GRID SERVICES PURCHASE AGREEMENT

[Date: 10/23/2019]

GRID SERVICES PURCHASE AGREEMENT BY AND BETWEEN

[NAME OF SUPPLIER]

AND

[HAWAIIAN ELECTRIC COMPANY, INC. OR HAWAII ELECTRIC LIGHT COMPANY, INC. OR MAUI ELECTRIC COMPANY, LIMITED]

THIS GRID SERVICES PURCHASE AGREEMENT (“Agreement”) is made this \_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_ (“Execution Date”), by and between [insert one of the following: Hawaiian Electric Company, Inc., Hawai‘i Electric Light Company, Inc., Maui Electric Company, Limited] (“Company”), a Hawai‘i corporation, with principal offices in \_\_\_\_\_\_\_\_\_\_\_\_, Hawai‘i and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Supplier”), a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, with principal offices in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_, doing business in \_\_\_\_\_\_\_\_\_\_\_\_\_, Hawai‘i.

WHEREAS, Company is an operating electric public utility on the Island of \_\_\_\_\_\_\_\_\_\_\_\_\_, subject to the Hawai‘i Public Utilities Law (Hawai‘i Revised Statutes, Chapter 269) and the rules and regulations of the Public Utilities Commission of the State of Hawai‘i (“PUC”); and

WHEREAS, Company operates the Company System as an independent power grid and must maximize system reliability for its customers by ensuring that its system (including transmission and distribution) meets the requirements for capacity, voltage stability, frequency stability, and reliability standards; and

WHEREAS, Supplier desires to establish and operate an aggregated network of Resources that can provide Grid Services to support the reliable operation of the Company System; and

WHEREAS, Supplier understands the need to use commercially reasonable efforts to maximize the overall reliability of the Company System; and

WHEREAS, Supplier desires to sell to Company certain Grid Services as aggregated by Supplier, and Company agrees to purchase such aggregated Grid Services from Supplier, upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the premises and the respective promises herein, Company and Supplier hereby agree as follows:

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1. DEFINITIONS

The following capitalized terms shall have the meanings set forth below:

“Agreement” – Shall have the meaning set forth in the first paragraph on the first page of this agreement.

“Automatic Generation Control” or “AGC” – Equipment that automatically adjusts generation and demand resources in the Company System from a central location to maintain the System’s frequency bias.

“Automatic Delivery” – event where equipment identifies a Contingency Event on the system or distribution circuit, which automatically triggers the activation of Reliability (back-tie) Service resources.

“Business Continuity Plans” – Shall have the meaning set forth in Section 27.1(g) (Business Continuity Plan).

“Business Day” – Any day other than a Saturday, Sunday or legal holiday of either the United States or the State of Hawai‘i.

“Calendar Month” – The period commencing at 12:00 a.m. on the first day of any month and terminating at 11:59 p.m. on the last day of the same month.

“Calendar Year” – The period commencing at 12:00 a.m. on January 1 of any year and terminating at 11:59 p.m. on December 31 of the same year.

“Capability” – For each Grid Service, the amount of the Grid Service available for delivery by Supplier to Company during a GS Event.

“Capacity” or “Capacity Grid Service” – Shall have the meaning set forth in Exhibit A-3 (Capacity Grid Service Description and Requirements).

“Claim” – Any claim, suit, action, demand or proceeding.

“Collateral” – Shall have the meaning set forth in Exhibit Q (Security Agreement).

“Commercial and Industrial Customer” or “C&I Customer” – The Customer Class that receives electric service under one or more of the following rate schedules as set forth in Exhibit K (Settlement): Schedule J (General Service Demand), Schedule P (Large Power Service), Schedule DS (Large Power Directly Served Service).

“Committed Forecast” – The prior month’s Operational Forecast available for Dispatch by Company.

“Company” – Shall have the meaning set forth in the first paragraph on the first page of this Agreement.

“Company Data” – Shall have the meaning set forth in Section 3.1 (Ownership of Company Data).

“Company System” – The electric system owned and operated by Company (including any non-utility owned facilities) consisting of power plants, transmission and distribution lines, and related equipment for the production and delivery of electric power to the public.

“Company System Operator” – The individual(s) designated by job position(s) as Company’s representative(s) to act on behalf of Company on all issues regarding scheduling and dispatch of Grid Services.

“Company Trademarks” – Shall have the meaning set forth in Section 19.2(a) (Co-Branding; Use of Company’s Trademarks).

“Company’s Corporate Code of Conduct” – Shall have the meaning set forth in Section 19.3(a) (Compliance with Company Policies).

“Conditions Precedent” – The conditions listed in Section 2.2 (Conditions Precedent to Company’s Obligations).

“Confidential Information” – Shall have the meaning set forth in Section 4.1 (Confidential Information).

“Consumer Advocate” – Shall have the meaning set forth in Section 4.5 (Company’s Disclosure).

“Contract Capability” – The Capability that Supplier has committed to deliver to Company per Grid Service per Customer Class over the Term, which is set forth in Exhibit H (Contract Capability).

“Contract Year” – The 12-month period beginning on the System Integration Date and/or each succeeding 12-month period thereafter.

“Customer Class” – The category to which each customer of Company can be assigned based on the rate class under which the customer receives electric service.

“Day” – A calendar day.

“Deferral Costs” – Shall have the meaning set forth in Section 19.7(b)(2) (Deferral Costs).

“Delivered Capability” – For each Grid Service, the amount of the Grid Service delivered by Supplier to Company during a GS Event.

“Disclosing Party” – Shall have meaning set forth in Section 4.1 (Confidential Information).

“Dispatch” – Company’s right, through supervisory equipment or otherwise, to schedule and direct the supply of the Grid Services consistent with this Agreement.

“Dispute” – Shall have the meaning set forth in Section 12.2 (Good Faith Negotiations).

“Distributed Energy Resources Management System” or “DERMS” – The system of assets owned and operated by Company consisting of servers and network communications equipment that enable (i) the exchange of data as described in Exhibit G (Data, Integration, and Testing Requirements) and Exhibit F (Operational Forecast) and (ii) control functions required for the dispatch of Grid Services. DERMS uses Siemens’ Demand Response Management System (“DRMS”) to provide event based resource management and combines it with the forecast, scheduling and online control components of Siemens’ Distributed Energy Management System (“DEMS”) to control distributed energy and load resources to manage capacity, as well as other uses as determined by Company.

