perkins noted that the Concession Agreement can be reviewed to make sure that this is specified and consistent.

Commissioner Bryant made a motion to table any further discussions on this item until the October work session and action meeting. Commissioner Proctor seconded and all voted in favor.

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Review Job Description for the Hydro Utilities Technician Position

**AGENDA INFORMATION:**

**Item Number:** VII  
**Department:** Administration  
**Contact:** Dean Lindsey, Public Services Director  
**Presenter:** Dean Lindsey, Public Services Director

**BRIEF SUMMARY:**

The former Hydro Utilities Technician recently filled the vacant Public Works Supervisor position. The Hydro Utilities Technician position is now vacant and staff has revised the job description to better fit the needs of the Public Services Department.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Hydro Utilities Technician Job Description

**STAFF COMMENTS AND RECOMMENDATIONS:**

Staff recommends approval of the job description at the next regular meeting.



## **Hydro Utilities Technician**

### **Primary Reason Why Classification Exists**

To assist in operating and maintaining the Hydro Electric plant, Drinking Water System, Waste Water Treatment Plant, and Collections System.

### **Distinguishing Features of the Class**

Employees in this class perform duties involving maintaining, operating and repairing the hydro plant, Drinking Water system, Collections, and WWTP. Work is performed during normal daily work hours, emergencies, and weekend shifts. Sound judgment, initiative and courtesy is required in performance of duties. Work is performed independently and under the direction of the Hydro Utilities Supervisor.

### **Illustrative Examples of Work**

- Monitors lake level, maintains and regulates lake level within Council approved parameters.
- Operates tainter gates, starts and stops generators to maintain and ensure lake stays within operating levels.
- Inspect and maintain well sites, and collect meter readings.
- Grounds maintenance for all equipment site locations.
- Monitors short term and long-term weather forecasts to anticipate appropriate actions regarding lake levels.
- Performs general, routine and preventive maintenance on hydro-electric generators and facilities.
- Employee is subject to call-back at any time; monitors weather conditions around lake and watershed, duties include working weekends and overnight, as needed.
- Works outdoors during rain storms to operate Dam Equipment and check lake levels.
- Works for extended periods, 24-36 hours, during emergency situations.
- Perform general maintenance, monitoring and sampling at WWTP
- Perform scheduled maintenance, inspections, and repairs of sewer collections and processing systems.
- Conduct daily inspections and general housekeeping of pumping station
- Performs other town infrastructure work as required.

### **Knowledge, Skills, and Abilities**

- Working knowledge of the occupational hazards of the work and of necessary safety precautions.
- Working knowledge of the use of computers to record data, to prepare reports, and operate plant equipment.
- Knowledge of project and emergency management.

- Knowledge of weather reporting and weather patterns.
- Knowledge of the appropriate and timely opening and closing of tainter gates to control, maintain and regulate lake level.
- Ability to work for extended periods of time during emergencies
- Thorough knowledge of OSHA regulations and requirements.
- Ability to work and make appropriate decisions during emergency situations.
- Ability to detect flaws in the operation of mechanical equipment.
- Knowledge of operation and repair of motors, gearboxes.
- Ability to understand and carry out moderately complex oral and written instructions.
- Ability to read meters, charts, and technical manuals and drawings accurately and to maintain records of operations.

### **Physical Requirements**

This is heavy work requiring the exertion of 100 pounds of force occasionally, up to 50 pounds of force frequently, and up to 20 pounds of force constantly to move objects. Work requires climbing, balancing, stooping, kneeling, crouching, crawling, reaching, standing, walking, pushing, pulling, lifting, fingering, grasping, feeling and repetitive motions. Vocal communication is required to express or exchange ideas. Hearing is required to perceive information at normal spoken word levels. Visual acuity is required for visual inspection involving small defects and/or small parts, use of measuring or testing devices, assembly of equipment, operating plant equipment, determining accuracy and thoroughness of work performed, and observing surroundings and activities. Employees must be able to perform physically demanding work during extended periods of time in emergency situations.

### **Working Conditions**

Work is subject to inside and outside environmental conditions including extreme heat and extreme cold. Employee is subject to noise, vibration, and hazards, including a variety of physical conditions, such as proximity to moving mechanical parts, electrical current, exposure to chemicals, and atmospheric conditions. Employees are exposed to oils and greases, bacteria, and blood-borne pathogens. Employees are required to wear personal protective equipment when necessary and required.

### **Education**

Graduation from high school or GED equivalent.

### **Experience**

None

### **Special Requirements**

- Valid North Carolina driver license

**FLSA Status:** Nonexempt

## **Disclaimer**

This classification specification has been designed to indicate the general nature and level of work performed by employees within this classification. It is not designed to contain or be interpreted as a comprehensive inventory of all duties, responsibilities, and qualifications required of employees to perform the job. The Town of Lake Lure reserves the right to assign or otherwise modify the duties assigned to this classification.

**LAKE LURE TOWN COUNCIL**  
**AGENDA ITEM REQUEST FORM**  
**Meeting Date: October 25, 2023**

**SUBJECT:** Review Proposed Schnabel Work Order No. 12, Proposal for Professional Engineering Services for Dam and Spillway Gate Inspections

**AGENDA INFORMATION:**

**Item Number:** VIII  
**Department:** Administration  
**Contact:** Dean Lindsey, Public Services Director  
**Presenter:** Dean Lindsey, Public Services Director

**BRIEF SUMMARY:**

Schnabel had submitted a proposal for Work Order No. 12 for professional engineering services for dam and spillway gate inspections at the Lake Lure Dam. Schnabel has proposed a fee of \$26,217 for the inspection of the dam and \$73,813 for the inspection of the spillway gate. The total cost associated with proposed Work Order No. 12 is \$100,030.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Proposed Schnabel Work Order No. 12, Proposal for Professional Engineering Services for Dam and Spillway Gate Inspections

**STAFF COMMENTS AND RECOMMENDATIONS:**

Staff recommends approval of Schnabel Work Order No. 12, Proposal for Professional Engineering Services for Dam and Spillway Gate Inspections at the next regular meeting.



October 9, 2023

Mr. Dean Lindsey  
Public Works Director  
Town of Lake Lure  
2948 Memorial Highway  
Lake Lure, NC 28746

**Subject: Work Order No. 12, Proposal for Professional Engineering Services for Dam and Spillway Gate Inspections at Lake Lure Dam, Lake Lure, North Carolina (Schnabel Reference 18C21024.08P)**

Dear Mr. Lindsey:

**SCHNABEL ENGINEERING SOUTH, P.C.** (Schnabel) is pleased to submit this proposal to provide professional engineering services for the dam and spillway gate inspections at Lake Lure Dam. This proposal has been prepared in response to our discussions in May and June 2023.

## 1.0 BACKGROUND

Lake Lure Dam and its associated impoundment are owned and operated by the Town of Lake Lure, NC, (Town) and serve as the centerpiece of the community. The dam is a concrete multiple-arch buttress dam with a maximum height of about 124 feet. The dam also includes a gated concrete gravity spillway and an intake tower and penstock that supply water to a hydroelectric generating station located immediately downstream of the dam. The dam was designed by Mees and Mees of Charlotte, NC, and construction was completed in September 1926. Lake Lure Dam is regulated by the North Carolina Department of Environmental Quality (NC DEQ) Division of Dam Safety as a very large, high hazard potential structure.

Schnabel performed a condition assessment of Lake Lure Dam which included a visual inspection of the dam and appurtenances and an underwater investigation of the dam (among other services). These investigations were performed during the months of October and November 2018. The results of these inspections are presented in our Condition Assessment Summary Report (Schnabel, 2019).

Based on the results of this condition assessment, Lake Lure Dam is in overall fair condition considering its age. However, there are several items that warrant repair, monitoring, and/or additional investigation or assessment. In addition, the dam does not meet NC DEQ Dam Safety requirements for hydraulic capacity and structural stability under seismic loading conditions. The concrete gravity gated spillway sections also do not meet global stability requirements for the load cases analyzed, and there is no functional reservoir drain. The results of our distanced visual inspection of the gates also revealed several potential issues with the spillway gates that warrant additional evaluation.

NC DEQ performed a visual inspection of Lake Lure Dam on March 30, 2023, and issued a Notice of Deficiency (NOD) letter to the Town on April 11, 2023. This NOD reiterated the need to address several previous recommendations from the 2017 NC DEQ Notice of Inspection letter and Schnabel's 2018 Visual Inspection Report. On behalf of the Town, Schnabel provided a response to the NOD to NC DEQ indicating that the Town would be retaining Schnabel to perform an updated visual inspection of the dam and provide updates to the previous recommendations, as needed, based on the results of that inspection. In addition, based on previous recommendations from Schnabel, the Town has requested that Schnabel also provide an updated scope of services to perform a hands-on inspection of the spillway gates. These services will be performed under the supervision of an experienced professional engineer licensed in the State of North Carolina.

## **2.0 SCOPE OF SERVICES**

### **Task 01 – Dam Inspection**

Schnabel will visit the site to perform a visual inspection of the dam. The visual inspection will be performed by a licensed professional engineer and an additional representative from Schnabel. The scope of this visual inspection will be similar to the visual inspection performed by Schnabel in 2018. The visual inspection will be limited to the exposed portions of the dam, spillway, powerhouse, bridge, and abutments. The visual inspection will include photo-documentation of the condition of the dam in each bay, including seepage/leakage, concrete condition (i.e., spalls, cracks, potential alkali-silica reactivity, etc.), and other conditions/deficiencies observed.

If acceptable to the Town, we will supplement our visual inspection by collecting additional photos and/or video using a small Unmanned Aerial Vehicle (sUAS or drone). The sUAS would be used to inspect areas with difficult access (e.g., downstream face of dam, left sidewall, spillway). The sUAS would be remotely piloted by a Schnabel representative who has a Federal Aviation Administration Small Unmanned Aircraft System (UAS) Remote Pilot Certificate and North Carolina Department of Transportation UAS Commercial Operator Permit. The sUAS inspection will be performed in accordance with FAA requirements.

The deliverable for this task will consist of a report summarizing the results of our visual inspection. The report will include updates, as applicable, to the observations and recommendations included in our 2018 Visual Inspection Report and the 2023 Notice of Deficiency letter from NC DEQ. The report will include select photographs taken during our inspection and a completed visual inspection checklist. We will provide a draft copy of our visual inspection report to the Town for review in digital (PDF) format and address comments received. The final version of the report will be provided to Town and NC DEQ in digital (PDF) format. We will participate in up to two conference calls with the Town and NC DEQ to discuss our inspection observations and associated recommendations.

### **Task 02 – Spillway Gate Inspection**

We will perform a hands-on structural inspection of the spillway gates to determine their condition and to assist in the development of any future required structural analysis or gate repair design.

Prior to our inspection, we will prepare a Gate Inspection Work Plan, which will address access considerations and safety provisions, and include an inspection checklist. The Work Plan will also include reference sketches for the existing gates based on available information.

The gate inspection team leader will be a licensed professional engineer with expertise in the fields of structural and mechanical engineering and will be responsible for supervising and coordinating with field personnel. We have budgeted for the team leader to be onsite for one full day during the gate inspection. Other team members will include a Schnabel representative, acting as the on-site notetaker for the duration of the inspection, and two Society of Professional Rope Access Technicians (SPRAT) certified technicians from Schnabel's subcontractor, Extreme Access Inc.

Each gate shall be locked out/tagged out (temporarily taken out of operation) by the Town prior to inspection. Our inspection team will establish fall protection and/or rope access to the downstream side of the three spillway gates and the trash gate. The team will inspect the downstream side of the gates to the extent visible and document conditions of the members, connections between members, the gate bearings, the trunnion anchorages, and the condition of the adjacent concrete piers and ogee gravity section at the floor of the gates. Gate leaks or debris on the gates may limit the inspection of some members, but removal of debris, including vegetation, is not included in the scope of this inspection. In areas where significant steel section loss is noted, we will perform thickness measurements. We will measure the thickness of the steel skin plate at multiple locations from the downstream side of the gate using an ultrasonic thickness gauge. Historical drawings for the spillway gates are incomplete, so we will field verify members shown on the historical drawings and measure typical member sizes on one typical spillway gate. Member sizes can be used for reference on future work, including any repairs or structural analysis of the gates. We will also review the general condition of the gate hoists. If the Town will allow a test gate operation, we will document the amperage draws on the hoists and compare with any available historical data provided by the Town. We have assumed the gates will be test operated a minimum of six inches and then closed by the Town. If a test gate operation is not possible at the time of the inspection, these amperage readings may be provided by the Town separately.

We have assumed that the inspection of the three spillway gates and the trash gate will take up to three consecutive days to complete under a single mobilization.

Following the inspection, we will provide a spillway gate inspection report detailing our findings, including photo documentation of the inspections. The report will include sufficient details and measurements to be used for potential future structural analysis and design of repairs. We will provide a draft copy of our report to the Town for review in digital (PDF) format and address comments received. The final version of the report will be provided to Town and NC DEQ in digital (PDF) format. We will participate in up to one additional conference call (beyond those described under Task 01 above) with the Town and NC DEQ to discuss our inspection observations and associated recommendations.

### **3.0 EXCLUSIONS**

Services not specifically identified above are not included in the scope of services under this agreement. The following services are specifically not included in our proposed scope:

- Infrared scanning of the dam to evaluate areas of leakage.

**Town of Lake Lure**

**Lake Lure Dam – Work Order No. 12 Proposal – Dam and Spillway Gate Inspections**

- Standby time due to inability to access the gates (e.g., gate flood operations), cancellations, and/or postponements after mutual agreement between Town and Schnabel for schedule of the field work for the gate inspection.
- Lead paint testing, abatement, or removal.
- Cleaning or removal of vegetation or debris from the gates.
- Intrusive investigations of the dam (e.g., concrete coring) and materials testing.
- Underwater inspection.
- Structural analysis of the spillway gates.
- Design services.
- Attendance at meetings, other than the conference calls described above.

**4.0 PROJECT FEES**

Our fees are summarized below and are for the specific scope of services detailed herein. A detailed breakdown of these fees is included as Attachment 1. The fee for work requested beyond the scope of services included herein will be based on our current unit prices at the time the work is authorized or a negotiated lump sum. Our current Schedule of Personnel Fees is included as Attachment 2.

Task	Lump Sum Fees		
	Schnabel	Subcontractor	Total
Task 01 – Dam Inspection	\$26,217	\$0	\$26,217
Task 02 – Spillway Gate Inspection	\$37,733	\$36,080	\$73,813
<b>Total:</b>	<b>\$63,950</b>	<b>\$36,080</b>	<b>\$100,030</b>

**5.0 SCHEDULE**

We will begin planning for the inspections upon receipt of notice-to-proceed (NTP) from the Town. We anticipate performing the dam inspection within about 4 weeks from NTP. Scheduling of the spillway gate inspection will be dependent on when NTP is issued and Extreme Access Inc.'s availability at that time. We will schedule the gate inspection as soon as reasonably possible for a day and time mutually agreeable to Schnabel, Extreme Access Inc., and the Town. We plan on providing draft inspection reports within 6 to 8 weeks of completion of the inspections.

**6.0 PAYMENTS**

Invoices will be submitted monthly as a percentage of completion of the lump sum fee. Payment terms will be in accordance with the Professional Services Agreement between Schnabel and the Town (Attachment 3).

**7.0 GENERAL**

The Terms and Conditions of the Professional Services Agreement between Schnabel and the Town will apply to the services proposed herein. Your acceptance of this work order proposal by signing and returning one copy of this letter will form our agreement for these services. You may transmit your acceptance of this proposal electronically with the understanding that the signature on the electronic document will be considered an original signature. This work order proposal is valid for 90 days from the date shown.

**Town of Lake Lure**  
**Lake Lure Dam – Work Order No. 12 Proposal – Dam and Spillway Gate Inspections**

We appreciate the opportunity to submit our proposal for these services and look forward to continuing to work with the Town on this project. Please contact us if you have any questions regarding this proposal.