“Distribution Capacity Service” – Shall have the meaning set forth in Exhibit A-11 (Distribution Capacity Service Description and Requirements).

“DPR” – Has the meaning set forth in Section 12.4(a) (Mediation).

“Enabled Capability” – The total capability per Grid Service that Supplier has enabled to provide to Company during each upcoming month.

“Enabled Capability Price” – The price per kW to be paid by Company to Supplier for each increment of enabled capability, which is identified in Exhibit K (Settlement).

“Enabled Capability Projection” – The Grid Service Capability that Supplier expects it can make available for delivery during the next month, shown as an hourly average by weekday and weekend or holiday during the month. The Enabled Capability Projection will reflect enrollment and disenrollment of Participants and enablement and disablement of Resources.

“Energy Management System” or “EMS” – A system of computer-aided tools used by bulk power system operators to monitor, control and optimize system performance.

“Environment” – Shall have the meaning set forth in Section 27.1(c) (Information Security Requirements/Malware).

“Equal Opportunity Clause” – Shall have the meaning set forth in Section 15.1 (Equal Employment Opportunity).

“Event of Default” – An event or occurrence specified in Section 6.1(a) (Default by Supplier) or Section 6.1(b) (Default by Company).

“Execution Date” – The date referred to in the first paragraph on the first page of this Agreement.

“Fast Frequency Response” or “Fast Frequency Response Grid Service” – Has the meaning set forth in Exhibit A-1 (Fast Frequency Response Description and Requirements).

“Force Majeure” – Has the meaning set forth in Section 14.1 (Definition of Force Majeure).

“Governmental Approvals”- All permits, licenses, approvals, certificates, entitlements and other authorizations issued by Governmental Authorities, as well as any agreements with Governmental Authorities, required to fulfill a party’s obligations under this Agreement, including the design, permitting, deployment, operation and maintenance of Supplier’s GSDS, and all amendments, modifications, supplements, general conditions and addenda thereto.

“Governmental Authority” – Any federal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal.

“Grid Services” – The services offered by Supplier to be delivered to Company for use in the Company System pursuant to this Agreement, which will be one or more of the following: Fast Frequency Response Grid Service, Regulating Reserve Grid Service, Distribution Capacity, Reliability (back-tie), Capacity Grid Service, and Replacement Reserve Grid Service, which are described in Exhibit A-1 (Fast Frequency Response Grid Service), Exhibit A-2 (Regulating Reserve Grid Service), Exhibit A-3 (Capacity Grid Service), Exhibit A-11 (Distribution Capacity), Exhibit A-12 (Reliability (back-tie)), and Exhibit A-4 (Replacement Reserve Grid Service), respectively.

“Grid Services Data” – Shall have the meaning set forth in Section 19.2(f) (Meter Data).

“Grid Services Delivery System” or “GSDS” – The system of assets owned and operated by or obligated to Supplier consisting of servers, network communications equipment, Resource control equipment, sensors and other monitoring devices required to deliver Grid Services to Company. The GSDS does not include any Participant Resources or Company revenue-grade meters.

“Grid Services Event” or “GS Event” – The delivery of a Grid Service at the Company’s command or request, or in the case of a Grid Service where autonomous delivery is required, the appropriate autonomous delivery of the relevant Grid Service.

“Grid Services Event Performance Factor” or “GS Event Performance Factor” – Shall have the meaning set forth in Exhibit K (Settlement).

“Grid Services Tariff” or “GS Tariff” – The set of rules approved by order of the PUC as may be amended from time to time, applicable to any aspect of the Grid Services Delivery System.

“Grid Services Value Ratio” or “GSV Ratio” - Shall have the meaning set forth in Exhibit K (Settlement).

“Hawai‘i General Excise Tax” – The tax on gross income codified under Hawai‘i Revised Statutes Chapter 237 and administered by the Department of Taxation of the State of Hawai‘i and all other similar taxes imposed by any Governmental Authority with respect to payments in the nature of a gross receipts tax, sales tax, privilege tax or the like, but excluding federal or state net income tax.

“HST” – Hawai‘i Standard Time.

“HRS” – Hawai‘i Revised Statutes, as may be amended.

“Indemnified Company Party” – Shall have the meaning set forth in Section 11.1(a) (Indemnification of Company).

“Indemnified Supplier Party” – Shall have the meaning set forth in Section 11.2(a) (Indemnification of Supplier).

“Initial Term” – Shall have the meaning set forth in Section 22.1(a) (Term).

“Laws” – All federal, state and local laws, rules, regulations, orders, ordinances, permit conditions and other governmental actions.

“Letter of Credit” – Shall have the meaning set forth in Section 21.3 (Letter of Credit).

“Liquidated Damages” – Any of the damages provided for in Article 7 (Liquidated Damages; Other Remedies) and any of the damages characterized as liquidated damages in this Agreement.

“Loss” or “Losses” – Any and all direct, indirect or consequential damages, fines, penalties, deficiencies, losses, liabilities (including settlements and judgments), costs, expenses (including reasonable attorneys’ fees and court costs) and disbursements.

“Malware” – Computer software, code or instructions that: (a) intentionally, and with malice intent by a third party, adversely affect the operation, security or integrity of a computing, telecommunications or other digital operating or processing system or environment, including without limitation, other programs, data, databases, computer libraries and computer and communications equipment, by altering, destroying, disrupting or inhibiting such operation, security or integrity; (b) without functional purpose, self-replicate written manual intervention; (c) purport to perform a useful function but which actually performs either a destructive or harmful function, or perform no useful function other than utilize substantial computer, telecommunications or memory resources with the intent of causing harm; or (d) without authorization collect and/or transmit to third parties any information or data; including such software, code or instructions commonly known as viruses, Trojans, logic bombs, worms, adware and spyware.

“Management Meeting” – Shall have the meaning set forth in Section 12.2 (Good Faith Negotiations).

“Monthly Invoice Report” or “MIR” – Shall have the meaning set forth in Exhibit J (Reporting).

“Operational Forecast” – The information shown in the approved Exhibit F (Operational Forecast).

“Participant” – A Residential Customer, SMB Customer, or C&I Customer enrolled by Supplier that contributes one or more Resources to Supplier pursuant to a Participant Service Agreement.

“Participant Data” – All data provided by Supplier to Company and all data provided by Company to Supplier regarding Participants pursuant to this Agreement.

“Participant Incentive and Capability Report” or “PIC” – Shall have the meaning set forth in Exhibit J (Reporting).

“Participant Incentive Credit” – Shall have the meaning set forth in Exhibit K (Settlement).

“Participant Service Agreement” – The agreement between Supplier and Participant, which shall comply with the requirements set forth in this Agreement, including but not limited to the requirements set forth in Section 19.6(b) (Participant Service Agreement).

“Parties” – Supplier and Company, collectively.

“Party” – Supplier or Company.

“Performance Factor” or “Settlement Performance Factor” – Shall have the meaning set forth in Exhibit K (Settlement).

“Performance Payment” – Shall have the meaning set forth in Exhibit K (Settlement).

“Personally Identifiable Information” – The personally identifiable information of individuals, and any information that may be used to track, locate or identify such individuals (or which is otherwise protected by privacy laws), including any automatically generated information (such as IP addresses and other customer identifiers) that identifies or is unique or traceable to a particular individual or computer or other electronic device capable of accessing the internet, including without limitation, name, address, telephone number, social security number, credit card account numbers, email addresses, user identification numbers or names and passwords, which is disclosed to Supplier or its subcontractors in connection with this Agreement by Company employees and individuals who seek to obtain or have obtained products or services from Company, which products and services are used or intended to be used for personal, family or household purposes.

“Portfolio” – Supplier’s collection of Resources.

“Pre-Deferral Estimate” – Shall have the meaning set forth in Section 19.7(b)(2)(C) (Pre Deferral Estimate).

“Prime Rate” -- The “prime rate” of interest, as published from time to time by The Wall Street Journal in the “Money Rates” section of its Western Edition Newspaper (or the average prime rate if a high and a low prime rate are therein reported). The Prime Rate shall change without notice with each change in the prime rate reported by The Wall Street Journal, as of the date such change is reported. Any such rate is a general reference rate of interest, may not be related to any other rate, may not be the lowest or best rate actually charged by any lender to any customer or a favored rate and may not correspond with future increases or decreases in interest rates charged by lenders or market rates in general.

“Proprietary Rights” – Shall have the meaning set forth in Section 28.12 (Proprietary Rights).

“PUC” or “Public Utilities Commission” – Shall have the meaning set forth in the recitals above.

“Receiving Party” – Shall have the meaning set forth in Section 4.1 (Confidential Information).

“Regulating Reserve” or “Regulating Reserve Grid Service” – Shall have the meaning set forth in Exhibit A-2 (Regulating Reserve Grid Service Description and Requirements).

“Reliability (back-tie)” – Shall have the meaning set forth in Exhibit A-12 (Reliability (back-tie) Description and Requirements).

“Replacement Reserve” or “Replacement Reserve Grid Service” – Shall have the meaning set forth in Exhibit A-4 (Replacement Reserve Grid Service Description and Requirements).

“Residential Customer” – A member of the Customer Class that receives electric service under Schedule R (Residential Service) as set forth in Exhibit K (Settlement).

“Resource” – An asset at a Participant’s location enabled by a Supplier under a Participant Service Agreement to provide one or more Grid Services to Company.

“Scheduled Delivery” – events that can be activated daily or scheduled by Company Control Center to proactively reduce the chance of overload on Distribution circuits.

“Security” – Shall have the meaning set forth in Section 21.1 (Security for the Performance of Supplier’s Obligations).

“Security Agreement” – The Security Agreement to be executed by Supplier in the form of Exhibit Q (Security Agreement) in favor of Company in accordance with Section 21.2 (Security Agreement).

“Settlement Month” – Shall have the meaning set forth in Exhibit K (Settlement).

“Small and Medium Business Customer” or “SMB Customer” – A member of the Customer Class that receives electric service under Schedule G (General Service Non-Demand) as set forth in Exhibit K (Settlement).

“Source Code” –The human readable source code of the GSDS that consists of narrated documentation related to the compilation, linking, packaging and platform requirements of the GSDS and any other materials or software sufficient to enable a reasonably skilled programmer to build, modify and use the code within a commercially reasonable period of time for the purpose of establishing, operating, and/or maintaining the GSDS and that can reasonably be compiled by a computer for execution.

“Source Code Authorized Use” – Shall have the meaning set forth in Section 5.1(b)(1)(E) (Authorized Use).

“Source Code Escrow” – The escrow established with the Source Code Escrow Agent under the terms of the Source Code Escrow Agreement under which Source Code shall be confidentially deposited by a Source Code Owner for safekeeping and, upon the satisfaction of certain conditions, released to the Company.

“Source Code Escrow Agent” – Iron Mountain Intellectual Property Management, Inc. or other similar escrow agent approved by Company.

“Source Code Escrow Agreement” – A multi-party escrow agreement between Company, Source Code Escrow Agent and any and all Source Code Owners depositing Source Code into the Source Code Escrow which, among other matters, names Company as beneficiary thereunder, and is otherwise acceptable in form and substance to Company.

“Source Code Owner” –The developer and/or owner of the Source Code authorized to deposit the Source Code with the Source Code Escrow Agent upon the terms of the Source Code Escrow Agreement.

“Supervisory Control And Data Acquisition” or “SCADA” – The system that provides remote control and monitoring of Company’s transmission and sub-transmission systems and enables Company to perform real-time control of equipment in the field and to monitor the conditions and status of the Company System.

“Supplier” – The person or entity identified the first paragraph of this Agreement.

“Supplier Agents” – Contractors, consultants, and other third parties retained by Supplier to assist Supplier to perform under this Agreement.

“Supplier Data” – Shall have the meaning set forth in Section 3.1(a) (Other Data).

“System Integration” – The satisfaction of the following conditions: (i) the Conditions Precedent have been met to the satisfaction of Company, (ii) Supplier has provided Company with written notice that Supplier is ready to declare the System Integration Date, (iii) Supplier has passed the GSDS Integration Test described in Exhibit G (Data, Integration, and Testing Requirements) as demonstrated by a written notice (electronic or paper) from Company, and (iv) Supplier’s GSDS is eligible to enroll Participants and to enable and deliver the Grid Services identified in this Agreement as demonstrated by a written notice (electronic or paper) from Company.