Sincerely,

**SCHNABEL ENGINEERING SOUTH, P.C.**



Jonathan M. Pittman, PE  
Project Manager / Senior Vice President

BFS:JMP:CMJ

Attachments:

- (1) Detailed Fee Breakdown (1 sheet)
- (2) Schedule of Personnel Fees (1 sheet)
- (3) Professional Services Agreement and Terms and Conditions (5 sheets)

**This work order proposal is:**

**ACCEPTED BY:** \_\_\_\_\_ **TOWN OF LAKE LURE, NC**

**SIGNATURE:** \_\_\_\_\_

**PRINTED NAME:** \_\_\_\_\_

**TITLE:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

ITEM	PRINCIPAL (11)	ASSOC. ENG. (31)	SENIOR ENG. (41)	PROJECT ENG. (51)	SR. STAFF ENG. (61)	CLERICAL / ADMIN (95)	TOTAL SE PERSONNEL TIME	TOTAL SE PERSONNEL COST	TRAVEL AND LIVING			Subtotal Travel Expense	Subtotal Travel Mileage	TOTAL ALL TRAVEL & LIVING COSTS	SUBCONTRACT	TOTAL OTHER SUB COSTS (521.03)	TOTAL IN-HOUSE EXPENSES	TOTAL SUBCONTRACTED EXPENSES	TOTALS							
	Pittman	Johnson	Khodaie, Duke	Stepek	Franklin	Sherwood, J. Smith			Hotel	Meals and Incidentals	Mileage	(531.14)	(531.10)							with	Extreme Access	with markups	with markups	Cost	Cost	Cost
	2023 Greensboro Rates	2023 Greensboro Rates	2023 Greensboro Rates	2023 Greensboro Rates	2023 Greensboro Rates	2023 Greensboro Rates			\$ 98.00	\$ 59.00	\$ 0.655	10%	10%							10%	Input \$ Below	10%	Cost	markup	Cost	Cost
UNIT or COST as shown in column heading	HOUR	HOUR	HOUR	HOUR	HOUR	HOUR	HOUR		Day	Day	Mile	markup	markup	markup	Cost	markup	Cost	Cost	Cost							
<b>Task 01 - Dam Inspection</b>	8.0	34.0	72.0	-	-	2.0	116.00	\$ 25,648.00	2.0	2.0	310.0	\$ 345.40	\$ 223.36	\$ 568.76	-	\$ -	\$ 568.76	-	\$ 26,216.76							
Inspection Planning (Doc Review and Form Prep)		6.0	8.0				14.00	\$ 3,104.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 3,104.00							
Inspection Field Work (1, 8 hr day + travel)		14.0	14.0				28.00	\$ 6,286.00	2.0	2.0	310.0	\$ 345.40	\$ 223.36	\$ 568.76		\$ -	\$ 568.76	\$ -	\$ 6,854.76							
Draft Inspection Report		8.0	40.0				48.00	\$ 10,152.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 10,152.00							
Final Inspection Report		4.0	8.0			2.0	14.00	\$ 2,784.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 2,784.00							
Meetings with Town and DEQ (Two 1-hr calls)		2.0	2.0				4.00	\$ 898.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 898.00							
Review and QA	2.0						2.00	\$ 606.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 606.00							
Project Management	6.0						6.00	\$ 1,818.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 1,818.00							
<b>Task 02 - Spillway Gate Inspection</b>	8.0	9.0	49.0	-	137.0	2.0	205.00	\$ 36,342.00	5.0	5.0	732.0	\$ 863.50	\$ 527.41	\$ 1,390.91	32,800.0	\$ 36,080.00	\$ 1,390.91	\$ 36,080.00	\$ 73,812.91							
Inspection Planning (Drawing, Form, and Work Plan Prep)			8.0		16.0		24.00	\$ 4,152.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 4,152.00							
Inspection Field Work (3, 8 hr days + travel)		4.0	20.0		32.0		56.00	\$ 10,100.00	5.0	5.0	732.0	\$ 863.50	\$ 527.41	\$ 1,390.91	32,800.0	\$ 36,080.00	\$ 1,390.91	\$ 36,080.00	\$ 47,570.91							
Meetings with Town and DEQ (One 1-hr call)		1.0	1.0		1.0		3.00	\$ 606.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 606.00							
Draft Gate Inspection Report			16.0		80.0		96.00	\$ 15,840.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 15,840.00							
Final Gate Inspection Report			4.0		8.0	2.0	14.00	\$ 2,244.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 2,244.00							
Review and QA	2.0	4.0					6.00	\$ 1,582.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 1,582.00							
Project Management	6.0						6.00	\$ 1,818.00				\$ -	\$ -	\$ -		\$ -	\$ -	\$ -	\$ 1,818.00							
<b>QUANTITY</b>	16.0	43.0	121.0	-	137.0	4.0	321.00		7.0	7.0	1,042.0															
<b>TOTAL COST</b>	\$ 4,848.00	\$ 10,492.00	\$ 24,805.00	\$ -	\$ 21,509.00	\$ 336.00		\$ 61,990.00	\$ 686.00	\$ 413.00	\$ 682.51	\$ 1,208.90	\$ 750.76	\$ 1,959.66	\$ 32,800.00	\$ 36,080.00	\$ 1,959.66	\$ 36,080.00	\$ 100,029.66							



**SCHEDULE OF PERSONNEL FEES – GREENSBORO, NORTH CAROLINA**  
**Effective until December 31, 2023**

Senior Consultant	\$307.00/hr
Principal	303.00/hr
Senior Associate	275.00/hr
Associate	244.00/hr
Senior Engineer/Scientist	205.00/hr
Project Engineer/Scientist	177.00/hr
Construction Resident Engineer/Resident Project Representative	177.00/hr
Senior Staff Engineer/Scientist/Technologist	157.00/hr
Staff Engineer/Scientist/Technologist	136.00/hr
Senior Technician II/Construction Resident Technician (see note 4)	129.00/hr
Senior Technician I (see note 4)	109.00/hr
Technician III (see note 4)	95.00/hr
Technician II (see note 4)	79.00/hr
Technician I (see note 4)	70.00/hr
CADD III	145.00/hr
CADD II	131.00/hr
CADD I	110.00/hr
Clerical/Admin	84.00/hr

**NOTES:**

1. Personnel fees will be based upon the actual hours charged times the appropriate hourly rate.
2. Travel by auto to and from jobs will be charged at the current IRS prevailing rate, plus a markup of 15% to cover handling, insurance and overhead. Travel by air or rail, lodging and meal expenses for personnel in the field will be billed at cost plus a 15% markup.
3. Per Diem rates for out-of-town or overnight travel will be in accordance with U.S. General Services Administration rates published on website [www.GSA.gov](http://www.GSA.gov) for the area in which the project is located.
4. Overtime for Technicians is time for work on Saturday, Sunday and federal holidays, time in excess of 8 hours per day, and time between the hours of 7:00 P.M. and 7:00 A.M. A surcharge of \$15/hr is added to the above rate for overtime.
5. Subcontractors and other non-labor project expenses are marked up 15% to cover the cost of handling, insurance and overhead.
6. Schedule of Fees will increase on January 1, 2024 and not less frequently than annually thereafter based on the Consumer Price Index as provided by the U.S. Department of Labor, Bureau of Labor Statistics – All Urban Consumers – U.S. City Average.

## PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement ("Agreement"), dated as of September 12, 2018 (the "Effective Date"), is by and between the **Town of Lake Lure** (hereinafter "Client"), with an office at 2948 Memorial Highway, Lake Lure, NC 28746 and **Schnabel Engineering South, P.C.** (hereinafter "Consultant") with an office at 11-A Oak Branch Drive, Greensboro, NC 27408 (hereinafter collectively "Parties").

This Agreement is specific to services ("Services") required to rehabilitate and/or upgrade Lake Lure Dam, its hydro-electric generating facility, and appurtenances to meet NCDEQ Dam Safety requirements and extend the service life of the facility ("Project"). Services may include review of existing documents, investigation of the existing condition of the structure, analysis of existing and proposed conditions, design of repairs or modifications, bidding support, construction administration and oversight, and related services. The work will be performed in phases, and the Scope of Work, fees and method of compensation, schedule, and deliverables of service will be presented in individual Task Order Proposals for each phase. Services provided under this Agreement will be performed under the supervision of a Professional Engineer licensed in the State of North Carolina.

In consideration of the mutual agreements herein expressed, the Parties contract, covenant, and agree as follows:

### 1. SCOPE OF SERVICES/COMPENSATION.

1.1 Consultant shall perform the Services set forth in individual Task Orders, which shall be governed by this Agreement. Each executed Task Order shall include the Scope of Work, fee compensation amounts and method of billing, the schedule of performance, and descriptions of the deliverables of Services..

1.2 Client shall pay Consultant for Services rendered under this Agreement on the basis set forth in each executed Task Order.

**2. TERM OF AGREEMENT.** Upon execution by the Parties, this Agreement shall have the Effective Date as set forth above and shall remain in force until all obligations related to the Services have been fulfilled, unless sooner terminated as provided herein.

### 3. ENTIRE AGREEMENT.

3.1 The Agreement between Consultant and Client consists of this Agreement, executed Task Orders, and any exhibits or attachments attached or incorporated herein. Together these elements will constitute the entire Agreement, superseding all prior written or oral negotiations, statements, representations, correspondence, and/or agreements. The Services to be provided by Consultant pursuant to this Agreement are described in each executed Task Order and include the Scope of Work. Both Client and Consultant must mutually acknowledge any changes to this Agreement in writing. All work performed by Consultant on or relating to the Project is subject to the terms and limitations of this Agreement.

3.2 If work is performed, but the parties do not reach agreement concerning modifications to the Scope of Work or compensation, then the terms and conditions of this Agreement apply to such work. Disputes concerning modifications to Scope of Work or compensation shall be resolved pursuant to Article 15, "Dispute Resolution."

### 4. STANDARD OF CARE, DISCLAIMER OF WARRANTIES.

4.1 Consultant shall perform Services under this Agreement in a manner consistent with the level of care and skill ordinarily exercised by members of the profession currently practicing in the same locality under similar conditions. NO OTHER REPRESENTATION AND NO WARRANTY OR GUARANTEE, EITHER EXPRESS OR IMPLIED, IS INCLUDED OR INTENDED BY THIS AGREEMENT.

### 5. SITE ACCESS, SITE CONDITIONS, SAMPLES.

5.1 Client will provide rights of entry and access for Consultant to perform its Services.

5.2 Consultant will take reasonable precautions to avoid damage or injury to subterranean structures or utilities in the prosecution of his work. Client agrees to advise Consultant of known or



suspected underground features in the area of the work, and Consultant will not be responsible for damage to below grade features not brought to its attention, or incorrectly shown on plans provided.

5.3 Client shall promptly pay and be responsible for the removal and lawful disposal of contaminated samples and cuttings, and hazardous substances, unless other arrangements are mutually agreed in writing.

## **6. OWNERSHIP OF DOCUMENTS, RESTRICTIONS ON REUSE.**

6.1 All documents, including opinions, conclusions, certificates, reports, drawings and specifications and other documents, prepared or furnished by Consultant and Consultant's independent professional consultants pursuant to this Agreement (collectively "Documents") are instruments of Service. Consultant retains all ownership and property interests in the Documents, including all common law, statutory and other reserved rights, including copyrights, whether or not the Project is completed. Consultant will provide signed and sealed versions of the final deliverables to the Client in both hard copy and electronic format. Client may make and retain copies of them for information and reference in connection with permitting, financing, bidding and construction of renovations and facility improvements relating to the Lake Lure Dam, Hydro-electric Plant and appurtenances as addressed by this Project; however, such copies are not intended or represented to be suitable for reuse by others, and may not be used on other projects or for additions to this Project outside the Scope of the Work.

6.2 At Client's request, Client may negotiate with Consultant to acquire ownership of Documents for a mutually agreed amount. If Client acquires ownership of Documents prepared by Consultant, Client agrees: a) that any subsequent reuse or modification of them by Client or any party obtaining them through Client will be at Client's sole risk and without liability to Consultant, and b) Client will defend, indemnify and hold harmless Consultant from and against any claims, damages, and liabilities arising from or related to any use, reuse or modification of Documents by Client or any party obtaining them through Client. Client agrees that Consultant may retain copies of all documents for its files.

6.3 Electronic communications and CADD data transferred by Email, websites or computer disks (collectively "E-Data") are provided only as an accommodation by Consultant for the benefit of Client. Signed paper prints of documents constitute the contract deliverables. Client assumes the risk that E-Data may differ from the paper deliverables. Client agrees to indemnify and hold harmless Consultant from and against claims, damages, and liabilities for defects or inappropriate use of E-Data created or transmitted by Consultant.

## **7. THIRD PARTY RELIANCE UPON DOCUMENTS.**

7.1 Consultant's performance of the Services, as set forth in this Agreement, is intended solely and exclusively for the Client's benefit and use. No party may claim under this Agreement as a third party beneficiary. Client agrees not to distribute, publish or otherwise disseminate Consultant's Documents, without first obtaining Consultant's prior written consent.

7.2 No third party may rely upon Consultant's Documents including, but not limited to, opinions, conclusions, certificates, reports, drawings and specifications unless Consultant has agreed to such reliance in advance and in writing.

## **8. ASSIGNMENT, SUBCONTRACTING.**

8.1 Neither Client nor Consultant may delegate, assign, sublet, or transfer all or any part of this Agreement, including its duties or interest in this Agreement without the written consent of the other party.

8.2 Notwithstanding Section 8.1, Consultant may subcontract subsurface exploration, testing, and other supplemental services without notification or consent of Client.

## **9. TERMINATION, SUSPENSION.**

9.1 Termination for Convenience. The Client may terminate this Agreement for its convenience upon twenty-one (21) days written notice to Consultant. In the event of termination for convenience, Consultant shall be compensated for all services satisfactorily performed and costs incurred up to the effective date of termination for which Consultant has not been previously compensated. Consultant shall not be reimbursed for anticipatory profits.

9.2 Termination for Cause. The Client may terminate this Agreement upon fourteen (14) days written notice may terminate this Agreement if Consultant fails to substantially perform through no fault of Client and does not commence correction of such performance within five (5) days of written notice and

diligently complete the correction thereafter. In the event of termination for fault, Consultant shall be compensated for all services satisfactorily performed and costs incurred up to effective date of termination for which Consultant has not been previously compensated. All costs and charges incurred by Client to complete the Services beyond the total compensation available under this Agreement when terminated shall be deducted from any compensation due or which may become due to Consultant, and to the extent such deduction is insufficient to cover such costs and charges to Client, Consultant shall be and remain liable to pay Client the amount of such excess.

9.3 Client's Failure to Pay. In the event of any failure of payment by Client when due, Consultant shall have the right to suspend work on the Project and may retain any and all work products whether prepared by Consultant or submitted to Consultant by others, until payment has been brought current. In such event, Consultant shall have no liability for any damages or losses that may result from any delay associated the suspension of work or for the withholding of work products. If Client's failure to pay continues for more than sixty (60) days, Consultant may terminate this Agreement effective upon written notice to Client.

#### **10. ALLOCATION OF RISK.**

10.1 Consultant's total cumulative liability to Client (including, but not limited to, attorneys' fees and costs awarded under this Agreement) irrespective of the form of action in which such liability is asserted by Client or others, shall not exceed the total compensation received by Consultant under this Agreement or \$3,000,000, whichever is greater.

10.2 Client and Consultant agree to limit each's liability to the other in the following respects: Neither party will have liability to the other for any special, consequential, incidental, exemplary, or penal losses or damages including but not limited to losses, damages or claims related to the unavailability of the other party's property or facility, shutdowns or service interruptions, loss of use, lost profits or revenue, inventory or use, charges or cost of capital or claims of the other party's customer.

10.3 The limitations of liability of this Agreement shall survive the expiration or termination of this Agreement.

#### **11. INSURANCE.**

11.1 Consultant shall procure and maintain for the duration of the Project and three years following, with insurance carriers reasonably acceptable to the Client, the following insurance coverage:

- (a) Commercial General Liability on an occurrence form, including coverage for premises and completed operations/products, Contractual Liability, General Aggregate per Project, "xcu" coverages
  - \$1,000,000 each occurrence
  - \$ 10,000 Medical Expenses
  - \$1,000,000 Personal and Advertising Injury
  - \$2,000,000 General Aggregate
  - \$2,000,000 Products/Completed Operations Aggregate
- (b) Automobile Liability - Including coverage for Owned, Hired, and Non-Owned Autos
  - \$1,000,000 Combined Single Limit
- (c) Workers Compensation and Employer's Liability
  - Statutory Limits for Workers Compensation
  - \$500,000 each accident
  - \$500,000 each occurrence by disease
  - \$500,000 by disease - policy limit
- (d) Umbrella Liability – applying over all above-referenced policies
  - \$10,000,000 each occurrence
- (e) Professional Liability
  - \$3,000,000 each claim
  - \$3,000,000 annual aggregate

11.2 Additional Insured. Except for Workers Compensation and Professional Liability, policies shall include Client as Additional Insured on a primary and noncontributory basis, to include ongoing and completed operations.

## **12. INDEMNIFICATION.**

12.1 Indemnification of Client. Subject to the provisions and limitations of this Agreement and to the extent allowable by law, Consultant agrees to indemnify and hold harmless Client, its shareholders, officers, directors, employees, and agents from and against any and all claims, suits, liabilities, damages, expenses (including without limitation reasonable attorney's fees and costs of defense) or other losses (collectively "Losses") to the extent caused by Consultant's negligent performance of its Services under this Agreement.

12.2 Indemnification of Consultant. Subject to the provisions and limitations of this Agreement and to the extent allowable by law, Client agrees to defend, indemnify and hold harmless Consultant from and against any and all claims by third parties related to services provided by Consultant under this Agreement, and against any and all Losses to the extent caused by the negligence of Client, its employees, agents and contractors. In addition, except to the extent caused by Consultant's sole negligence, Client expressly agrees to defend, indemnify and hold harmless Consultant from and against any and all Losses arising from or related to the existence, disposal, release, discharge, treatment or transportation of Hazardous Materials, or the exposure of any person to Hazardous Materials, or the degradation of the environment due to the presence, discharge, disposal, release of or exposure to Hazardous Material.

## **13. INVOICES, PAYMENTS.**

13.1 Payment is due without retainage upon presentation of invoice and is past due thirty (30) days from invoice date, and will not be contingent upon receipt of funds from third parties. Client agrees to pay a service charge of one percent (1%) per month or fraction thereof on past due payments under this Agreement.

13.2 It is further agreed that in the event a lien or suit is filed to enforce overdue payments under this Agreement, Consultant will be reimbursed by Client for all costs of such lien or suit and reasonable Attorney's fees in addition to accrued service charges, where the court of appropriate jurisdiction enters a finding in favor of Consultant.

**14. NOTICE.** All notices, requests, claims, demands and other communications hereunder shall be in writing. Such notices shall be given (i) by delivery in person, (ii) by a nationally recognized commercial courier service; or (iii) by United States Postal Service, registered mail, postage prepaid and return receipt requested. Notices shall be effective upon actual delivery at the following addresses:

**Client:** Town of Lake Lure  
2948 Memorial Highway  
Lake Lure, NC 28746

**Consultant:** Schnabel Engineering South, P.C.  
11-A Oak Branch Drive  
Greensboro, NC 27407

or to that address which the receiving Party may from time to time give notice to the other Party in writing. Rejection or other refusal to accept, or the inability to deliver because of changed address of which no notice was given, shall be deemed to be receipt of the notice as of the date of such rejection, refusal to accept or inability to deliver.

## **15. DISPUTE RESOLUTION.**

15.1 Claims, disputes, and other matters in controversy between Consultant and Client caused by or any way related to this Agreement will be submitted to non-binding mediation as a condition precedent to litigation. The cost for mediation including the mediator's fees, reproduction of documents, and miscellaneous out-of-pocket expenses will be borne equally by each party to this Agreement.

15.2 The law of the State of North Carolina will govern the validity of these terms, their interpretation and performance. Client and Consultant agree that venue for any litigation will be in the courts of the State of North Carolina, and Consultant and Client both hereby waive any right to initiate any action in, or remove any action to, any other jurisdiction.

**16. FORCE MAJEURE.**

16.1 Any delay in or failure of performance of, either party to this Agreement shall not constitute a default, if and to the extent such delay or failure is caused by occurrences beyond the reasonable control of the party affected, including but not limited to, acts of God or the public enemy, acts of war, public disorder, insurrection, rebellion, sabotage, flood, riot, or any causes a party is unable, with reasonable diligence, to prevent; provided, however, that a party who is prevented from performing for any reason shall immediately notify the other party in writing of the reason for the non-performance and the anticipated extent of any delay.

**17. SEVERABILITY.**

17.1 This Agreement reflects the entire agreement of the parties with respect to its terms and supersedes all prior agreements, whether written or oral. If any portion of this Agreement is void or voidable, such portion will be deemed stricken and the Agreement reformed to as closely approximate the stricken portions as the law allows.

**IN WITNESS WHEREOF**, the parties, by their duly authorized representatives, have hereunto executed this Agreement, on the day and year first above written.

**CONSULTANT:**

**Schnabel Engineering South, PC**

By: [Signature]

Name: Jonathan Pittman  
(print)

Title: Senior Vice President

Date: September 15, 2018

**CLIENT:**

**Town of Lake Lure**

By: [Signature]

Name: Kurtis J. Conkey  
(print)

Title: Mayor

Date: September 15, 2018

**Exhibits:**

None  
Rev 2018-08

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Discuss Capital Reserve for Buildings, Land, and Parks

**AGENDA INFORMATION:**

**Item Number:** IX  
**Department:** Administration  
**Contact:** Stephen Ford, Finance Director  
**Presenter:** Stephen Ford, Finance Director

**BRIEF SUMMARY:**

Town staff has proposed the creation of a capital reserve fund for the planning and funding of future building, development, and other land improvements. Initial funding would be appropriated through fund balance transfers equal to unexpended amounts approved in capital budget line items that were not expended during the last fiscal year. It is staff's opinion that creating this capital reserve is would result in an advantage for formal method to save funds for future capital expenditures.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Memo from Finance Officer Stephen Ford

**STAFF COMMENTS AND RECOMMENDATIONS:**

Staff recommends the future establishment of a capital reserve fund for buildings, development, and land improvements.

# memo

## TOWN OF LAKE LURE

To: The Mayor and Town Commissioners  
From: Stephen Ford, Finance Officer  
CC: Hank Perkins, Town Manager  
Olivia Stewman, Town Clerk  
Date: 10/20/2023  
Re: Establish a Capital Reserve Fund-Buildings, Development, Other Improvements

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Comments: The Finance Officer and staff, with support of the Town Manager, request Council establish a capital reserve fund and appropriate funds for the purpose of planning and funding future building, development, and other land improvements. At this time, no bonds or financing of funding is requested or recommended. Rather, funding would initially be appropriated through fund balance transfers equal to unexpended amounts approved in capital budget lime items that were not expended during the last fiscal year. A schedule is listed below.

As you know and have experienced in the past, Town Council must adopt an ordinance or resolution that states the following.

The purpose of which the fund is being created. (Council may accumulated funds for multiple capital projects within a single capital reserve fund, but each project must be listed separately (Example: the Towns Capital Fund related to the Dam-funded by assigned tax levy/rate)

The approximate period of time during which funds will be accumulated and expended for each project

The sources from which funds will be allocated to the fund. Note that each time Council makes an appropriation, the capital reserve fund must be amended to account for the additional revenue. It may also not be automatic-rather approved in each year's budget ordinance.

Advantages of this mechanism is a FORMAL method to save funds for future capital expenditures. It is more transparent because the Council must specify the capital projects for which it is accumulating funds. It can be less flexible-because once appropriated, the funds must be used for capital expenditures.

To note once more, capital projects will be need to be specific and not for general capital expenditures-but capital projects can be added-deleted or the nature of the capital projects can be changed. Funds just cannot be diverted to cover operating expenses.

548 Parking Lot (TDA Match)	200,000.00
555 PW Storage Bldg	400,000.00

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Review Recommended Personnel Policy Changes

**AGENDA INFORMATION:**

**Item Number:** X  
**Department:** Administration  
**Contact:** Jennifer Duncan, Human Resources  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

Town staff members have been in the process of reviewing the Personnel Policy and drafting recommended changes. The three major changes that need to be addressed are retiree health insurance benefits, overtime compensation, and transfer of sick time.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Recommended Personnel Policy Changes

**STAFF COMMENTS AND RECOMMENDATIONS:**

None at this time.

(Additions are underlined, removals are ~~struck through~~)

## Section 1. Insurance Benefits

The Town offers group hospitalization, dental insurance, vision, and life insurance. Such provisions and costs shall be as determined by the Town Board and budgeted. The Town may make other group insurance plans for dental, vision, and life insurance available for its employees upon authorization of the Council. The Town's medical insurance is through the NC State Health Plan effective July 1, 2007 and the Town must abide by the NC General Statutes. Details of medical care coverage and benefits will be outlined for each employee by the administrative office on request.

Insurance benefits including health, dental, vision and life are paid for by the town for full-time employees working a minimum of 30 hours per week. Employees may elect to include coverage for his or her family members at their expense. Benefits shall go into effect the first calendar day of the month ~~following 30 days~~ of employment.

~~Health insurance for eligible retired employees is provided by the North Carolina State Health Plan. Dental, vision and life insurance is provided to retirees at the same coverage level as regular employees.~~

The Town provides health insurance to eligible retirees. An eligible retiree is eligible who retires with the North Carolina Local Government Employees Retirement System (LGERS) after being employed as a full-time employee, for a minimum of five (5) consecutive years at the time of retirement.

(a) Employees in the health insurance plan before January 1<sup>st</sup>, 2021:

Health insurance for eligible retired employees who were covered by the North Carolina State Health Plan before January 1<sup>st</sup>, 2021 is provided by the North Carolina State Health Plan. These health benefits will be in effect until Medicare eligible. Dental, vision and life insurance is provided to retirees at the same



coverage level as regular employees. Retiree may elect to pay the premiums for dependents on vision and dental. This will be billed directly to retiree on an annual basis.

(b) Employees in the town's health insurance plan on or after January 1, 2021:

Health insurance for eligible retired employees who were in the health insurance plan on or after January 1, 2021 will be provided a health insurance plan comparable to the State Health plan after being on COBRA for eighteen (18) months after retirement. The Town will reimburse retiree for the cost of COBRA premiums paid for by the retiree. These health benefits will be in effect until Medicare eligible. Dental, vision and life insurance is provided to retirees at the same coverage level as regular employees. Retiree may elect to pay the premiums for dependents on vision and dental. This will be billed directly to retiree on an annual basis.

(Additions are underlined, removals are ~~struck through~~)

- (c) Employees required to work hours over the maximum allowed in the assigned work period shall be compensated for such overtime hours worked subject to the following provisions:
- (1) The maximum compensatory time that may be accrued by any non-exempt employee shall be 480 (320 overtime hours worked) for public safety and 240 (160 overtime hours worked) hours in all other Town positions. Employees are required to take accrued compensatory time before using accrued vacation and/or sick leave. Compensatory time will be paid out annually during the same fiscal year to each employee with a balance.
  - (2) Department Heads may, with prior approval of the Town Manager, pay employees for overtime work when it is not feasible to permit their absence for the purpose of taking compensatory time off.
  - (3) An employee whose employment is terminated shall receive pay for all compensatory time accrued but not taken.

(Additions are underlined, removals are ~~struck through~~)

(e) Sick Leave Accrual Transfer

Employees that have accrued sick leave in the service of any other governmental jurisdiction in North Carolina which is part of the North Carolina Local Governmental Employees' Retirement System or the State Employees' Retirement System who left that jurisdiction within good standing within ~~one~~ two year of being employed by the Town of Lake Lure may have the total amount of accrued sick leave transferred to their account with the Town upon request and upon presentation of a letter from their previous employer certifying the number of unused sick leave hours accrued by the employee.

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Continue Discussions Regarding Boys Camp Road/Parks and Recreation trust Fund (PARTF)

**AGENDA INFORMATION:**

**Item Number:** XI  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

As discussed at previous meetings, Town staff found that cell towers are prohibited by Parks and Recreation Trust Fund (PARTF) guidelines for land acquisition. The Town received a PARTF grant for an acquisition project for Boys Camp Road in 2019. At the time of award, the Town had no plans to place a cell tower on the property, but it is now a priority that the Town have the cell tower constructed on the property to increase public safety. Town Council and staff previously discussed the Town's options which include converting a different property that is not currently owned by the town and must be appraised at the same value as the Boys Camp Property per today's value or paying back the funds. Council will continue to discuss options and determine the best course of action to regaining compliance with PARTF.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

N/A

**STAFF COMMENTS AND RECOMMENDATIONS:**

Town staff has noted that the process for converting a different property would be a longer process than paying back the funds.

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Review Maintenance Agreement for New Electric Vehicle Chargers and  
Discuss Charging for use of Chargers to Cover Town Costs

**AGENDA INFORMATION:**

**Item Number:** XII  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

The Town's electric vehicle (EV) charging stations recently stopped functioning properly. Town staff is recommending that the EV charging stations be replaced with NovaCHARGE stations. NovaCHARGE has provided the Town with a proposed maintenance agreement that includes a term of three years and would automatically renew unless otherwise notified.

Furthermore, Town staff is recommending the pass-through of the electric charge and Town costs to the users of the chargers through a minimal charging fee.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Maintenance Agreement; Warranty and Product Registration

**STAFF COMMENTS AND RECOMMENDATIONS:**

Town staff recommends that Council approve the NovaCHARGE Maintenance Agreement at the next regular meeting.

**NovaCHARGE  
ChargeUP  
SERVICES AND SUBSCRIPTION AGREEMENT**

**IMPORTANT – READ CAREFULLY:** This is a legal agreement (“Agreement”) between you (“SUBSCRIBER”) and NovaCHARGE, LLC (“NovaCHARGE”).

**IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, DO NOT INSTALL OR USE THE CHARGEUP SERVICE, ASSOCIATED DOCUMENTATION, OR ANY PORTION THEREOF AND DO NOT REQUEST OR ACCEPT SUPPORT SERVICES FROM CHARGEUP. BY ACCESSING THE CHARGEUP SERVICE YOU ARE DEEMED TO ACCEPT THIS AGREEMENT. WARRANTIES, SUPPORT, LICENSES, AND DAMAGES ARE DISCLAIMED AND/OR LIMITED BELOW, PLEASE READ ENTIRELY AND CAREFULLY.**

NovaCHARGE principal place of business: 4201 Vineland Rd, Ste I-5, Orlando, FL 32811 (“NovaCHARGE”); and

**WHEREAS:**

- A. NovaCHARGE is a provider of ChargeUP (as defined below) for managing the charging of electric vehicles.
- B. The Subscriber is an owner and/or operator of Charging Stations (defined below) and wishes to register its Charging Stations on ChargeUP and to avail itself of the ChargeUP Network Services (as defined below) for the Charging Stations on the terms and subject to the conditions set out in this Agreement. The following Subscriber scenarios are supported:
  - (1) The Subscriber may be a “Host,” which operates Charging Stations, setting pricing and usage rules, as provided to them by a Subscriber that owns the Charging Station and is a Station Manager;
  - (2) The Subscriber may be a “Station Manager,” which owns the Charging Station, but does not set pricing and usage rules; and
  - (3) The Subscriber may be both a Station Manager and a Host.
- C. To enable the Subscriber to use the ChargeUP Network Services, NovaCHARGE will grant the Subscriber the right to access ChargeUP and use the ChargeUP Network Services on the terms and subject to the conditions set out in this Agreement so that a Driver can charge their electric vehicle (EV).

**OPERATIVE PROVISIONS**

In consideration of, among other things, the mutual agreements and obligations contained in this Agreement, the parties agree as follows:

**1. DEFINITIONS**

As used in this Agreement, the following terms have the following meanings:

“Authorization” means the (i) Subscriber may grant a Known Driver with the right to access a Charger, based on usage and pricing rules or (2) the Subscriber authorizing new administrative users to use the ChargeUP system as one of their licensed users.

“Business Day” means a day (other than a Saturday, Sunday or public holiday) on which banks in the United States of America are open for general banking business.

“ChargeUP” means services provided by NovaCHARGE for a managing the charging of electric vehicles and for providing ChargeUP Network Services as more fully described at [www.novacharge.net](http://www.novacharge.net).

“ChargeUP Network Services” has the meaning set out in Section 4.1.

“Charging Session” means a session during which a Driver is using the Subscriber’s Networked Charging Station to charge their electric vehicle and which lasts for a continuous period of time commencing when a Driver has accessed such Networked Charging Station and ending when such Driver has terminated such access.

“Charging Station” means an electric vehicle charging station owned or leased by the Subscriber.

“Collection and Processing Fees” means the fees charged by NovaCHARGE for the management, collection and processing of Session Fees on behalf of the Subscriber and the remittance of any balance to the Subscriber.

“Commissioning” means activation of a Charging Stations onto ChargeUP.

“Confidential Information” has the meaning set out in Section 10.

“Driver” means a person or entity of an electric vehicle that avails itself of charging and other services from any Networked Charging Station.

“Driver Fee” means the fees charged to a Driver for a Charging Session.

“Deduction” means the amounts withheld by NovaCHARGE from the amounts charged to a Driver for a Charging Session to cover (i) a Collection and Processing Fee; (ii) Driver Fee; and (ii) to the extent required, applicable Taxes and Regulatory Charges.

“Fees” has the meaning set out in Section 5.1.

“Net Session Fee” means a transaction fee that is charged to the Driver for each Charging Session. The Net Session Fee can be paid by the Host or the Driver.

“NovaCHARGE Services” means, collectively, the various service offerings made available for subscription from time to time by NovaCHARGE.

“NovaCHARGE Marks” means the various trademarks, service marks, names and designations used in connection with the NovaCHARGE products and services, including, without limitation, the mark “NovaCHARGE” and “ChargeUP.”

“Initial Term” shall mean the purchased period on the sale invoice, commencing on the Effective Date.

“Insolvency Event” shall be deemed to have occurred, in relation to any person or entity, when such person or entity files, or consents to the filing against it, a petition for relief under any bankruptcy or insolvency laws, makes an assignment for the benefit of creditors or consents to the appointment of a receiver, liquidator, assignee, custodian, trustee or other official with similar powers over a substantial part of its property; or a court having jurisdiction over such person or entity or any of the property of such person or entity shall enter a decree or order for relief in respect thereof in any involuntary case under any bankruptcy or insolvency law, or shall appoint a receiver, liquidator, assignee, custodian, trustee or official with similar powers over a substantial part of the property of such person, or shall order the winding-up, liquidation or rehabilitation of the affairs of such , and such order of decree shall continue in effect for a period of sixty (60) consecutive days.

"Intellectual Property Rights" or "IPRs" shall mean all intellectual and industrial property rights of whatever nature anywhere in the world and all rights pertaining thereto, whether recorded or registered in any manner, or otherwise, including without prejudice to the foregoing generality, patents, trademarks, registered designs (including applications for any of the same), copyright, design rights, semi-conductor topography rights, database and software rights, mask works, trade secrets, know-how, business names, trade names, brand names, domain names and all other legal rights anywhere in the world protecting such intangible property.