“System Integration Date” – The date on which Supplier has achieved System Integration.

“System Integration Date Deadline” – The date that is ninety (90) Days after the PUC Approval Date.

“Tariff” – The tariff applicable to Electric Service of Hawaiian Electric Company, Inc.

“Term” – Shall have the meaning set forth in Section 22.1(a) (Term).

“Termination Assistance Period” – Shall mean a period of time designated by Company, commencing on the date a determination is made that there will be an expiration or termination of this Agreement and continuing for up to ninety (90) days after the effective date of the termination of this Agreement, during which Supplier shall provide the Termination Assistance Services.

“Termination Assistance Services” – Shall mean (1) Supplier's cooperation with Company or any other operator designated by Company in the transition of the GSDS to Company or the other operator designated by Company and (2) any other service requested by Company in order to facilitate the transfer of the GSDS to Company or any other operator designated by Company. Termination Assistance Services might include, by way of example only, training of staff of Company or other operator regarding equipment operation and maintenance, assisting to integrate a Resource to communicate directly with DERMS rather than through Supplier's head end system, assisting to integrate a Resource to communicate with the other operator’s head end system, and assisting with development of Company's new head end system (using Supplier's Source Code) that would communicate with a Resource.

1. TERMS AND CONDITIONS
   1. General Purpose of the Agreement
      1. Overview. Supplier will design, permit, deploy, operate and maintain the Grid Services Delivery System to deliver Grid Services to Company in compliance with all applicable Laws and the terms and conditions of this Agreement. Grid Services from Supplier will be sold to Company under Dispatch for use in the Company System in accordance with the terms of this Agreement. Supplier will carry out its obligations under this Agreement in all respects in a manner that gives full recognition to the fact that, in order for Company to provide service to its customers, Supplier must design, permit, deploy, operate, and maintain the GSDS in order to achieve the System Integration Date by the System Integration Date Deadline and thereafter be available to provide Grid Services accordance with the terms of this Agreement.
      2. Provision of Grid Services. Company agrees to allow Supplier to operate the GSDS to provide the Grid Services to Company; provided, however, that such operation shall not: (i) adversely affect Company’s property or the operations of its customers and customers’ property; (ii) present safety hazards to the Company System, Company’s property or employees; or Company’s customers or the customers’ property or employees; (iii) fail to comply with any Laws, the Tariff, Government Approvals or Company’s interconnection requirements; or (iv) otherwise fail to comply with this Agreement. Such parallel operation shall be contingent upon the satisfactory completion, as determined solely by Company, of the testing and other requirements set forth in Exhibit G (Data, Integration, and Testing Requirements).
   2. Conditions Precedent to Company’s Obligations. Company’s obligation to purchase the Grid Services from Supplier and any and all obligations of Company that are ancillary to that purchase are contingent upon the occurrence of the Conditions Precedent set forth below prior to the System Integration Date or by such earlier date as might be specified. The Company’s extension of or failure to enforce the time to meet a Condition Precedent shall not be construed as a waiver of that or any other Condition Precedent or the waiver of any other time to meet a Condition Precedent.
      1. By the Execution Date, execute the Trademark License Agreement.
      2. By the Execution Date, execute the Security Agreement.
      3. By the Execution Date, deliver the Letter of Credit to Company.
      4. No later than thirty (30) days prior to the System Integration Date Deadline, provide to Company all marketing materials as described in Section 19.2(a)(1) (Marketing Material).
      5. No later than thirty (30) days prior to the System Integration Date Deadline, provide to Company the form(s) of the Participant Service Agreement(s).
      6. No later than thirty (30) days prior to the System Integration Date Deadline, provide to Company a successful demonstration of Supplier’s portal for engagement with Participants as described in Section 19.2(a)(2) (Participant Engagement Portal).
      7. No later than thirty (30) days prior to the System Integration Date Deadline, submit to Company copies of any and all required insurance policies (or binders as appropriate) procured by Supplier in accordance with Article 13 (Insurance) to be in effect no later than the System Integration Date or any entry upon the property of Company or any potential Participant related to the GSDS, whichever occurs earlier.
      8. No later than thirty (30) days prior to the System Integration Date Deadline, deliver all Business Continuity Plans to Company.
      9. No later than thirty (30) days prior to the System Integration Date Deadline, establish a Source Code Escrow.
      10. Satisfy all requirements set forth in Exhibit A-1 (Fast Frequency Response Grid Service Description and Requirements), Exhibit A-2 (Regulating Reserve Grid Service Description and Requirements), Exhibit A-3 (Capacity Grid Service Description and Requirements), Exhibit A-4 (Replacement Reserve Grid Service Description and Requirements), Exhibit A-11 (Distribution Capacity) and Exhibit A-12 (Reliability (back-tie)) relevant to each of the Grid Services being provided.
      11. Satisfy the requirements of Exhibit E (Advanced Metering).
      12. Complete and obtain Company’s approval of Exhibit F (Operational Forecast).
      13. Satisfy the requirements of Exhibit G (Data, Integration, and Testing Requirements).
   3. Failure to Meet System Integration Date Deadline
      1. System Integration Date Deadline and Grace Periods. Time is of the essence of this Agreement, and Supplier shall achieve the System Integration Date no later than the System Integration Date Deadline. If Supplier fails to achieve the System Integration Date by the System Integration Date Deadline, Supplier shall have the following grace periods within which to achieve the System Integration Date:
         1. Force Majeure. If the failure to achieve the System Integration Date by the System Integration Date Deadline is the result of Force Majeure, Supplier shall be entitled to a grace period following the System Integration Date Deadline equal to the lesser of ninety (90) days or the duration of the Force Majeure.
         2. Untimely Performance by Company. If the failure to achieve the System Integration Date by the System Integration Date Deadline is the result of any failure by Company in the timely performance of its obligations under this Agreement, Supplier shall be entitled to a grace period following the System Integration Date Deadline equal to the duration of the period of delay directly caused by such failure in Company’s timely performance. Such grace period shall be Supplier’s sole recourse for any such failure by Company. For purposes of this Section 2.3(a)(2) (Untimely Performance by Company), Company’s performance will be deemed to be timely if it is accomplished within the time period specified in this Agreement with respect to such performance or, if no time period is specified, within a reasonable period of time. The determination of what period of time is reasonable for a particular activity will take into account Company’s past practices in similar activities.
      2. No extension of Term. Notwithstanding anything that might be construed to the contrary, any grace period allowed pursuant to Section 2.3(a)(2) (Untimely Performance by Company) shall not operate to extend the Term as established under Section 22.1(a) (Term).
      3. Reporting. At Company’s request, Supplier shall provide written reports regarding its progress towards satisfying the Conditions Precedent set forth in Section 2.2 (Conditions Precedent to Company’s Obligations) above. Company may prescribe a form for such report.
2. OWNERSHIP OF DATA AND MATERIALS