"Known Driver" means a Driver who is known or has a business relationship with the Subscriber. Examples of Known Drivers are fleet drivers, employees or residents, associated with the Subscriber.

"Networked Charging Stations" means any Charging Stations that have been registered and activated on ChargeUP. Each charge connector or charge port of a Charging Station is considered as one Networked Charging Station; accordingly, a dual port Charging Station counts as two Networked Charging Stations.

"Personally Identifiable Information" or "PII" means information that can identify the Driver.

"Session Fees" means the fees set by the Subscriber for a Charging Session, including any applicable Taxes and/or Regulatory Charges.

"Subscribed Services" means any Services subscribed for by the Subscriber.

"Subscriber Data" has the meaning set out in Section 6.3.

"Subscription Fees" means the fees charged by NovaCHARGE for the use of the ChargeUP Network Services per Networked Charging Station per year set forth in Annexure C or the quote provided by NovaCHARGE.

"Term" means (i) the Initial Term, and (ii) each Additional Term, unless this Agreement is terminated earlier pursuant to Section 8.

## **2. NOVACHARGE RESPONSIBILITIES**

2.1 NovaCHARGE Responsibilities. Subject to the terms and conditions of this Agreement, NovaCHARGE agrees to (a) operate, maintain, administer and support ChargeUP and (b) provide the Subscribed Services to the Subscriber and its Networked Charging Stations.

2.2 License of ChargeUP. In connection with its obligations under Section 2.1, NovaCHARGE hereby grants to the Subscriber, and the Subscriber hereby accepts, a non-transferable and non-exclusive right and license to use ChargeUP during the Term.

2.3 Limitations. NovaCHARGE shall not be responsible for, and makes no representation or warranty with respect to, the following: (i) continued and uninterrupted availability of sufficient electrical power to any of the Subscriber's Charging Stations and consequently any failure or interruption to ChargeUP and the ChargeUP Network Services; (ii) continued and uninterrupted availability of any wireless or cellular communications network or internet service provider network services necessary for the continued operation by NovaCHARGE of ChargeUP and/or the provision of the ChargeUP Network Services; and/or (iii) any Charging Stations that are not Networked Charging Stations.

2.4 Non-Exclusive Basis. The participation of the Subscriber and its Networked Charging Stations and the provision of the ChargeUP Network Services to the Subscriber shall be on a non-



exclusive basis and NovaCHARGE shall, at all times and at any time, be entitled to permit similar participation and provide similar services to any other party, whether such party is a competitor of the Subscriber or otherwise, without restriction on such terms as NovaCHARGE may at its sole discretion determine without reference to the Subscriber.

### **3. SUBSCRIBER RESPONSIBILITIES**

- 3.1 Subscriber's Responsibilities. The Subscriber shall be responsible for: (a) notifying NovaCHARGE of any new Charging Stations to be registered as Networked Charging Stations, which shall include providing NovaCHARGE with full specifications and descriptions in relation to each such Charging Station, and to register and activate such new Charging Stations on ChargeUP; (b) operating and maintaining the Networked Charging Stations in compliance with all applicable laws and contractual obligations; (c) providing NovaCHARGE with advance written notice of the relocation or decommissioning of any Networked Charging Stations or of Networked Charging Stations that are non-operational or not intended to be replaced or repaired by the Subscriber; (d) the maintenance and updating of all Known Driver information; (e) all invoicing and Known Driver payment matters; and (f) assisting to obtain any permits, licenses or regulatory approvals as may be required for the use by the Subscriber of ChargeUP.
- 3.2 Subscriber's Representations and Warranties. The Subscriber represents and warrants to NovaCHARGE that: (a) it has the power and authority to enter into and be bound by this Agreement; (b) all Networked Charging Stations and any electric vehicle charging products used with such Networked Charging Stations have been properly installed and are operated in a duly authorized manner; (c) the electrical usage to be consumed by Subscriber's Networked Charging Stations will not violate or otherwise conflict with the terms and conditions of any applicable electrical purchase or other agreement including, without limitation, any lease, to which Subscriber is a party; and (d) it has not installed or attached Networked Charging Stations on or to infrastructure not owned by Subscriber without proper authority, or in a manner that will block any easement or right of way.
- 3.3 Subscriber's Undertakings. The Subscriber further undertakes to NovaCHARGE that: (i) it will not remove, conceal or cover the NovaCHARGE Marks or any other markings, labels, legends, trademarks, or trade names installed or placed on the Networked Charging Stations or any peripheral equipment for use in connection with the Networked Charging Stations; (ii) the Subscriber shall comply with, and shall have responsibility for and cause its employees and agents accessing or using ChargeUP to comply with, all of the rules, regulations and policies of NovaCHARGE as may from time to time be notified by NovaCHARGE to the Subscriber (and the display or availability of any such rules, regulations and policies (and any variation or changes thereto) on any portal or service to which the Subscriber has access, shall constitute due notice to Subscriber, its employees and agents); (iii) the Subscriber shall be responsible for using the ChargeUP Network Services in compliance with applicable laws and this Agreement, and in particular, shall: (A) use commercially reasonable efforts to prevent unauthorized access to any ChargeUP Network Services, (B) not sell, resell, license, rent, lease, transfer or grant access to ChargeUP to a third party, (C) not interfere with or disrupt the integrity of ChargeUP, the ChargeUP Network Services or any data contained therein, and (D) not attempt to gain unauthorized access to ChargeUP or the ChargeUP Network Services or their related systems or networks.
- 3.4 Driver App Agreement. Subscriber acknowledges that its Drivers will be required to enter into a ChargeUP App agreement through their smartphones with NovaCHARGE in order to be able to use a Networked Charging Station to charge an EV.

### **4. CHARGEUP NETWORK SERVICES**

- 4.1 Collection Services. See Annexure A for information on the ChargeUP Network Services. Where the Subscriber levies charges on Drivers and NovaCHARGE is engaged to provide management,

collection and/or processing services for such charges:

- 4.1.1 The Subscriber shall have sole authority to determine and set in real-time the Session Fees (which shall include all applicable Taxes and Regulatory Charges, each as defined below) applicable to Subscriber's Networked Charging Stations.
  - 4.1.2 In exchange for NovaCHARGE collecting Session Fees on behalf of the Subscriber, the Subscriber hereby authorizes NovaCHARGE to deduct from all Session Fees collected: (i) a Collection and Processing Fee; and (ii) to the extent required, applicable Taxes and Regulatory Charges.
  - 4.1.3 NovaCHARGE shall remit the equivalent of the balance of the Session Fees net of the deductions made pursuant to Section 4.1.2 to the Subscriber not more than thirty (30) days after the end of each calendar quarter in which such Session Fees were collected to such account designated in writing by the Subscriber, but only if the Session Fees payable to Subscriber are greater than twenty-five dollars (\$25.00). Any Session Fees held back in accordance with the prior sentence will be accumulated until they exceed the required amount.
  - 4.1.4 Unless required by law or otherwise stated herein, Collection and Processing Fees do not include any taxes, levies, duties or similar governmental assessments of any nature, including, but not limited to, value added, sales, local, city, state or federal taxes ("Taxes") or any fees or other assessments levied or imposed by any governmental regulatory agency ("Regulatory Charges"). The Subscriber shall be responsible for the payment of all Taxes and Regulatory Charges incurred in connection with any Session Fees; provided that, NovaCHARGE is solely responsible for all Taxes and Regulatory Charges assessable based on NovaCHARGE' income, property and employees. Where NovaCHARGE is required by law to collect and/or remit the Taxes or Regulatory Charges for which the Subscriber is responsible, the appropriate amount shall be invoiced to the Subscriber and deducted by NovaCHARGE from Session Fees, unless Subscriber has otherwise provided NovaCHARGE with a valid tax or regulatory exemption certificate or authorization from the appropriate taxing or regulatory authority.
- 4.2 Provision of Assistance, Training and Maintenance Services. NovaCHARGE shall supply training, technical assistance and maintenance with respect to the ChargeUP Network Services to the Subscriber, as set out at [www.chargeup.net](http://www.chargeup.net).
- 4.3 Services and Service Levels. The service levels applicable to the provision of ChargeUP to the Subscriber shall be as set out in Annexure B.
- 4.4 Non-Transferability. All ChargeUP Network Services and Services shall be non-transferable; provided that ChargeUP Network Services subscribed for in relation to a Networked Charging Station that is to be de-commissioned may be transferred to a Networked Charging Station that is purchased by Subscriber to replace such de-commissioned Networked Charging Station.

## 5. FEES

- 5.1 Fees. In consideration of the Services provided hereunder, the Subscriber shall pay NovaCHARGE the following fees (collectively, the "Fees"):
- 5.1.1 Subscription Fees payable the sooner (i) upon registration and activation of a Networked Charging Station on ChargeUP or (ii) when the Charging Station is provided by NovaCHARGE, sixty (60) days of the delivery of the Charging Station. No refund or pro-rating of Subscription Fees shall be available for any Networked Charging Stations that are decommissioned during the year; and,

- 5.1.2 Collection and Processing Fee shall be payable upon the Subscriber commencing the levy of charging fees on Drivers, and shall be paid, by either the Subscriber or passed to driver, to NovaCHARGE for each Charging Session used by a Driver where a Session Fee applies, payment of which shall be set off against Session Fees collected by NovaCHARGE, or in case of insufficient Session Fees, billed separately.
- 5.2 Additional Services. Where the Subscriber requires additional services to be provided by NovaCHARGE, including but not limited to, customization of web design interfaces, additional software and/or hardware integration services, which are not included in the scope of Services, such additional services shall be subject to additional fees to be mutually agreed between the Subscriber and NovaCHARGE.
- 5.3 Adjustments to Pricing.
- 5.3.1 NovaCHARGE undertakes that there shall be no increase in the Subscription Fees payable for each Networked Charging Station during the first year of the Initial Term.
- 5.3.2 The parties agree that NovaCHARGE shall be entitled to adjust the Collection and Processing Fee at its sole discretion upon one-hundred and twenty (120) day prior notice.
- 5.4 Payment of Fees. The Subscriber agrees that:
- 5.4.1 The Subscriber shall pay all Fees within thirty (30) days of its receipt of an invoice with respect thereto. Except as otherwise specified herein, all Fees shall be quoted in and payable in US Dollars.
- 5.4.2 If any invoiced Fees are not received by NovaCHARGE by the due date, then such outstanding amount: (i) may accrue late interest at the rate of one and one-half percent (1.5%) of the outstanding balance per month, or the maximum rate permitted by law, whichever is lower ("Late Payment Interest Rate"), from the date such payment was due until the date on which such payment is received by NovaCHARGE in cleared funds, and (ii) in the event the Subscriber has not paid Fees within thirty (30) days of the due date, NovaCHARGE may, at its sole discretion, impose additional conditions in connection with future renewals of any NovaCHARGE Services and acceptance of purchase orders for additional NovaCHARGE Services other than those set forth herein.
- 5.4.3 If any amount owing by the Subscriber under this Agreement is more than thirty (30) days overdue, NovaCHARGE may, without otherwise limiting NovaCHARGE' rights or remedies available under law, terminate this Agreement, and/or suspend the use by the Subscriber of the NovaCHARGE Services until such amounts are paid in full.

## 6. OWNERSHIP OF INTELLECTUAL PROPERTY

- 6.1 Validity and Ownership. The Subscriber acknowledges and admits the validity, and NovaCHARGE' and its licensors ownership, of all Intellectual Property Rights in relation to the ChargeUP Network Services, the NovaCHARGE Marks, ChargeUP and the NovaCHARGE Services (collectively the "NovaCHARGE Intellectual Property"), and agrees that it will not, directly or indirectly, challenge or contest the validity of the NovaCHARGE Intellectual Property, or any registrations thereof and/or applications therefore in any jurisdiction, or the right, title and interest of NovaCHARGE therein and thereto, nor will it claim or register any interest in the NovaCHARGE Intellectual Property in any jurisdiction, other than the rights expressly granted hereunder.
- 6.2 Property of NovaCHARGE. The Subscriber acknowledges that (i) as between the parties, all Intellectual Property Rights in the NovaCHARGE Intellectual Property are and will remain the exclusive property of NovaCHARGE and its licensors and (ii) as between the parties, all uses of

the NovaCHARGE Intellectual Property, except for its Use by the Subscriber pursuant to this Agreement, shall inure solely to the benefit of NovaCHARGE. The Subscriber shall not at any time do or suffer to be done any act or thing that will in any way impair the rights of NovaCHARGE and its licensors in and to the NovaCHARGE Intellectual Property. Nothing in this Agreement grants, nor shall the Subscriber acquire hereby, any right, title or interest in or to the NovaCHARGE Intellectual Property or any underlying or third-party Intellectual Property Rights inhering therein, or any goodwill associated therewith, other than those rights expressly granted hereunder. This Agreement shall not affect NovaCHARGE' right to enjoin or obtain relief against any acts by third parties or trademark or patent infringement or unfair competition, or any other action that NovaCHARGE may take to protect NovaCHARGE's and its licensors' Intellectual Property Rights.

6.3 Property of the Subscriber. The parties agree that all data contributed directly by the Subscriber and which is owned by the Subscriber, or licensed directly to the Subscriber by any party other than NovaCHARGE, prior to the inclusion of such data in the ChargeUP Network Services (collectively, the "Subscriber Data") is and will remain the exclusive property of the Subscriber and will inure solely to the benefit of the Subscriber. NovaCHARGE shall be granted such access to the Subscriber Data: (a) as may be necessary to enable NovaCHARGE to perform its obligations hereunder; (b) in order to respond to service or technical problems which may arise from time to time and at any time; and/or (c) otherwise at the Subscriber's discretion. All data collected by NovaCHARGE in connection with the operation of ChargeUP shall be jointly owned by NovaCHARGE and Subscriber, with both Parties retaining independent rights to use the data. NovaCHARGE may use Subscriber Data in an anonymized and aggregate form for providing ChargeUP.

6.4 License. NovaCHARGE shall have a royalty-free, worldwide, transferable, sublicensable, irrevocable perpetual license to use or incorporate in ChargeUP and/or the NovaCHARGE Services any suggestions, enhancement requests, recommendations improvements or other feedback provided by the Subscriber and/or Subscriber Authorized Users relating to any and all of ChargeUP and the NovaCHARGE Services.

## **7. NO ASSIGNMENT OR SUBLICENCES**

7.1 No Assignment. Neither party may assign any of its rights or obligations hereunder, whether by operation of law or otherwise, without the express written consent of the other party. Notwithstanding the foregoing either party may assign this agreement together with all rights and obligations hereunder, without consent of the other party, in connection with a merger, acquisition, corporate reorganization, or sale of any or substantially all of its assets provided the assignee agrees in writing to comply with all applicable provisions of the Agreement, including protecting Confidential Information. This Agreement shall not be assignable by the Subscriber to any direct or indirect competitor of NovaCHARGE engaging in developing electric vehicle charging hardware and/or software and any attempt to assign without such consent shall be void. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and permitted assigns.

7.2 No Sub-Licensing. Except as otherwise set forth herein, the License, the NovaCHARGE Services and the rights granted to the Subscriber under this Agreement shall not be sub-licensed by the Subscriber without the prior written authorization of NovaCHARGE.

## **8. TERM AND TERMINATION**

8.1 Term. This Agreement shall commence on the Effective Date, during which the access to ChargeUP, the License and the subscription for the NovaCHARGE Services shall continue until the expiration of all of the Subscriber's service plans.

8.2 Auto Renewal. Unless either party gives the other party written notice, not later than 60 days prior

to the last day of the Initial Term, of its intent to terminate this Agreement at the end of the Initial Term, this Agreement shall automatically renew for an additional term of one (1) calendar year (each such additional calendar year term to be referred to as an "Additional Term") at the same Fees unless otherwise agreed by the parties. Either party may terminate this Agreement during any Additional Term by giving written notice to the other party at least 60 days prior to the last day of such current Additional Term or in such other manner as may be otherwise provided in this Agreement, failing which this Agreement shall again automatically be renewed for a subsequent Additional Term.

### 8.3 Early Termination for Cause by NovaCHARGE.

8.3.1 NovaCHARGE may terminate the license granted to the Subscriber hereunder and terminate this Agreement immediately upon five (5) Business Days' prior written notice to the Subscriber, if:

8.3.1.1 an Insolvency Event has occurred in relation to the Subscriber;

8.3.1.2 the Subscriber breaches any material provision of this Agreement and fails to cure such breach within thirty (30) days following the Subscriber's receipt of written notice thereof from NovaCHARGE; or

8.3.1.3 (i) the Subscriber is more than 60 days late in the payment of Fees or any other payments due and owing (and documented) to NovaCHARGE; (ii) the Subscriber has received prior notices of such Fees and/or other payments from NovaCHARGE and requests for payments therefore; and (iii) the Subscriber fails to cure such late payment within 7 days following such written notice from NovaCHARGE.