   1. Ownership of Company Data. As between Company and Supplier, all Company pricing and incentives under this Agreement, all data prepared by Supplier for delivery to Company, and all data provided by Company to Supplier pursuant to this Agreement, including but not limited to all names, addresses, and rate schedules of Company’s customers (“Company Data”) is, will be, and shall remain the property of Company. Unless approved by Company, which approval may be withheld in Company’s sole discretion, the Company Data shall not (i) be used by Supplier other than in connection with its performance under this Agreement, (ii) be disclosed, sold, assigned, leased or otherwise provided to third parties by Supplier, or (iii) be commercially exploited by or on behalf of Supplier. The availability of financial compensation to Company shall not preclude injunctive relief to prevent disclosure of Company Data. This provision shall not apply to data acquired independently by Supplier.
      1. Other Data. All data provided by Supplier to Company pursuant to this Agreement and not otherwise owned by Company as provided in Section 3.1 (Ownership of Company Data) (“Supplier Data”) may be used by Company for any Company business purpose, including, without limitation, any business purpose in connection with this Agreement. Supplier hereby grants to Company and its affiliates (and their third party service providers) a non-exclusive, perpetual, royalty-free, irrevocable worldwide right and license to use and access, modify, maintain, enhance and create derivative works based upon the Supplier Data accordingly.
   2. Ownership of Materials. Except as otherwise provided, any and all drawings, specifications, technical information, reports, studies, documents, materials and business information of any type whatsoever (the “Materials”) provided to Supplier by Company, or prepared or developed by Supplier for or on behalf of Company in the performance of this Agreement (except as provided below), are Company's exclusive property. Any restrictions or claims to ownership or rights included on or within the Materials delivered by Supplier to Company that conflict or are inconsistent with this Section 3.2 (Ownership of Materials) are null and void.
3. Confidentiality
   1. Confidential Information. Each Party may have a proprietary interest or other need for confidentiality in certain information that may be furnished to the other pursuant to this Agreement or any work performed hereunder. For purposes of this Agreement, Confidential Information means all information regarding Company’s customers, customer lists, any of the data and testing results produced under this Agreement, and information identified by either Party as confidential. The party disclosing such information shall be referred to in this section as the Disclosing Party, and the party receiving such information shall be referred to as the Receiving Party.
   2. Non-Disclosure. The Receiving Party will hold in confidence and, without the consent of the Disclosing Party, will not use, reproduce, distribute, transmit, or disclose, directly or indirectly, the Confidential Information of the Disclosing Party except as permitted herein. The Receiving Party may only disclose the Confidential Information to its officers, directors, employees, professional advisors and independent contractors and consultants with a direct need to know the information for the implementation or exercise of rights and/or performance of obligations under or arising from this Agreement, provided that such persons/entities are bound by written confidentiality agreements with terms and conditions that are no less restrictive than those contained in this section. Without limiting the foregoing, the Receiving Party agrees that it will exercise at least the same standard of care in protecting the confidentiality of the Disclosing Party’s Confidential Information as it does with its own Confidential Information of a similar nature, but in any event, no less than reasonable care.
   3. Exceptions. Confidential Information for purposes of this Agreement shall not include information if and only to the extent that the Receiving Party establishes that the information: (i) is or becomes a part of the public domain through no act or omission of the Receiving Party; (ii) was in the Receiving Party’s lawful possession prior to the disclosure and had not been obtained by the Receiving Party either directly or indirectly from the Disclosing Party; or (iii) is lawfully disclosed to the Receiving Party by a third party without restriction on disclosure. Confidential Information may also be disclosed by the Receiving Party pursuant to a requirement of a governmental agency, regulatory body or by operation of law, provided that the recipient shall disclose only that part of the Confidential Information that it is required to disclose and shall notify the Disclosing Party prior to such disclosure in a timely fashion in order to permit the Disclosing Party to lawfully attempt to prevent or restrict such disclosure should it so elect, and shall take all other reasonable and lawful measures to ensure the continued confidential treatment of the same by the party to which the Confidential Information is disclosed.
   4. Return or Destruction of Confidential Information. At any time during or after the Term, at the Disclosing Party’s written request, the Receiving Party will return to the Disclosing Party within ten (10) Business Days, all copies of Confidential Information in tangible form received from the Disclosing Party in the Receiving Party’s or its representatives’ possession or certify within such period that it has destroyed such Confidential Information; provided, however, that the Receiving Party’s sole obligation with respect to the disposition of any documentation prepared for or by the Receiving Party or its representatives that contains, is based on, or otherwise reflects or is derived from, in whole or in part, any Confidential Information shall be to redact or otherwise expunge all such Confidential Information from such documentation and certify to the Disclosing Party that it has so redacted or expunged the Confidential Information.
   5. Company’s Disclosure. Any provision herein to the contrary notwithstanding, Company may disclose Confidential Information, as necessary and appropriate, to the Public Utilities Commission and/or the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs of the State of Hawai‘i (“Consumer Advocate”) (including their respective staffs) provided that such disclosure is made under a protective order entered in the docket or proceeding with respect to which the disclosure will be made or any general protective order entered by the PUC.
   6. Prohibited Activities. Supplier acknowledges that it will derive significant value from Company’s provision of Confidential Information that will enable Supplier to optimize the performance of its contractual duties to Company pursuant to this Agreement. Supplier shall not use Company’s Confidential Information other than for Company’s exclusive benefit.
4. SOURCE CODE
   1. Source Code.
      1. Supplier’s Obligation to Provide Source Code. No later than thirty (30) days prior to the System Integration Date Deadline, Supplier shall provide the Source Code in a form reasonably satisfactory to Company. Supplier shall provide updates of any Source Code within thirty (30) Days of being notified that the Source Code has been modified, updated or superseded by the Source Code Owner.
      2. Escrow Establishment. If Supplier is unable to provide the Source Code directly to Company, due to its agreement with the Source Code Owner or otherwise, Supplier shall arrange for and ensure that the Source Code is deposited into the Source Code Escrow as set forth in Section 5.1(b)(1) (Source Code Escrow) no later than the time periods set forth in Section 5.1(a) (Supplier’s Obligation to Provide Source Code). Supplier shall be responsible for all costs associated with establishing and maintaining the Source Code Escrow.
         1. Source Code Escrow.
            1. Establishment of Source Code Escrow. Supplier shall arrange for and ensure the deposit of a copy of the current version of the Source Code and any updates to the deposited Source Code with the Source Code Escrow Agent under the terms and conditions of the Source Code Escrow Agreement.
            2. Release Conditions. Company shall have the right to obtain promptly from the Source Code Escrow Agent one copy of the escrowed Source Code, and any updates, under the following conditions:

A receiver, trustee, or similar officer is appointed, pursuant to federal, state or applicable foreign law, for the Source Code Owner;

Any voluntary or involuntary petition or proceeding is instituted, under (x) U.S. bankruptcy laws or (y) any other bankruptcy, insolvency or similar proceeding outside of the United States, by or against the Source Code Owner; or

Failure of the Source Code Owner to function as an ongoing concern or operate in the ordinary course.

* + - * 1. Remedies. If Company has the right to obtain from the Source Code Escrow Agent the escrowed Source Code, and Company finds that Supplier failed to arrange for and/or ensure the update of the Source Code Escrow with the modified and/or updated Source Code as provided in Section 5.1(b)(1)(A) (Establishment of Source Code Escrow) or that the Source Code is incomplete or otherwise unusable, Supplier shall be liable to Company for liquidated damages in the amount of FIVE HUNDRED DOLLARS ($500) per day for each day Supplier fails to provide such Source Code to Company or such update to the Source Code to Company from the date such Source Code or update was first required to be made to Company. Failure to provide the updated Source Code within thirty (30) Days’ notice from Company of a breach of Section 5.1(b)(1)(A) (Establishment of Source Code Escrow) shall constitute an Event of Default pursuant to Section 6.1(a) (Default by Supplier) under this Agreement.
        2. Certification. The Source Code Escrow Agent shall release the Source Code to Company upon receipt of a signed statement by a representative of Company that reads substantially as follows:

The undersigned hereby certifies that (i) I am duly authorized to execute this document on behalf of Hawaiian Electric Company, Inc. (“Hawaiian Electric”), and (ii) Hawaiian Electric is entitled to a copy of the Source Code of the GSDS Pursuant to Section 5.1(b)(1)(B) (Release Conditions) of the Grid Services Purchase Agreement dated \_\_\_\_\_\_\_\_, between \_\_\_\_\_\_\_\_\_\_\_\_\_ and Hawaiian Electric.

* + - * 1. Authorized Use. If Company becomes entitled to a release of the Source Code from escrow, Company may thereafter correct, modify, update and enhance the GSDS for the sole purpose of providing itself the support and maintenance it otherwise would have been entitled to if Supplier had performed under Section 5.1(a) (Supplier’s Obligation to Provide Source Code) (“Source Code Authorized Use”).
        2. Confidentiality Obligations. Company shall keep the Source Code confidential pursuant to the confidentiality obligations of this Agreement. Company shall restrict access to the Source Code to those employees, independent contractors and consultants of Company who have agreed in writing to be bound by confidentiality and use obligations consistent with those specified in this Agreement, and who have a need to access the Source Code on behalf of Company to carry out their duties for the Source Code Authorized Use. Promptly upon Supplier’s request, Company shall provide Supplier with the names and contact information of all individuals who have accessed the Source Code and shall take all reasonable actions required to recover any such Source Code in the event of loss or misappropriation or to otherwise prevent its unauthorized disclosure or use.
      1. Monetary Escrow.
         1. Establishment of Monetary Escrow. If the Source Code is not provided to the Company as set forth in Section 5.1(a) (Supplier’s Obligation to Provide Source Code) or Section 5.1(b)(1) (Source Code Escrow) then, no later than the time periods set forth in Section 5.1(a) (Supplier’s Obligation to Provide Source Code) for delivery of the Source Code, Supplier shall provide an irrevocable standby letter of credit (“Source Code Recreation Letter of Credit”) with no documentation requirement in the amount of $\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ substantially in the form attached to this Agreement as Exhibit R (Form of Letter of Credit) from a bank or other financial institution located in the United States with a credit rating of “A‑” or better. Such Source Code Recreation Letter of Credit shall be issued for a minimum term of one (1) year. Furthermore, at the end of each year the Source Code Recreation Letter of Credit shall be renewed for an additional one (1) year term so that at the time of such renewal, the remaining term of any such Source Code Recreation Letter of Credit shall not be less than one (1) year. The Source Code Recreation Letter of Credit shall include a provision for at least thirty (30) Days advance notice to Company of any expiration or earlier termination of the Source Code Recreation Letter of Credit so as to allow Company sufficient time to exercise its rights under said Source Code Recreation Letter of Credit if Supplier fails to extend or replace the Source Code Recreation Letter of Credit. In all cases, the reasonable costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Source Code Recreation Letter of Credit shall be borne by Supplier.
         2. Release Conditions. Company shall have the right to draw on the Source Code Recreation Letter of Credit the funds necessary to develop and recreate the GSDS or such part thereof as deemed necessary by Company upon Company’s request if Supplier fails to provide the Company the Source Code or updates within the time periods set forth in Section 5.1(a) (Supplier’s Obligation to Provide Source Code), Company gives written notice of such failure to Supplier, and Supplier fails to remedy such breach within five (5) Days following receipt of such notice.
         3. Extend Letter of Credit. If the Source Code Recreation Letter of Credit is not renewed or extended no later than thirty (30) Days prior to its expiration or earlier termination, Company shall have the right to draw immediately upon the full amount of the Source Code Recreation Letter of Credit and to place the proceeds of such draw (“Proceeds”), at Supplier’s cost, in an escrow account in accordance with Section 5.2(b)(2) (Monetary Escrow), until and unless Supplier provides a substitute form of letter of credit meeting the requirements of Section 5.1(b)(2) (Monetary Escrow).
         4. Proceeds Escrow. If Company draws on the Source Code Recreation Letter of Credit pursuant to Section 5.1(b)(2)(C) (Extend Letter of Credit), Company shall, in order to avoid commingling the Proceeds, have the right but not the obligation to place the Proceeds in an escrow account as provided in this Section 5.1(b)(2)(D) (Proceeds Escrow) with a reputable escrow agent acceptable to Company (“Escrow Agent”). Without limitation to the generality of the foregoing, a federally-insured bank shall be deemed to be a “reputable escrow agent.” Company shall have the right to apply the Proceeds as necessary to recover amounts Company is owed pursuant to this Section 5.1 (Source Code). To that end, the documentation governing such escrow account shall be in form and content satisfactory to Company and shall give Company the sole authority to draw from the account. Supplier shall not be a party to such documentation and shall have no rights to the Proceeds. Upon full satisfaction of Supplier’s obligations under Section 5.1 (Source Code), Company shall instruct the Escrow Agent to remit to the bank that issued the Source Code Recreation Letter of Credit that was the source of the Proceeds the remaining balance (if any) of the Proceeds. If there is more than one escrow account with Proceeds, Company may, in its sole discretion, draw on such accounts in any sequence Company may select. Any failure to draw upon the Proceeds for any damages or other amounts due Company shall not prejudice Company’s rights to recover such damages or amounts in any other manner.
         5. Supplier’s Obligation. If the Source Code Recreation Letter of Credit is not sufficient to cover Company’s associated consultant fees and other costs and expenses to develop and recreate the Source Code, Supplier shall pay to Company the difference within ten (10) Days of Company’s written notice to Supplier.
         6. Model Verification. Supplier shall work with the Company to validate the new Source Code developed by or on behalf of Company within sixty (60) Days of receiving such new Source Code. Supplier shall also arrange for and ensure that Company may obtain new Source Code directly from the Source Code Owner in the event that Supplier ceases to operate as a going concern or is subject to voluntary or involuntary bankruptcy and is unable or unwilling to obtain the new Source Code from the Source Code Owner.
         7. Certification. The terms of the Source Code Recreation Letter of Credit shall provide for a release of the funds, or in the event the funds have been placed into a Proceeds Escrow, the Escrow Agent shall release the necessary funds to Company upon receipt of a signed statement by a representative of Company that reads substantially as follows:

The undersigned hereby certifies that (i) I am duly authorized to execute this document on behalf of Hawaiian Electric Company, Inc. (“Hawaiian Electric”), and (ii) Hawaiian Electric is entitled to $\_\_\_\_\_\_\_\_\_\_\_\_, pursuant to Section 5.1(b)(2)(B) (Release Conditions) of the Grid Services Purchase Agreement dated \_\_\_\_\_\_, between \_\_\_\_\_\_\_\_\_\_\_, and Hawaiian Electric.

* + - * 1. Authorized Use. If Company becomes entitled to a release of funds from escrow, Company may thereafter use such funds to develop, recreate, correct, modify, update and enhance the Source Code for the sole purpose of providing itself the support and maintenance it otherwise would have been entitled to if it had been provided the Source Code by Supplier under Section 5.1(a) (Supplier’s Obligation to Provide Source Code) (“Monetary Authorized Use”).
        2. Supplementary Agreement. The parties stipulate and agree that the escrow provisions in this Section 5.1 (Source Code), and the Source Code Escrow Agreement and Monetary Escrow Agreement are “supplementary agreements” as contemplated in Section 365(n)(1)(B) of the United States Bankruptcy Code (“Code”). In any voluntary or involuntary bankruptcy proceeding involving Supplier, failure by Company to assert its rights to “retain its rights” to the intellectual property encompassed by the Source Code or the funds in the monetary escrow, pursuant to Section 365(n)(1)(B) of the Code, under an executory contract rejected in a bankruptcy proceeding, shall not be construed as an election to terminate the contract by Company under Section 365(n)(1)(A) of the Code.