8.3.2 Upon any termination of this Agreement pursuant to Section 8.3.1 above, subject to the additional terms and conditions hereof, all rights in the ChargeUP Network Services granted to the Subscriber hereunder shall automatically revert to NovaCHARGE, and the Subscriber shall have no further rights in, and shall immediately cease all use of, the ChargeUP Network Services. The Subscriber shall also promptly return or destroy all documents (including copies), diskettes, tapes and other material (in whatsoever medium) held by the Subscriber in relation to the ChargeUP Network Services to NovaCHARGE upon written demand therefor by NovaCHARGE. The failure of NovaCHARGE to make any such demand initially shall not operate as a waiver by NovaCHARGE of this provision.

8.4 Early Termination for Cause by the Subscriber. The Subscriber may terminate this Agreement immediately upon 5 Business Days' prior written notice to NovaCHARGE, if:

8.4.1 an Insolvency Event has occurred in relation to NovaCHARGE; or

8.4.2 NovaCHARGE breaches any material provision of this Agreement and fails to cure such breach within thirty (30) days following NovaCHARGE' receipt of written notice thereof from the Subscriber.

## 9. LIMITATION OF LIABILITY

9.1 LIMITATION OF NOVACHARGE'S LIABILITY. EXCEPT AS EXPRESSLY SET FORTH HEREIN, ACCESS TO CHARGEUP, THE LICENSE AND THE NOVACHARGE SERVICES ARE PROVIDED BY NOVACHARGE WITHOUT ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. IN NO EVENT WILL NOVACHARGE OR ITS LICENSORS BE LIABLE TO THE SUBSCRIBER OR ANY THIRD PARTY FOR ANY INDIRECT,

INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES RESULTING FROM THE USE OF CHARGEUP, OR OTHERWISE ARISING OUT OF THIS AGREEMENT, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING THE FOREGOING, IN NO EVENT WILL NOVACHARGE'S OR ITS LICENSORS AGGREGATE LIABILITY TO THE SUBSCRIBER PURSUANT TO THIS AGREEMENT EXCEED THE TOTAL SUM OF ANY FEES RECEIVED BY NOVACHARGE FROM THE SUBSCRIBER IN THE TWELVE CALENDAR MONTHS IMMEDIATELY PRIOR TO THE DATE ANY SUCH CLAIM IS MADE. FOR THE AVOIDANCE OF DOUBT, NOVACHARGE SHALL OWE NO LIABILITY TO THE SUBSCRIBER OR ITS DRIVERS FOR ANY BREACH BY THE SUBSCRIBER OF ITS CONTRACTUAL OBLIGATIONS TO SUCH DRIVERS INCLUDING BUT NOT LIMITED TO, ANY FAILURE BY THE SUBSCRIBER TO COMPLY WITH ITS SERVICE LEVEL AGREEMENTS UNLESS SUCH LIABILITY ARISES AS A RESULT OF FRAUD OR GROSS NEGLIGENCE ON THE PART OF NOVACHARGE.

## 10. CONFIDENTIALITY

- 10.1 Each party agrees to keep confidential the terms of this Agreement and all information, documents and materials, whether printed or oral, relating to this Agreement, the parties and the transactions contemplated hereunder ("Confidential Information") confidential and not to disclose such Confidential Information except:
- 10.1.1 with the prior written consent of the other party;
  - 10.1.2 as may be required by applicable laws or by the rules of any stock exchange or other authority by which a party may be bound (in which case the disclosing party shall immediately notified the other party thereof);
  - 10.1.3 to its professional advisers, employees, officers or other representatives; and
  - 10.1.4 to any advisors and professional services providers which may be appointed by a party to give effect to the obligations of such party under this Agreement.

## 11. MISCELLANEOUS

- 11.1 No Partnership. Nothing in this Agreement shall create a partnership or establish a relationship of principal and agent or any other fiduciary relationship between or among any of the parties.
- 11.2 Remedy. No remedy conferred by any of the provisions of this Agreement is intended to be exclusive of any other remedy available at law, in equity, by statute or otherwise. Each and every other remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law in equity, by statute or otherwise. The election by any party to pursue one or more of such remedies shall not constitute a waiver by such party of the right to pursue any other available remedy. The parties agree that monetary damages may not be a sufficient remedy for the damage which would accrue to a party by reason of failure by any other party to perform certain of the obligations hereunder. Any such party shall, therefore, be entitled to seek injunctive relief, including specific performance, to enforce such obligations.
- 11.3 Costs and Expenses. The parties agree that unless expressly provided otherwise in this Agreement, each of the parties shall bear its own respective costs and expenses, legal or otherwise, reasonably incurred in relation to preparation, negotiation and execution of this Agreement and all ancillary documents.
- 11.4 Further Assurance. Each of the parties shall, and shall use its reasonable endeavors to procure that any necessary third parties shall, execute and deliver to the other party such other instruments and documents and take such other action as may be required to carry out, evidence and confirm the provisions of this Agreement.

- 11.5 Public Announcements. Subject as required by law or by any relevant regulatory authorities, all announcements and circulars by or on behalf of any of the parties and relating to the subject matter of this Agreement shall be in terms to be agreed between the parties in advance of issue.
- 11.6 Entire Agreement. This Agreement sets forth the entire agreement and understanding between the parties in connection with the license granted hereunder and the arrangements described herein and supersedes all prior oral and written agreements, memoranda, understandings and undertakings between the parties.
- 11.7 Variations. No purported variations of this Agreement shall be effective unless made in writing by all the parties.
- 11.8 Severability of Provisions. If any term or provision in this Agreement shall be held to be illegal or unenforceable, in whole or in part, under any enactment or rule of law, such term or provision or part shall, to that extent, be deemed not to form part of this Agreement but the enforceability of the remainder of this Agreement shall not be affected.
- 11.9 No Waiver. A party's failure to insist on strict performance of any provision of this Agreement shall not constitute a waiver thereof or of any right or remedy for breach of a like or different nature. Subject as aforesaid, no waiver shall be effective unless specifically made in writing and signed by a duly authorized officer of the party granting such waiver.
- 11.10 Counterparts. This Agreement may be entered into in any number of counterparts and by the parties on separate counterparts, each of which when executed and delivered shall be an original, but all the counterparts shall together constitute one and the same instrument.
- 11.11 Notices. All notices, requests, demands and other communications given by any of the parties hereunder shall be in writing and shall be given only by personal delivery, registered mail or courier service or sent by facsimile transmission or electronic mail to the addresses and facsimile numbers set out below:

For NovaCHARGE: 4201 Vineland Road, Ste I-5  
Orlando, FL 32811  
Attention: President & COE

For the Subscriber: Address provided by Subscriber or included in the quote provided by NovaCHARGE.

or to such other address or facsimile number as the parties may from time to time notify the others in writing. Any such communication shall be deemed duly given in the case of personal delivery and courier service upon delivery and receipt of written acknowledgement thereof, in the case of registered mail ten days after posting, in the case of facsimile transmission upon transmission and receipt of a satisfactory transmission transcript; *provided* that if such day is not a Business Day or such time not a normal business hour then delivery shall be deemed to have occurred on the following Business Day.

11.12 Governing Law; Dispute Resolution.

11.12.1 This Agreement shall be governed by, and construed and enforced in accordance with the laws of the state of Florida, without giving effect to any principles of conflict of laws.

11.12.2 Any action or arbitration arising from this Agreement related thereto shall be commenced and maintained only in the State of Florida. Each of the parties hereto consents to the jurisdiction and venue of the courts located there.

- 11.12.3 Any dispute arising from this Agreement or related thereto shall be resolved by binding arbitration as provided by the rules of the Arbitration Rules and Procedures of the Judicial Arbitration and Mediation Services, Inc. (JAMS) then in effect, by one or more commercial arbitrator(s) with substantial experience in the industry and in resolving complex commercial contract disputes in Orlando, Florida.
- 11.12.4 The parties each expressly waive the right to a jury trial, and agree that the arbitration award shall be final and binding on the parties. The arbitrator(s) shall have the discretion to award monetary and other damages, or to award no damages, and to fashion any other relief the arbitrator deems appropriate, but only to the extent consistent with law.
- 11.12.5 The reasonable expenses incurred in any proceeding to compel arbitration or to confirm or enforce an arbitral award or any resulting judgment, including attorney's fees shall be paid to the prevailing party in such a proceeding. Each party shall bear its own expenses, including attorney's fees, incurred during arbitration.



## ANNEXURE A

### ChargeUP

The ChargeUP Network Services consists of an integrated Internet-based platform, ChargeUP network, that has interactive communication with Networked Charging Stations. The platform is made up of:

1. A back-end communications server with an integrated database
2. A front-end user interface for Subscriber administration of Chargers and associated business models
3. A front-end user interface for Driver reporting and account administration
4. A mobile phone application for Driver access that is available on Android and iOS operating systems.
5. A Driver and Subscriber payment collection and settlement system
6. A Charger and Driver data collection and reporting system
7. A call center for Driver technical and payment support

Together, the ChargeUP Network Services performs the following functions:

1. Provides a list of Charging Stations belonging to the Subscriber, including all pertinent information such as location address, serial number, manufacturer, model, charging access type and pricing for energy dispensed to Drivers, if applicable
2. Reports the availability and health status of Charging Stations, and current state of use, including whether they are in-use, faulted, available or temporarily out of communication.
3. Enables the Subscriber to set a price for energy dispensed to Drivers from these Charging Stations
4. Provides a payment method for Drivers to pay for use of these Charging Stations
5. Provides a payment processor which complies with Payment Card Industry ("PCI") Data Security Standard DSS") of Visa and MasterCard.
6. Collects usage and charging data from these Charging Stations and provides them to the Subscriber in various reporting formats
7. Provides first level technical support to Drivers and provides them to the appropriate Charging Station manufacturer for escalation
8. Provides downloadable usage reports on a daily, weekly, monthly or annual basis consisting of individual charge session data (including station ID, start time, end time, total duration, total kWh and total revenue, as appropriate)
9. Provides Subscribers with monthly billing statements and reports detailing total revenue collected from Session Fees and total NovaCHARGE Fees applicable
10. Provides Drivers with monthly billing statements and reports detailing energy purchased as collected from Session Fees and total NovaCHARGE Fees, where applicable

## **ANNEXURE B**

### **SERVICES AND SERVICE LEVELS**

NovaCHARGE shall provide services and support according to the following terms:

1. Phone support for payment and technical issues shall be provided to Drivers 24 hours a day, 365 days a year
2. NovaCHARGE shall provide an on-call resource to the Subscriber at all other times and shall provide appropriate email and phone contact information to ensure accessibility
3. NovaCHARGE shall ensure that scheduled system downtime occur only between the hours of 10PM to 5AM Eastern Standard Time to avoid disruption to the Subscriber and Drivers.
4. NovaCHARGE shall ensure that unscheduled downtime be responded to immediately and every reasonable effort be made to restore service
5. The Subscriber acknowledges that some downtime may be attributed to Charging Station hardware and while NovaCHARGE will promptly report and log the problem to the associated party; the duration of downtime in this instance is out of NovaCHARGE's control

**ANNEXURE C**

**FEES**

<b>Fee</b>	<b>Amount</b>	<b>Comment</b>
Subscription Fee	\$299/yr per Charging Station Port	Annual Fee for Network Access
Session Fee	\$0.50 + 5% of Session Fee Collected	May be paid by Subscriber or passed on to Driver, depending on Subscriber rules preference.

## **LIMITED WARRANTY FOR NC7000 & NC8000 SERIES ELECTRIC VEHICLE CHARGERS**

### **WARRANTY** (this “Warranty”)

It is acknowledged that you have read and agree to the terms of this Warranty by using and installing this charger (the “Product”). Subject to the terms and conditions set forth in this Warranty, including but not limited to the Exclusions and Limitations, Warranty obligations for this Product are limited.

NovaCHARGE warrants that this Product shall be free of defects in materials and workmanship under normal use for a period of four (4) years (commercial products), and two (2) years (residential Model NC7000-R and commercial Model NC8000-80A) from the date of delivery (the “W, warranty Period”).

It is the requirement of the above remedy that you must contact NovaCHARGE and provide the model number, serial number and date of purchase during the Warranty Period. Upon NovaCHARGE’s notice, you must return the Product and include (i) a copy of your original purchase invoice or receipt to verify your warranty; (ii) your name, address, and telephone number; (iii) the Return Materials Authorization (RMA) number.

If any defect is found in the Product and a valid claim is received within the Warranty Period, your sole and exclusive remedy will be for NovaCHARGE, in its sole discretion and to the extent permitted by law, to (1) repair the defect in the Product at no charge, using new parts or refurbished parts, or (2) exchange the Product with new or refurbished hardware that is functionally equivalent to the original Product, or (3) if the Product is returned directly to NovaCHARGE and not to the original reseller, then NovaCHARGE reserves the right to replace the Product with an equivalent without any trademark/logo bearing. In addition, Warranty obligations do not apply to installation service of the Product.

### **EXCLUSIONS AND LIMITATIONS**

This warranty applies only to the Product manufactured by NovaCHARGE and does not apply to any non-NovaCHARGE Product even if packaged or sold with the Product. Software distributed by NovaCHARGE with or without the NovaCHARGE brand name (including, but not limited to system software) is not covered under this warranty.

NovaCHARGE does not warrant that the operation of the Product will be uninterrupted or error-free. NovaCHARGE is not responsible for damage arising from failure to follow instructions relating to the Product’s use.

This warranty does not apply to: (a) cosmetic damage; (b) removed or defaced serial numbers or warranty seal; (c) a product or part that has been modified to alter functionality or capability without the prior written permission; (d) damage caused by accident, abuse, misuse, fire, earthquake or any Force Majeure; (e) operating the Product not for the permitted or intended uses; (f) damage caused by use with non-NovaCHARGE products; (g) coatings unless failure has occurred due to a defect in materials or workmanship; or (h) damage caused by or via the network on which the Product is used including, but not limited to, any unauthorized online access.

## WARRANTY (CONTINUED)

### IMPORTANT WARNING

Do not open, take apart or disassemble the Product in any way. Doing so may cause damage that is not covered by this warranty. Only NovaCHARGE or a NovaCHARGE authorized service provider should perform service on the Product.

TO THE EXTENT PERMITTED BY LAW, THIS WARRANTY AND THE REMEDIES SET FORTH ABOVE ARE EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES, REMEDIES AND CONDITIONS, WHETHER ORAL, WRITTEN, STATUTORY, EXPRESS OR IMPLIED. TO THE EXTENT PERMITTED BY APPLICABLE LAW, NOVACHARGE SPECIFICALLY DISCLAIMS ANY AND ALL STATUTORY OR IMPLIED WARRANTIES, INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES AGAINST HIDDEN OR LATENT DEFECTS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NOVACHARGE OR A NOVACHARGE AUTHORIZED REPRESENTATIVE SHALL MODIFY OR EXTEND ANY WARRANTY. EXCEPT AS EXPRESSLY SET FORTH IN THIS WARRANTY, IN NO EVENT SHALL NOVACHARGE BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE OR INDIRECT DAMAGES, OR FOR LOSS OF ACTUAL OR ANTICIPATED PROFITS, LOSS OF OPPORTUNITY, LOSS OF DATA, LOSS OF USE OF MONEY, LOSS OF INCOME OR REVENUE, BUSINESS INTERRUPTION ARISING OUT OF OR IN RELATION TO THIS AGREEMENT AND/OR THE PRODUCTS, WHETHER BASED ON PRINCIPLES OF CONTRACT, NEGLIGENCE, TORT OR OTHERWISE, EVEN IF IT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES. THE FOREGOING LIMITATION SHALL NOT APPLY TO DEATH OR PERSONAL INJURY CLAIMS, OR ANY STATUTORY. NOTWITHSTANDING THE FOREGOING, THE LIABILITY OF NOVACHARGE ARISING IN CONNECTION WITH THIS WARRANTY OR THE USE OR INABILITY TO USE THE PRODUCTS IN CONNECTION THEREWITH, HOWEVER CAUSED, AND ON ANY THEORY OF LIABILITY, INCLUDING CONTRACT, STRICT LIABILITY, NEGLIGENCE OR OTHER TORT, SHALL NOT EXCEED THREE TIMES THE AMOUNT OF THE PRODUCTS.

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## PRODUCT REGISTRATION

Thank you for selecting this NovaCHARGE Product. NovaCHARGE is a green business and we strive to reduce paper waste wherever possible. To that end, we offer electronic product registration and support documentation.

### Instructions:

- Go to <https://www.novacharge.net/faqs>
- Select Register Product button & Complete the required contact and charger information
- Be sure to use the model number noted on the charger box
- Submit registration

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**LAKE LURE TOWN COUNCIL**  
**AGENDA ITEM REQUEST FORM**  
Meeting Date: October 25, 2023

**SUBJECT:** Review the Zoning and Planning Board’s Recommendation Regarding Chickens and Chapter 4 (“Animals”) of the Code of Ordinances

**AGENDA INFORMATION:**

**Item Number:** XIII  
**Department:** Community Development  
**Contact:** Michael Williams, Community Development Director  
**Presenter:** Michael Williams, Community Development Director

**BRIEF SUMMARY:**

Town Council previously requested that the Zoning and Planning Board provide recommendations in regard to a citizen’s request to amend Code of Ordinances Chapter 4 (“Animals”) to allow chickens within town limits. The Zoning and Planning Board held their initial discussion on the matter during their September 19<sup>th</sup> regular meeting and Town staff was asked to provide the Board with a staff recommendation based on the conversations at that meeting. Staff’s recommend changes to Chapter 4 (“Animals”) were as follows (Additions are underlined, removals are ~~struck through~~):

***Sec. 4-1. Definitions.***

*The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:*

*Dog having dangerous or destructive propensities means a dog which constitutes a physical threat to humans or other animals, or a dog which habitually turns over garbage receptacles, habitually destroys shrubs, flowers, grass, and other plant growth, habitually kills other animals, habitually attacks or attempts to attack persons, or habitually performs other similar acts.*

*Chicken coop means a protective indoor space where chicken hens are kept.*

*Chicken run means a fully enclosed area where chicken hens may move freely in the open.*

*Free range means permitting livestock to graze, forage for food or otherwise roam freely outdoors as opposed to being confined within an enclosure.*

*Hen means a female chicken.*

*Proper enclosure when used in reference to dogs means a building or other structure from which a dog cannot escape, or an outside area enclosed by a fence at least six feet in height secured to the ground in a manner so that a dog cannot escape.*

**Sec. 4-3. Livestock.**

- (a) *Keeping of livestock prohibited. It shall be unlawful to keep or maintain any cow, mule, sheep, goat, hog, other livestock, or fowl other than hens as defined in section 4-1, on any lot or within any pen, stable, or other enclosure or building within the corporate limits. This section shall not be deemed to prohibit the assembling of livestock for shipment or the unloading from shipment of livestock, provided that such livestock are not kept within the corporate limits for more than 24 hours prior to shipment or subsequent to unloading.*
- (b) *Horses and ponies. Horses and ponies may be kept within town limits for pleasure or recreational purposes only, provided that no horse or pony is kept, housed, penned, or maintained in a shed, stall, stable or other place within 200 feet of a residence, including the owner's or boarder's residence, church, store or other place of business. All pens, sheds, stalls or stables, or structures in which the same may be kept, housed or penned, shall at all times be required to be kept clean, disinfected and sanitary, and the same shall not emit at any time any noxious or offensive odor or smell which can be detected by and is offensive to the occupant of any house in the town. Safeguards must be utilized and maintained to minimize the breeding and dissemination of rodents and flies by the use of appropriate pesticides and feed-storage facilities. The pasturing of any horse or pony will be limited to one animal for every two acres of pasture.*
- (c) *Hens. Up to four (4) hens may be kept within town limits, on residentially zoned properties, for non-commercial purposes only, provided that no hen is kept, housed, penned or maintained within 100 feet of a residence other than the owner's or tenant's, a church, store or other place of business. Additionally, hens shall be kept separated from any property line by a minimum of (25 or 50 feet) and a minimum of (50 or 75 feet) from any body of water or roadway. All areas where hens are kept shall at all times be required to be kept clean, disinfected and sanitary, and the same shall not emit at any time any noxious or offensive odor which can be detected by and is offensive to the occupant of any dwelling in the town. Safeguards must be utilized and maintained to minimize the breeding and dissemination of rodents and flies by the use of appropriate pesticides and feed-storage facilities. Hens must be kept within a completely enclosed chicken coop and/or run, the total area of which shall not exceed (200 or 160 square feet) in size. The free ranging of hens is prohibited. Any individual keeping hens within the town must obtain an annual registration permit with an annual fee in order to be in compliance with this section of the Code of Ordinances.*
- (d) *Effect upon existing livestock. Persons keeping or maintaining within the corporate limits any of the animals named in subsection (a) of this section, shall remove them from the corporate limits in order to comply with subsection (a) of this section not later than six months from the effective date of the ordinance from which this subsection is derived.*

*(e) Violations. In any event, if any horse, pony or hen being kept pursuant to this section becomes noncompliant with these provisions, upon written notice given by the town to either the owner of the horse, pony or hen or the possessor of said horse, pony or hen, that owner or possessor shall have seven days to correct the deficiencies noted in the written notice, and failure to correct the deficiencies noted in the written notice shall constitute a violation of this chapter.*

Following review of staff's recommendations, the Board motioned to make the following recommendations to Council:

*To recommend to amend the ordinance to allow chickens in the Town of Lake Lure with future recommendations for appropriate definitions. This motion carried with a 3-2 vote.*

*To recommend adoption of staff's recommended language with the requirement that hens shall be kept separated from any property line by a minimum of 50 feet and a minimum of 75 feet from any body of water or roadway, and removal of the language that states that "no hen is kept, housed, penned or maintained within 100 feet of a residence other than the owner's or tenant's, a church, store or other place of business." This motion was lost with a 2-3 vote.*

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Chapter 4 ("Animals") with Staff's Recommendations

**STAFF COMMENTS AND RECOMMENDATIONS:**

None at this time.



Chapter 4 ANIMALS.....1  
    Sec. 4-1. Definitions.....1  
    Sec. 4-2. Dangerous dogs; barking; leash requirements.....1  
    Sec. 4-3. Livestock.....2  
    Sec. 4-4. Bird sanctuary.....3  
    Sec. 4-5. Penalty.....3

## Chapter 4 ANIMALS<sup>1</sup>

### Sec. 4-1. Definitions.

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Dog having dangerous or destructive propensities* means a dog which constitutes a physical threat to humans or other animals, or a dog which habitually turns over garbage receptacles, habitually destroys shrubs, flowers, grass, and other plant growth, habitually kills other animals, habitually attacks or attempts to attack persons, or habitually performs other similar acts.

*Chicken coop* means a protective indoor space where chicken hens are kept.

*Chicken run* means a fully enclosed area where chicken hens may move freely in the open.

*Free range* means permitting livestock to graze, forage for food or otherwise roam freely outdoors as opposed to being confined within an enclosure.

*Hen* means a female chicken.

*Proper enclosure when used in reference to dogs* means a building or other structure from which a dog cannot escape, or an outside area enclosed by a fence at least six feet in height secured to the ground in a manner so that a dog cannot escape.

(Code 1989, § 81.01)

### Sec. 4-2. Dangerous dogs; barking; leash requirements.

- (a) The keeping or maintenance outside a proper enclosure of any dog having dangerous or destructive propensities is prohibited.
- (b) The keeping or maintenance of any dog which by prolonged and habitual barking, howling, or whining cause serious annoyance to neighboring residents and interfere with the reasonable use and enjoyment of the

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<sup>1</sup>State law reference(s)—Rabies, G.S. 130A-184 et seq.; authority of city to define and prohibit abuse of animals, G.S. 160A-182; authority of city to regulate domestic animals, G.S. 160A-186; limitations on municipal regulations concerning standards of care for farm animals, G.S. 160A-203.1; authority of city to regulate possession or harboring of dangerous animals, G.S. 160A-187; bird sanctuaries, G.S. 160A-188.

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premises occupied by such residents, or with the reasonable use and enjoyment of the public streets, sidewalks or other public areas, is prohibited.

- (c) It shall be unlawful for any person owning, having possession, charge, care, custody or control of a dog to allow such dog to enter any town owned parcels, including, but not limited to, Lake Lure Town Hall, Washburn Marina, Morse Park, Dittmer Watts Nature Trail and Lake Lure Greenspace without being secured by a leash, lead or other means of physical restraint not exceeding 10 feet in length, which leash, lead or other means of physical restraint is not harmful or injurious to the dog and which is held by a responsible person capable of physically restraining the dog. This section shall apply to all dogs with the following exceptions:
- (1) Dogs used or being trained for law enforcement by law enforcement officials.
  - (2) Service animals, as defined by the Americans with Disabilities Act, used by authorized persons and under the control of such persons.
  - (3) Dogs in specified off-leash areas as designated by the town.
  - (4) Dogs fulfilling a specific town or public purpose, per authorization from the town.

(Code 1989, § 81.02; Ord. of 9-11-2012; Ord. of 5-14-2019; Ord. No. 21-12-14, 12-14-2021)

#### **Sec. 4-3. Livestock.**

- (a) *Keeping of livestock prohibited.* It shall be unlawful to keep or maintain any cow, mule, sheep, goat, hog, other livestock, or fowl other than hens as defined in section 4-1, on any lot or within any pen, stable, or other enclosure or building within the corporate limits. This section shall not be deemed to prohibit the assembling of livestock for shipment or the unloading from shipment of livestock, provided that such livestock are not kept within the corporate limits for more than 24 hours prior to shipment or subsequent to unloading.
- (b) *Horses and ponies.* Horses and ponies may be kept within town limits for pleasure or recreational purposes only, provided that no horse or pony is kept, housed, penned, or maintained in a shed, stall, stable or other place within 200 feet of a residence, including the owner's or boarder's residence, church, store or other place of business. All pens, sheds, stalls or stables, or structures in which the same may be kept, housed or penned, shall at all times be required to be kept clean, disinfected and sanitary, and the same shall not emit at any time any noxious or offensive odor or smell which can be detected by and is offensive to the occupant of any house in the town. Safeguards must be utilized and maintained to minimize the breeding and dissemination of rodents and flies by the use of appropriate pesticides and feed-storage facilities. The pasturing of any horse or pony will be limited to one animal for every two acres of pasture.
- (c) *Hens.* Up to four (4) hens may be kept within town limits, on residentially zoned properties, for non-commercial purposes only, provided that no hen is kept, housed, penned or maintained within 100 feet of a residence other than the owner's or tenant's, a church, store or other place of business. Additionally, hens shall be kept separated from any property line by a minimum of (25 or 50 feet) and a minimum of (50 or 75 feet) from any body of water or roadway. All areas where hens are kept shall at all times be required to be kept clean, disinfected and sanitary, and the same shall not emit at any time any noxious or offensive order which can be detected by and is offensive to the occupant of any dwelling in the town. Safeguards must be utilized and maintained to minimize the breeding and dissemination of rodents and flies by the use of appropriate pesticides and feed-storage facilities. Hens must be kept within a completely enclosed chicken coop and/or run, the total area of which shall not exceed (200 or 160 square feet) in size. The free ranging of hens is prohibited. Any individual keeping hens within the town must obtain an annual registration fee to be in compliance with this section of the Code of Ordinances.

- (d) *Effect upon existing livestock.* Persons keeping or maintaining within the corporate limits any of the animals named in subsection (a) of this section, shall remove them from the corporate limits in order to comply with subsection (a) of this section not later than six months from the effective date of the ordinance from which this subsection is derived.
- (e) *Violations.* In any event, if any horse, pony or hen being kept pursuant to this section becomes noncompliant with these provisions, upon written notice given by the town to either the owner of the horse, pony or hen or the possessor of said horse, pony or hen, that owner or possessor shall have seven days to correct the deficiencies noted in the written notice, and failure to correct the deficiencies noted in the written notice shall constitute a violation of this chapter.

(Code 1989, § 81.03; Ord. of 2-23-1993)

#### **Sec. 4-4. Bird sanctuary.**

- (a) The territory within the corporate limits of the town is declared a bird sanctuary.
- (b) It shall be unlawful for any person to kill, trap, or otherwise take any bird within the corporate limits except hawks, crows, starlings, pigeons, and domesticated fowls.
- (c) On all town property, it shall be unlawful to:
- (1) Feed any pigeon, duck, goose, or any other bird;
  - (2) Disperse any food material or other matter edible by pigeons, ducks, geese, or any other birds so as to make such material or matter available to pigeons, ducks, geese, or any other birds for ingestion; or
  - (3) Permit any food or other matter edible by any pigeon, duck, goose, or any other bird to remain on the ground after dispersing or dropping the same.
- (d) A violation of subsection (c) of this section shall constitute an infraction for the first offense. Any subsequent violation occurring within six months after the first violation shall constitute a misdemeanor punishable as per section 4-5. At the sole discretion of the town attorney, any subsequent violation may be prosecuted as an infraction.

(Code 1989, § 81.04)

State law reference(s)—Establishment of bird sanctuaries authorized, G.S. 160A-188.

#### **Sec. 4-5. Penalty.**

- (a) Any person violating the provisions of sections 4-2 and 4-3 shall be guilty of a misdemeanor, punishable on conviction by a fine not exceeding \$50.00 or by imprisonment of not more than 30 days.
- (1) The violation of any provision of section 4-3 shall subject the offender to a civil penalty in the amount of \$50.00 to be recovered by the town. Violators shall be issued a written citation which must be paid within 72 hours.
  - (2) Each day's continuing violation of section 4-3 shall be a separate and distinct offense.
  - (3) Notwithstanding subsection (a)(1) of this section, this provision may also be enforced by appropriate equitable remedies issuing from a court of competent jurisdiction or by criminal penalties as provided in G.S. 14-4.
- (b) Any person violating the provisions of section 4-4 shall be guilty of a misdemeanor, punishable on conviction by a fine not exceeding \$50.00 or by imprisonment of not more than 30 days, or both.

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(c) In addition, enforcement of this chapter may be by injunction, restraining order, or order of abatement in a court of competent jurisdiction, as provided by G.S. 160A-175(d) and (e).

(Code 1989, § 81.99; Ord. of 2-23-1993)

**LAKE LURE TOWN COUNCIL**  
**AGENDA ITEM REQUEST FORM**  
**Meeting Date: October 25, 2023**

**SUBJECT:** Review the Zoning and Planning Board's Recommendation Regarding Alcohol Sales in Lake Lure

**AGENDA INFORMATION:**

**Item Number:** XIV  
**Department:** Community Development  
**Contact:** Michael Williams, Community Development Director  
**Presenter:** Michael Williams, Community Development Director

**BRIEF SUMMARY:**

The Zoning and Planning Board has been in the process of reviewing Town Ordinances in relation to the sale of alcohol in town limits. Based on discussions held during review, Town staff provided the Board with recommended amendments at their October 17<sup>th</sup> regular meeting. Staff's recommendations were as follows (Additions are underlined, removals are ~~struck through~~):

1. *Rescind previous recommendation made on July 18 on bars and definitions.*
2. *Recommend amending the zoning ordinance as follows:*
  - a. *Add/revise TOLL definitions per NC General Statutes 18B for the following:*
    - *Hotels and motels – staff recommends revising existing TOLL Section 36-5: Hotels and Motels. 1) The term “hotels and motels” means a building or group of buildings occupied as at temporary abiding place for individuals where rooms are usually occupied singularly for hire and in which rooms no provision for cooking area made. A hotel or motel may include a restaurant and/or on premise consumption of alcohol, including spirituous liquors with a valid NC ABC license. Subsections 2-4 shall remain.*
    - *Restaurant – staff recommends adding definition: Restaurant means an establishment substantially engaged in the business of preparing and serving meals, and shall have a kitchen and inside dining area with seating for at least ten (10) people. A restaurant may include on premise consumption of alcohol, including spirituous liquors with a valid NC ABC license. Mobile Food Vendors and/or food trucks shall not be considered as a restaurant.*
    - *Mobile Food Vendor – means a readily movable trailer or motorized wheeled vehicle, with a valid DMV license tag.*

equipped to serve food. It shall not be considered as a restaurant.

- Private Club – staff unclear of purpose or necessity
  - Community Theatre – staff unclear of purpose or necessity
  - Convention Center – staff unclear of purpose or necessity
- b. Delete 36-65(C)(2): “Bars, taverns, private clubs, or sale of alcoholic beverages for on premise consumption”. – staff notes that ABC Commission defines “Bars” as serving spirituous liquors.
- c. Correct micro-brewery definition error in ordinance to read: Micro-brewery means an independently owned facility that brews craft beer, ale, porter of other fermented malt beverages in quantities up to 15,000 barrels per year with at least 75 percent of its product sold on-site. (See “nano-brewery” & “brew-pub” definitions.)
- d. In 36-62(B) (1) delete:” alcoholic beverages for off-premises consumption”. (Retail stores are permitted use with no limitations of ABC-permitted alcohol sales.)

Following review of staff’s recommendations, the Board motioned to make the following recommendation to Council were made:

*To recommend the amendment of the Zoning Ordinances to revise definitions to fit the North Carolina General Statute 18B definitions for hotel/motel, restaurants, mobile food vendor, private club, community theatre, and convention center; to remove Section 36-65(C) (2); to correct the “micro-brewery” definition error to reflect that the products sold must be at least 75 percent on-site; and to remove “alcoholic beverages for off-premises consumption” from Section 36-62(B) (1). This motion carried 5-0.*

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Town Staff’s Recommendations

**STAFF COMMENTS AND RECOMMENDATIONS:**

None at this time.

Summary of PZB review of alcohol sales in Lake Lure  
From Randall Nelson, Planning & Zoning Board Chair  
and Mike Williams, Community Development Director  
October 13, 2023 (originally sent September 15, 2023)

Part I - PZB Action Items

1. Rescind previous recommendation made on July 18 on bars and definitions.
2. Recommend amending the zoning ordinance as follows:
  - a. *Add/revise* TOLL definitions per NC General Statutes 18B for the following:
    - Hotels and motels – staff recommends revising existing TOLL Section 36-5: *Hotels and Motels*. 1) The term “hotels and motels” means a building or group of buildings occupied as at temporary abiding place for individuals where rooms are usually occupied singularly for hire and in which rooms no provision for cooking area made. A hotel or motel may include a restaurant and/or on premise consumption of alcohol, including spirituous liquors with a valid NC ABC license. Subsections 2-4 shall remain.
    - Restaurant – staff recommends adding definition: *Restaurant* means an establishment substantially engaged in the business of preparing and serving meals, and shall have a kitchen and inside dining area with seating for at least ten (10) people. A restaurant may include on premise consumption of alcohol, including spirituous liquors with a valid NC ABC license. Mobile Food Vendors and/or food trucks shall not be considered as a restaurant.
    - *Mobile Food Vendor* – means a readily movable trailer or motorized wheeled vehicle, with a valid DMV license tag, equipped to serve food. It shall not be considered as a restaurant.
    - Private Club – staff unclear of purpose or necessity
    - Community Theatre – staff unclear of purpose or necessity
    - Convention Center – staff unclear of purpose or necessity
  - b. *Delete* 36-65(C)(2): “Bars, taverns, private clubs, or sale of alcoholic beverages for on premise consumption”. – staff notes that ABC Commission defines “Bars” as serving spirituous liquors.
  - c. Correct micro-brewery definition error in ordinance to read: *Micro-brewery* means an independently owned facility that brews craft beer, ale, porter or other fermented malt beverages in quantities up to 15,000 barrels per year with at least 75 percent of its product sold on-site. May be able to do this administratively after review of the minutes. (See “nano-brewery” & “brew-pub” definitions.)
  - d. In 36-62(B)(1) *delete:*” alcoholic beverages for off-premises consumption”. (Retail stores are permitted use with no limitations of ABC-permitted alcohol sales.)
  - e. Recommend that all town ordinances regarding any approved forms of breweries or wineries (i.e. nano brewery to regional brewery) be interpreted to allow retail sales of other ABC-permitted malt beverages and unfortified wines.

Part II - Things learned in this review:

1. Mixed drinks (hard liquor) are only allowed to be served in specific establishments identified by referendum dated June 4, 1985. The establishments are hotels, restaurants, community theatres, convention centers, and private clubs.
2. An establishment cannot sell alcohol for on premise consumption in the town of Lake Lure unless it is a restaurant, **and/or** it meets some classification of a brewery, winery, or distillery.
3. There is nothing in the Town's ordinance that prohibits one permitted use, such as a winery, from selling other types of alcohol such as beer. The Town's enforcement of this has been ambiguous. Without a written policy adopted by Town Council stating otherwise, a legally permitted use should be able to sell whatever alcohol their ABC permit allows them to sell.
4. The North Carolina ABC Commission, as part of the alcohol permit process, requires the Town to complete a form entitled **Inspection/Zoning Compliance**. The form, when completed, indicates whether the proposed establishment is a permitted use in the zone in which it wants to locate. The execution of this form by the Town's Community Development Office defines the extent and official limit of the Town's involvement with that establishment's alcohol sales.



**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Continue Review of Proposals for the Lease of the Former ABC Store Property

**AGENDA INFORMATION:**

**Item Number:** XV  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

Town Council will continue review of proposals for the lease of the former ABC Store building located at 2654 Memorial Highway.

Wade Oppliger has expressed that he plans to attend with WNC Outdoor Collective to discuss their proposal.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Revised Proposal from Lake Lure Tours; Revised Proposal from John Venuto; Revised Proposal from Wade Oppliger, Paul & Cara Brock, and Leslie Rowland; Comparison Chart

**STAFF COMMENTS AND RECOMMENDATIONS:**

N/A

**LAKE LURE TOURS, INC**  
P.O. BOX 10043  
FLEMING ISLAND, FL 32006

September 14, 2023

**A PROPOSAL for the use of the  
FORMER ABC STORE and contiguous TOWN PROPERTY  
addressed as 2654 Memorial Highway and 2662 Memorial Hwy, Lake Lure, NC  
also known as Rutherford County Parcel #1616937 and Parcel #1616938**

Whereas the Town of Lake Lure is interested in receiving proposals for a second-party's operation and use of the former ABC Store and property; and whereas Lake Lure Tours, Inc. has interest in leasing 2654 Memorial Highway, Rutherford County GIS PIN # 0632878422 / Parcel #1616937 and 2662 Memorial Highway, Rutherford County GIS PIN # 0632876300 / Parcel #1616938, we are pleased to present the following property-use plan and use-value proposal.

**The General Proposal**

Continuously since 2007, Lake Lure Tours, Inc. (herein LLT) has been and remains a financially-sound, mutually-beneficial Concession Agreement partner with the Town of Lake Lure (herein 'the Town'). Hence, in order to further LLT's commitments to and positive fiduciary relationship with the Town, as well as to expand our core business, LLT proposes to re-use the main former ABC Store building (Parcel #1616937), along with a shared-with-the-public use and a kiosk presence at the non-motorized watercraft launch site; to grade and install gravel parking from non-motorized launch ramp to northern terminus of the property; to take responsibility for and rehabilitate Town-owned site improvements, including four of six Town-owned watercraft slips; and to provide the preservation and management of Pool Creek Park "Green Space" (these latter four being portions of PIN #1616938).

**Former ABC Store Building**

LLT's proposed use (by LLT and/or a responsible teaming partner) of the approximately 3,000-square-foot, former ABC Store building and its immediately-adjacent 11 parking spaces (Parcel #1616937) is to remodel as needed, stock, promote, and operate an open-to-the-public retail business operated as an "outdoors store" -- catering to tourists and residents in supplying a wide variety of "outdoors" and related products and supplies including gear, accessories, and related "outdoor" products, targeting recreation and tourism in the form of fishing, hiking & climbing, camping, and lake enjoyment activities.

### **Non-Motorized Watercraft Launch Center**

LLT proposes to stock and manage (out-of-doors) at the current non-motorized launch site (located on Parcel #1616938), various non-motorized watercraft for rentals and sales. The proposed public non-motorized watercraft operation adjacent to the current launch ramp would be stocked by LLT with canoes, kayaks, and stand-up paddleboards (including paddles and required life jackets) additional to and/or currently in LLT's rental inventory. Commercial non-motorized permitting of all rental watercraft would remain responsibility of LLT. Information, rentals, and Q/A available to the public from LLT staff at LLT's non-motorized launch ramp area kiosk. In order to create a "non-motorized center of activity," LLT aims to expand the operation at the no-fee, public, non-motorized launch ramp facility and provide additional parking for users northward from the launch ramp at both sides of the road .

### **Pool Creek Park "Green Space"**

In preservation and maintenance of the Pool Creek Park "Green Space" (parcel # 1616938) LLT shall be responsible for groundskeeping (grass mowing, weed control, storm waste collection and removal); the Green Space user's waste collection / disposal; maintenance of the "Green Space" security fencing and gate accesses; maintaining or addition of directional and identification signage – with no physical changes to the current green growth and general park-like appearance of the space. Vehicle traffic shall be prohibited within the "Green Space" (other than Town or LLT maintenance vehicles).

The "Park / Green Space" will be open to public use year-round; and the current, incidental, "picnic" and "dog walking" use of the space shall be open to the public on a daily, first-come-first-served basis. Unless due to reasons of LLPD security or capacity use by others, entry and exit gating of the Pool Creek Park "Green Space" shall remain unlocked, with the "Green Space" readily accessible to public foot traffic.

Additionally, and under LLT's husbandry, preservation, and coordination, the Park / "Green Space" shall be available by advanced reservation to non-profit, public, private, and for-profit groups for special events and gatherings, such as LL Classical Academy Student Appreciation event; special Church events; Rutherford County B.A. R.N. Farmers' Market; larger- scale Family Re-Unions , Weddings, Corporate Retreats, and the like – similar to the current uses of Morse Park, the Gazebo, Town Center's Keeter Field, and from time to time, the beach at Lake Lure. LLT shall encourage public and private use of the Pool Creek Park "Green Space," and LLT's encouragement of and cooperation with such group users shall not be unreasonably withheld.

### **Current and Additional Parking Area Use**

Both paved and gravel , sign-marked parking of the parcels shall remain reserved for patrons and users of parcel s #1616937 & #1616938 operations -- excepting Sunday mornings until 10 a.m. (when Chimney Rock Baptist Church's "lakeside services" are held). Otherwise, any-time vehicle parking for

non-motorized watercraft launchers; information seekers at LLT's information kiosk, overflow store parking, and users of Pool Creek Park "Green Space" shall have exclusive use of site parking.

From approximately even with the front of the little chapel and even with the northwest corner of the former ABC building, LLT shall grade-to-level and install packed gravel (inside any trout buffer boundary) on both sides of the current gravel roadway, northward to the present cul-de-sac at the northern end of parcel #1616938 (ending at LLPD boat slips). This additional parking shall have parking bumpers and signage appropriate to its use.

### **Proposed Financials**

Two town-owned parcels (the former ABC site parcel #1616937 and parcel 1616938 and its site improvements) shall be rented to LLT by the Town of Lake Lure at the rate of \$60,000/year, payable at the rate of \$5,000 monthly to Town of Lake Lure by LLT.

Additionally, any and all revenue earned by LLT at these parcels (excepting the \$5,000/mth base rent and excluding gross retail sales by the outdoor store operation), including non-motorized watercraft rentals or sales, motorized watercraft rent fees (if any at the site), boat slip use or any other rents payable to LLT from the property or its improvements, shall be subject to a 15% Concession Agreement fee to be paid by LLT to the Town, monthly.

### **Term of Lease & Concession Agreement**

A reasonable term of lease and applicability of Concession Agreement revenue to the Town could track the term of the Current Concession Agreement between the Town and LLT.

This proposal is intended (1) to assist the Town in obtaining the highest and best use of Town-owned property; (2) to expand LLT's services to the residents and tourists of Lake Lure; (3) to preserve and invigorate Town Center's attractiveness and vitality; and (4) to enlarge LLT's commitment to a quality partnership with the Town of Lake Lure.

Respectfully,  
LAKE LURE TOURS, INC.

  
George Wittmer

Town of Lake Lure Proposal  
2654 Memorial Hwy  
Parcel 1616937  
Adjusted  
The Cove at Lake Lure  
John Venuto  
239-850-8456

#### Objective

To secure property listed above for successful 80 seat full-service restaurant commercial development

Open 7 days a week

#### Business Terms

- 3-year contract
- Two 1-year options
- Rent \$3,00 month
- 10% concessions Quarterly Distributions of NET profit

#### Town will provide.

- Floor Plan
- Permits for Build out
- Contactors Build out
- Plumbing Design and build out
- Commercial Septic tank/Grease trap
- Kitchen 14 ft Hood approx. \$21,000
- 20 parking spaces included
- Gas line installation
- Electric installation
- Backside lighting and Landscaping for outdoor seating
- Front lighting
- Signage in front space
- Indoor lighting
- Walk-in cooler/Freezer
- Building taxes
- Required to handle all building and landscape maintenance

#### Restaurant will provide

- Restaurant will provide all specs for build out including, Electric, Plumbing, Hood, Grease trap, Floor design
- Restaurant concept
- Kitchen equipment
- Furniture, Fixtures and Equipment

- **Liquor License**
- **Restaurant will be required to maintain property and Equipment**
- **Business will provide all Licenses and insurances**
- **Business will be required to manage all routine maintenance**

October 20, 2023

To: Hank Perkins, Town Manager-Lake Lure, NC  
From: Wade Oppliger & Leslie Rowland (Lake Lure Rowing Club)  
Paul & Cara Brock (Lured Market & Grill, Lured On-The-Fly, Sunken Buffalo)  
RE: LOI-Lake Lure Building Lease Question (Revised 10.20.23)

Good day Mr. Perkins,

We present to the Town of Lake Lure our proposal to lease of the building at 2654 Memorial Highway and to formalize the Town's allowance for the Lake Lure Rowing Club operations at the adjacent town property.

Inclusive; we are asking to take over the existing town boat house or be allowed to add a structure adjacent to the existing boathouse to house a community access gym and rowing center and covered shelter for our rowing shells and equipment. All needed improvements, modifications, and any additional docks (on approval by the Town) would be done at our expense.

*We acknowledge Commissioner Doster's statement that the Town may wish to retain use of the boathouse and docks for police and emergency equipment use--our proposal is not dependent on the building and docks being available—but the following presumes this option, unless noted.*

We ask the Town to evaluate our proposal with appreciation of the revenue opportunities created by our proposal. The economic impact of our activities will benefit the region's food, beverage, hospitality, and general merchandise retailers and ultimately the Town of Lake Lure. Our plan intends to create a legacy for the Town of Lake Lure, the value of which exceeds any reasonable rent that can be garnered solely from the lease of the building at 2654 Memorial Highway. We believe the benefit of our community—especially in the long term, should be considered.

Our group members have demonstrated intentional betterment of the Lake Lure community by investing in-and operating businesses that build community, create opportunity, and increase attraction to the Lake Lure and Hickory Nut Gorge region for people interested in outdoor activities and events.

**We are offering: \$4000.00/month for the building plus a 15% concession agreement payment for revenue generated via our gym operations and rowing rentals, also paid to the town monthly.**

After group review of the interior space and subsequent consultation with Mike Williams, we plan to proceed with updates and possible alteration of the interior space of the building to best accommodate our business model. We understand and accept the financial responsibility for any changes, with one exception:

We would like the Town to add a deck to the back side of the building with a door providing access to the inside of the building. Exact dimensions of the deck can be discussed respecting any restrictions illustrated by Mike Williams—but the expectation would be for the deck to be of a size to provide comfortable, functional space for customers to enjoy food and drink while enjoying the views.

The former ABC building will provide a line of outdoor provisions. The group will collaborate and leverage the knowledge-base and connections of the 97 business-strong, Outdoor Builder's Alliance of Western North Carolina to curate our offering of outdoor gear.

As the second largest producer of outdoor gear east of Colorado, Western North Carolina provides a unique opportunity to work with and represent local makers. Our proximity to this manufacturing will provide unique event opportunities as well.

Complementing our assortment of outdoor gear will be a curated presentation of healthy, high energy/protein food and drink. We will focus on convenient, high-quality food and beverages for guests and residents alike.

We plan on greatly adding to the current offering of Lured Market, creating a full-service, local market carrying complete assortment of meats, cheeses, gourmet canned foods, pastas, ingredients, sauces, and ready-to-eat gourmet meals. We will also carry fresh Carolina seafood, local beef, poultry, pork and eggs and in-season, fresh produce. We plan to add grab-n-go sandwiches prepared by the Lured Grill staff and offer a line local bread, baked goods and pastries. In addition, we'll continue to carry an expanded sundries and basic household and vacation rental necessities. We also plan to add to our local art and hand-crafted goods. We will introduce a wine shop expanding greatly our already curated wine selection and offering wine education classes and tastings on a regular basis. We will also add an even broader retail selection of local and domestic beer, hard cider and seltzers.

Brand new will a full gourmet coffee shop with hot and cold coffee drinks, espresso, etc. a service many Lake Lure residents have been requesting the past four years. Additionally, we will offer smoothies, fresh juices and a presentation of healthy, high-energy snacks and drinks. Overall, we believe and expanded Lured Market can better serve our local community as well as our visitors with a broader selection of quality food, drink and merchandise while creating a great starting point for the day's activity planning and a great spot to wind down.

**Rowing Activity Center and Gym (15% Concession contribution to Town, paid monthly)**

As per the proposal sent forward to the Parks & Recreation Committee dated March 2, 2023; if the Town of Lake Lure emergency watercraft are re-located, we are asking the Town to grant our group the use of the existing building and docks. With modifications and updates (funded by our group and approved by the appropriate Town of Lake Lure's advisory boards and Commission) the building and docks would serve as home base for our rowing and water-based activities.

The existing docks would be lowered to a height appropriate to launch rowing craft. We will request permission to add a 60'-70' x 8' wide dock parallel to the shoreline behind the existing docks, which will be used for long boat launch and docking.

As revenue allows, we will propose adding a floating dock (Connect-a-dock or similar) that would run along the shoreline from the current boathouse to the existing non-motorized craft launch. This addition will facilitate additional water activity access from the current park area.

*We will provide boat/water activity safety and Lake Lure rules to all renters and have information available in the Trader's shop and at the location where watercraft are rented, leveraging the opportunity provided by the consolidation of non-motorized access to Lake Lure.*

Plans for the existing boathouse building: Fill in the boat slips inside the building, creating a solid floor that would house a rowing-based gym focused on stationary rowing machine exercise, which is a low impact, full body fitness program with high cardiovascular benefit appropriate for all ages and abilities.

*If the decision of the Town is to maintain the existing boathouse and dock area for emergency/town equipment—with the Town's approval—we will place, upgrade and work out of the structures proposed on the site plan—utilizing historical wooden structures that have been offered to us by the Abel Water Ski School—or by raising funds through grants and donations to build structures to the Town of Lake Lure's specifications.*

The Row House Gym would host classes as well as be available other hours as a self-serve/fee-based business. Estimated fees to run between \$45-\$60/month for the community and for visiting guests.

**Monthly revenue model at start up would be \$1000.00/month.** (based on 20 memberships)

The building would serve as home to the quickly evolving Lake Lure Juniors Rowing program. The Lake Lure Rowing Club and Lake Lure Academy have partnered in a ground-breaking partnership that will begin in August 2023. Both an on-campus and off-campus rowing team are now active.

**Monthly revenue at start up is \$1000.00/month.**



We will add a rowing/watercraft rental component based at this location. Beginning Spring 2024 (after the lake has returned to full pond) we intend to start with 6-10 row boards. Estimates can increase if we are allowed more types of watercraft to rent.

**Monthly revenue at start up (and through the 2024 season) will be \$2400.00/month.\*\***

(\*\*this is accretive revenue—not transferred revenue accomplished by the move from the beach to this area)

Events and guide services organized and managed by the Outdoor Collective will contribute to the concession agreement paid to the Town of Lake Lure.

**Monthly revenue at start up. \$400.00/month.**

Having a boathouse and rowing dock access will also benefit Lake Lure by having facilities to host additional college and prep rowing teams in the future. I am researching use fees for other locations—but in addition to the economic benefit provided by schools and teams visiting Lake Lure through hotel stays, food and such, I believe modest fees are paid for use of the local rowing club’s facilities.

**Potential revenue \$250-\$500/team for use of our facilities + lodging/food/local transport and general needs.**

**Re-capping concession revenue estimates for year one of operations:**

Row House Gym	\$1000.00/month
Juniors Rowing	\$1000.00/month
Rowing craft rentals	\$24000.00/month
Events/Guide Services	\$TBD
At large rowing based events:	\$TBD
2024 Monthly Estimated Rev:	\$4400.00/month (\$52,800.00/year)
15% to Town of Lake Lure:	\$660.00/month (\$7920.00/year)

**Annual growth estimated at 25% over the next four years:**

Year	Revenue	Concession Payments
2025	\$66,000.00	\$9,900.00
2026	\$82,500.00	\$12,375.00
2027	\$103,125.00	\$15,687.50
2028	\$128,906.25	\$19,335.94

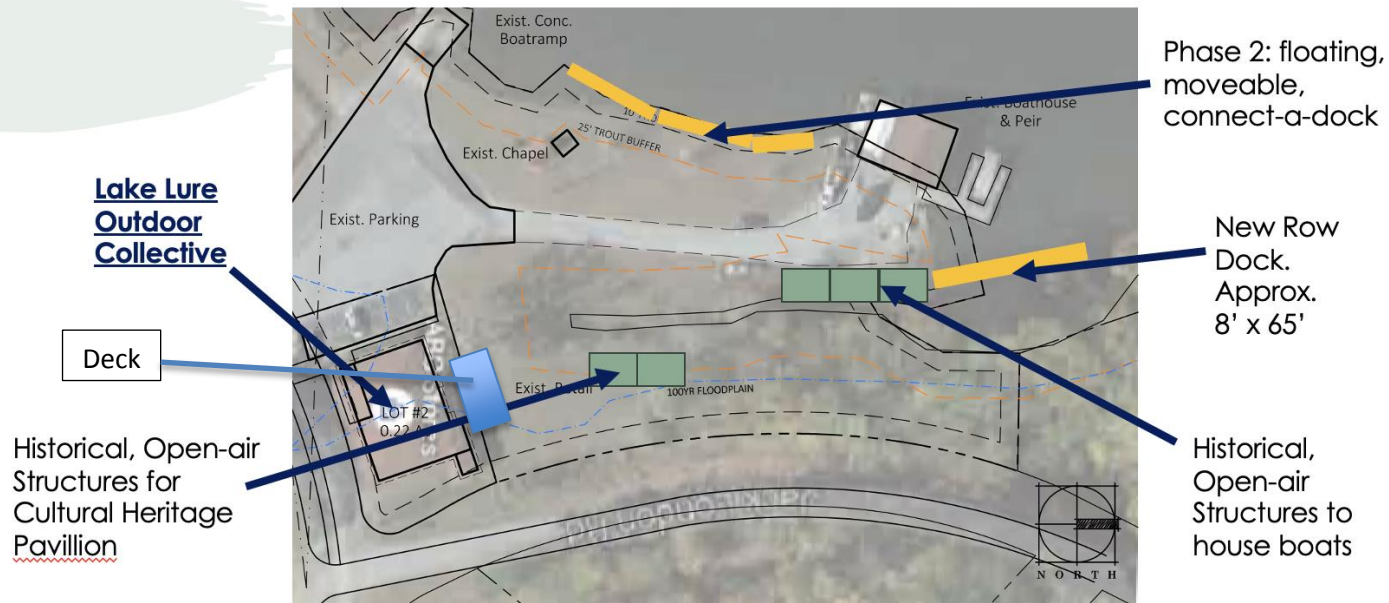
We will secure funding for a non-profit WNC Heritage Pavilion, that will feature events on the property. Regional music, storytelling, crafting and skills will be featured. (We are currently researching the best location for the Pavilion with Mike Williams—the site plan presentation will identify our preliminary idea for placement for this space.)

Thank you for your consideration. We are available for any questions or clarifications.

Wade

Wade Oppliger, Managing Partner  
Leslie Rowland, Financial Partner  
Paul & Cara Brock, Guidance Partner and Non-profit heads

# Lake Lure Outdoor Collective Site Plan\*\*



**\*\* Presumes Town retains use of boathouse.**

**ABC PROPERTY**

Opportunity & Constraint Site Plan

### Lease Proposals for Former ABC Store Property

Proposer(s)	Lake Lure Tours	John Venuto	Wade Oppliger & Leslie Rowland (Lake Lure Rowing Club), Paul & Cara Brock (Lured Market, Sunken Buffalo, On-the Fly), Lincoln Walters (WNC Outdoor Collective)
<b>Brief Description</b>	Outdoors Store, Non-Motorized Boat Operations	Restaurant - The Cove at Lake Lure	Lake Lure Outdoor Collective, Rowing Activity Center & Gym, WNC Heritage Pavilion
<b>Rent</b>	\$5,000/Month	\$3000/Month	\$4000/Month
<b>Upfits - Town Costs</b>	None Listed	Costs for floor plan, permits build out, contractors build out, plumbing design and build out, commercial septic tank/grease trap, kitchen 14 ft. hood (Approx. \$21,000), 20 parking spaces included, gas line installation, electric installation, backside lighting and landscaping for outdoor seating, front lighting, signage in front space, indoor lighting, walk in-cooler/freezer, building taxes, handling of all building and landscape maintenance	None Listed
<b>Upfits - Proposer Costs</b>	Remodeling (as needed), grading and installing gravel parking from non-motorized launch ramp to northern terminus of the property, site improvements	Costs for all specs for building out including electric, plumbing, hood, greese trap, floor design; restaurant concept, kitchen equipment, furniture, fixtures and equipment, liquor license, maintaining of property and equipment, licenses and insurances, routine maintenance	Updates and possible alteration of the interior space of the building, construction of additional docks
<b>Concession Agreement</b>	15% Concession for non-motorized watercraft rentals or sales, motorized watercraft rent fees (if any at the site), boat slip use or any other rents	10% Concessions Quarterly Distributions of NET Profit	15% Concession for revenue generated via gym operations and rowing rentals, paid monthly
<b>Term</b>	Term of Current Concession Agreement - 10 yrs., "Reasonable Term of Lease"	3-year contract with two 1-year options	None Listed, projected financials are shown through 2028
<b>Areas of Proposed Use</b>	Former ABC Store Building, Non-Motorized Watercraft Launch Center, Pool Creek Park "Green Space" (Council has verbally expressed that they would like this removed from the proposal), Parking Area	Former ABC Store Building and Parking Lot	Former ABC Store Building, Docks and Non-Motorized Ramp, Adjacent Property

**LAKE LURE TOWN COUNCIL**  
**AGENDA ITEM REQUEST FORM**  
Meeting Date: October 25, 2023

**SUBJECT:** SRF Loan Updates

**AGENDA INFORMATION:**

**Item Number:** XVI  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

On October 16, Town staff received an email containing an attached letter for an amended offer and acceptance for SRF. Originally, the Town was offered an additional \$7 million which was recently accepted by Council. In the amended letter, it is detailed that there was a clerical error in the initial offer letter and \$80,261 was inadvertently omitted. The amended offer letter is corrected to reflect that the Town is being offered an additional \$7,080,261 loan. The loan would still be 0% interest and have a term of 30 years. During future meetings, Council will be asked to adopt a new resolution, which will replace Resolution No. 23-10-10B Accepting a SRF Loan of \$7 Million. In addition, the Capital Project Ordinance for the sewer replacement project will require an amendment to accurately reflect this change. Staff is working towards completing all additional requirements for accepting the loan, as updated.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

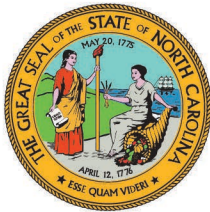
N/A

**ATTACHMENTS:**

Amended Offer and Acceptance Letter for SRF Loan

**STAFF COMMENTS AND RECOMMENDATIONS:**

At a future date, staff will recommend that Council adopt an updated acceptance resolution and an updated capital project ordinances.



NORTH CAROLINA  
Environmental Quality

ROY COOPER

Governor

ELIZABETH S. BISER

Secretary

SHADI ESKAF

Director

October 6, 2023

Mr. Hank Perkins, Town Manager  
Town of Lake Lure  
PO Box 255  
Lake Lure, NC 28746

SUBJECT: Offer and Acceptance for a State Loan -  
**Amended**  
Project No. CS370489-05  
Subaqueous Sanitary Sewer Replacement  
W.W. Collection System Improvements

Dear Mr. Perkins:

The Town of Lake Lure has been approved for loan assistance from the Clean Water State Revolving Fund. Enclosed are two (2) copies of an Offer-and-Acceptance Document extending a State Revolving Loan with an increase of \$7,080,261, including \$80,261 inadvertently left off the initial Funding Offer, for a total amount of **\$19,580,261**, with \$500,000 in principal forgiveness. This offer is made subject to the assurances and conditions set forth in the Offer-and-Acceptance Document.

Please submit the following items to Pam Whitley, Division of Water Infrastructure, 1633 Mail Service Center, Raleigh, North Carolina 27699-1633 or via email at [pam.whitley@deq.nc.gov](mailto:pam.whitley@deq.nc.gov).

1. A resolution adopted by the governing body accepting the loan offer and making the applicable assurances contained therein. (Sample copy attached)
2. One (1) copy of the original Offer-and-Acceptance Document executed by the Authorized Representative for the project, along with the signed "Standard Conditions for the Federal SRF loans". **Retain the other copy for your files.**
3. Federal ID and Unique Entity ID Number Request Memo (Memo attached)
4. Sales-Tax Certification (attached)
5. Professional Engineering Services Procurement Form




Please note that if a Fiscal Sustainability Plan is applicable to this project, the certification is not due until the final reimbursement request.

The Site Certification, a Capital Project Ordinance (or budget ordinance covering the project), and the Professional Engineering Services Procurement Form are due before disbursements will begin.

Reimbursement requests should be sent to DWI Finance Accountants at the address noted or emailed to [dwi.businessoffice@deq.nc.gov](mailto:dwi.businessoffice@deq.nc.gov).

On behalf of the Department of Environmental Quality, I am pleased to make this offer of State Revolving Loan funds, made available by North Carolina Water Infrastructure Fund and the Federal Clean Water Act Amendments of 1987. Should you have any questions concerning this offer of funding, or any of the stipulations outlined in this offer package, please contact Fred Oelrich at [Fred.Oelrich@deq.nc.gov](mailto:Fred.Oelrich@deq.nc.gov) or (919) 707-9194.

Sincerely,

DocuSigned by:  
  
6300A872077B4C5...

Shadi Eskaf, Director  
Division of Water Infrastructure, NCDEQ

Enclosures: Resolution to Accept Loan Offer (suggested format)  
Loan Offer and Acceptance Document (two copies)  
Federal ID and Unique Entity ID Number Request Memo  
Sales-Tax Certification Form  
Fiscal Sustainability Plan Certification  
Reimbursement Request Form  
Site Certification  
Capital Project Ordinance Sample  
Professional Engineering Services Procurement Form

cc: Hank Perkins, ([whperkins@townoflakelure.com](mailto:whperkins@townoflakelure.com))  
Heather Miller, LaBella Associates ([hmillier@labellapc.com](mailto:hmillier@labellapc.com))  
Pam Whitley  
Mark Hubbard, PE  
Fred Oelrich  
Logan Kluttz  
Jennifer House  
Janice Fenner  
Carrie Shortt  
SRF (COM\_LOX)  
Agreement ID: 2000039264



**LAKE LURE TOWN COUNCIL**  
**AGENDA ITEM REQUEST FORM**  
**Meeting Date: October 25, 2023**

**SUBJECT:** Discuss Internships

**AGENDA INFORMATION:**

**Item Number:** XVII  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

Town staff is interested in the possibility of hosting two interns from local universities in the future. One intern would work with Town Hall staff to complete tasks associated with utilities and administrative actions. The other intern would work with Community Development on zoning and Geographic Information System (GIS) operations. Staff feels that internship opportunities would help advance future local government employees while interns would offer valuable support to the Town. Town Manager Hank Perkins has been in contact with faculty at Appalachian State University in regard to questions about hosting an intern in the near future.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

N/A

**STAFF COMMENTS AND RECOMMENDATIONS:**

N/A

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Discuss Nelon Garbage Services

**AGENDA INFORMATION:**

**Item Number:** XVIII  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

There is a necessity to enter into a new agreement with Nelon Garbage Services. Town staff recommends that the new agreement span from the date of approval until the end of June 2025. The Town currently pays Nelon \$17,600.00 per month for garbage pick-up and disposal services. Prior to the end of the term, staff recommends advertising for bids for solid waste services in order to evaluate future options. Staff will be developing an agreement with Nelon for Council consideration at the regular November meeting.

**RECOMMENDED MOTION AND REQUESTED ACTIONS:**

N/A

**ATTACHMENTS:**

Former Agreement with Nelon

**STAFF COMMENTS AND RECOMMENDATIONS:**

Staff recommends future approval of a Garbage Services Agreement with Nelon with a term expiring in June 2025 and staff recommends advertising for bids for solid waste management prior to the expiration of the Nelon Agreement.



**Contractual Agreement between Nelon Garbage Service LLC  
and The Town of Lake Lure**

As of July 1, 2022 thru June 30, 2023

this is to be considered Nelon Garbage Service LLC agreement with the Town of Lake Lure on the picking up and hauling of the town's garbage.

All garbage is required to be set out at the pickup points or by the street. All house hold garbage is to be in tied garbage bags in nothing over a 35 gallon container. If any resident chose to use containers 40 gallon or more it will be left in the container if loose and not in tied garbage bags due to the difficulty of lifting these containers and dumping them into pickups and the packer. Please do not overload the large trash bags, my employees have to pull and strain to lift the bags out of the large containers, putting themselves at risk of an injury. All loose in the bottom of the large trash containers will be the responsibility of the home owner or resident to put into a tied garbage bag. Any garbage that is scattered due to the bears or any other animals is the responsibility of the home owner or resident to pick up. Hard trash, leaves, brush, yard debris, building material (lumber, roofing material, etc.), cardboard boxes, liquid paint, any kind of oil, moving boxes, and appliances will not be picked up. Only house-hold garbage will be picked up. Any garbage container that is behind a fence is required to be set out at the pickup points or have easy access to it. Residences that have a gate that requires a gate opener, gate code, or key are required to provide Nelon Garbage Service a gate opener, gate code or key. All motels, restaurants, and grocery stores are required to have dumpsters, and all other businesses are required to have dumpsters or have garbage containers and make arrangements with me and pay me for the service.

I am asking for an increase of \$200.00 more a month for garbage service. Monthly fee would increase to \$17,600.00, which would be payable in twelve monthly payments, for a total of \$211,200.00, beginning July 1, 2022 thru June 30, 2023.

Due to the size and continuous growth of the town if any of the garbage is not picked up on Monday, it will be picked up Tuesday. In the event of bad weather the garbage will be picked up as soon as possible. Garbage will be picked up on Mondays even if the Rutherford County Landfill is closed due to a holiday, with the exception of Christmas, which will result in a pickup on Tuesday, should it fall on a Monday.

Signature:  Date: 5/31/22

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Project Manager Updates

**AGENDA INFORMATION:**

**Item Number:** XIX  
**Department:** Project Management  
**Contact:** Mike Dydula, Project Manager  
**Presenter:** Mike Dydula, Project Manager

**BRIEF SUMMARY:**

Project Manager Mike Dydula will provide Council with an update in regard to ongoing major projects.

**LAKE LURE TOWN COUNCIL  
AGENDA ITEM REQUEST FORM  
Meeting Date: October 25, 2023**

**SUBJECT:** Town Manager Updates

**AGENDA INFORMATION:**

**Item Number:** XX  
**Department:** Administration  
**Contact:** Hank Perkins, Town Manager  
**Presenter:** Hank Perkins, Town Manager

**BRIEF SUMMARY:**

Town Manager Hank Perkins will provide Council with any updates that are not included on the meeting agenda. Council will also have the opportunity to ask any questions.

**XXI**

**ADJOURNMENT**