1. EVENTS OF DEFAULT
   1. Events of Default.
      1. Default by Supplier. The occurrence of any of the following events at any time during the Term shall constitute an Event of Default by Supplier:
         1. Supplier shall fail to pay Company any amount as and when due under this Agreement (less any amounts disputed in good faith pursuant to Article 12 (Governing Law; Dispute Resolution)) and Supplier does not remedy such non-payment within thirty (30) Days after written demand therefor by Company served upon Supplier;
         2. Supplier shall fail to operate, maintain or repair the GSDS in accordance with the terms of this Agreement such that a condition exists in relation to the GSDS that has an adverse physical impact on the Company System or the equipment of Company’s customers or other suppliers or which Company reasonably determines presents an immediate danger to such personnel or equipment, and Supplier shall fail to initiate and diligently pursue reasonable action to cure such failure within seven (7) Days after actual receipt by Supplier of demand therefor by Company, provided, that Company may, after providing written notice to Supplier, access the GSDS and any of Supplier’s equipment related to the GSDS or Supplier’s provision of Grid Services to Company, and undertake such reasonable action on behalf of Supplier, until either such adverse effect or danger is eliminated or Company is reasonably satisfied that Supplier has, within the aforesaid seven (7) Day period, initiated and is diligently pursuing such reasonable action. Supplier shall bear or reimburse Company, as the case may be, for all reasonable, documented, out-of-pocket costs incurred by Company in connection with such reasonable actions taken by Company on behalf of Supplier as provided herein, and shall cooperate in good faith with Company in providing access to the GSDS and any of Supplier’s equipment related to the GSDS or Supplier’s provision of Grid Services to Company, in the event Company elects to undertake such action as provided herein;
         3. Supplier shall (i) abandon the GSDS prior to the date sixty (60) days after System Integration Date Deadline or (ii) fail to maintain continuous service to the extent required by this Agreement for a period of seven (7) or more consecutive Days, the last twenty-four (24) hours of which shall be after notice by Company to Supplier that it is not in compliance with this provision, unless such abandonment or failure is caused by Force Majeure or an Event of Default by Company. For purposes of this Section 6.1(a) (Default by Supplier), abandonment of the GSDS prior to the System Integration Date shall mean the failure by Supplier to proceed with or prosecute in a diligent manner the planning, design, engineering, permitting, deployment (including, without limitation, purchasing, accounting, training and administration) and start‑up of the GSDS for a consecutive period of thirty (30) Days, the last ten (10) Days of which shall be after notice from Company to Supplier that it is not in compliance with this provision;
         4. Supplier shall fail to meet the warranties and guarantees of performance specified in this Agreement, including but not limited to the agreements set forth in Exhibit I (GSDS Service Level Agreement), taking into account any time allowed in Exhibit I (GSDS Service Level Agreement) for cure;
         5. Without the prior written consent of Company, such consent not to be unreasonably withheld, *[NAME OF ENTITY OPERATING GSDS]* (“Operator”) having been previously approved by Company as the operator of the GSDS, is no longer the operator of the GSDS; provided, however, that to the extent that the grant of consent by Company is dependent upon qualifications to carry out the role of operator, Company’s consent shall be granted if Company is reasonably satisfied that the substitute operator (i) has the qualifications or has contracted with an entity having the qualifications to operate the GSDS in a manner consistent with the terms and conditions of this Agreement and (ii) has provided Company with evidence satisfactory to Company of its creditworthiness and ability to perform its financial obligations hereunder (including such guarantees as Company deems appropriate) in a manner consistent with the terms and conditions of this Agreement.
         6. Supplier shall (i) be dissolved, be liquidated, be adjudicated as bankrupt, or become subject to an order for relief under any federal bankruptcy law; (ii) fail to pay, or admit in writing its inability to pay, its debts generally as they become due; (iii) make a general assignment of substantially all its assets for the benefit of creditors; (iv) apply for, seek, consent to, or acquiesce in the appointment of a receiver, custodian, trustee, examiner, liquidator or similar official for itself or any substantial part of its property; (v) institute any proceedings seeking an order for relief or to adjudicate it as bankrupt or insolvent, or seeking dissolution, winding up, liquidation, reorganization, arrangement, adjustment or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization or relief of debtors; or (vi) take any action to authorize or effect any of the foregoing actions;
         7. Without the application, approval or consent of Supplier, a receiver, trustee, examiner, liquidator or similar official shall be appointed for Supplier, or any part of its property, or a proceeding described in Section 6.1(a)(6) (Default by Supplier) shall be instituted against Supplier and such appointment shall continue undischarged or such proceeding shall continue undismissed or unstayed for a period of sixty (60) consecutive Days or Supplier shall fail to file in a timely manner, an answer or other pleading denying the material allegations filed against it in any such proceeding;
         8. Without the prior written consent of Company, Supplier shall transfer, convey, lose or relinquish its right to own the GSDS to any person;
         9. The Security provided by Supplier pursuant to the Security Agreement described in Section 21.2 (Security Agreement) becomes substantially impaired and Supplier fails to cure such impairment promptly upon becoming aware of its existence;
         10. Supplier shall fail to maintain in full force and effect throughout the Term a Letter of Credit in accordance with the provisions of Section 21.3 (Letter of Credit) and such failure continues for forty-five (45) Days after written notice of noncompliance with this Section 6.1(a) (Default by Supplier) by Company;
         11. Supplier shall fail to perform a material obligation of this Agreement not otherwise specifically referred to in this Section 6.1(a) (Default by Supplier), which failure has or may reasonably be anticipated to have a material adverse effect on Supplier’s delivery of Grid Services to Company in accordance with the terms of this Agreement and which failure shall continue for forty-five (45) Days after written demand by Company for performance thereof;
         12. Supplier makes any representation or warranty to Company required by, or relating to Supplier’s performance of, this Agreement that is false and misleading in any material respect when made; or
         13. Supplier modifies its GSDS control schema in a manner that adversely affects its obligations to Company under this Agreement.
      2. Default by Company. The occurrence of any of the following at any time during the Term of this Agreement shall constitute an Event of Default by Company:
         1. Company shall fail to pay Supplier any amount as and when due under this Agreement (less any amounts disputed in good faith pursuant to Article 12 (Governing Law; Dispute Resolution)) and shall fail to remedy such non-payment within forty-five (45) Days after demand therefor from Supplier;
         2. Company shall (i) be dissolved, be adjudicated as bankrupt, or become subject to an order for relief under any federal bankruptcy law; (ii) fail to pay, or admit in writing its inability to pay, its debts generally as they become due; (iii) make a general assignment of substantially all its assets for the benefit of creditors; (iv) apply for, seek, consent to, or acquiesce in the appointment of a receiver, custodian, trustee, examiner, liquidator or similar official for itself or any substantial part of its property; (v) institute any proceedings seeking an order for relief or to adjudicate it as bankrupt or insolvent, or seeking dissolution, winding up, liquidation, reorganization, arrangement, adjustment or composition of it or its debts under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors; or (vi) take any action to authorize or effect any of the foregoing actions;
         3. Without the application, approval or consent of Company, a receiver, trustee, examiner, liquidator or similar official shall be appointed for Company or any part of its respective property, or a proceeding described in Section 6.1(b)(2) (Default by Company) shall be instituted against Company and such appointment shall continue undischarged or such proceeding shall continue undismissed or unstayed for a period of sixty (60) consecutive Days or Company shall fail to file timely an answer or other pleading denying the material allegations filed against it in any such proceeding;
         4. Company shall fail to perform a material obligation of this Agreement not otherwise specifically referred to in this Section 6.1(b) (Default by Company), which failure shall have a material adverse effect on its ability to accept and pay for, or Supplier’s ability to deliver, Grid Services in accordance with the terms of this Agreement and which failure shall continue for forty-five (45) Days after written demand by Supplier for performance thereof; or
         5. Company makes any representation or warranty to Supplier required by, or relating to Company’s performance of, this Agreement that is false and misleading in any material respect when made.
   2. Notice of Default. Upon the occurrence of an Event of Default specified in Section 6.1 (Events of Default), the non-defaulting Party shall deliver to the defaulting Party a written notice that (i) declares that an Event of Default has occurred under Section 6.1 (Events of Default); and (ii) identifies the specific provision or provisions of such Section under which such Event of Default shall have occurred.
   3. Equitable Remedies. Supplier acknowledges that Company is a public utility and is relying upon Supplier’s performance of its obligations under this Agreement, and that Company and/or its customers may suffer irreparable injury as a result of the failure of Supplier to perform any of such obligations, whether or not such failure constitutes an Event of Default or otherwise gives rise to one or more of the remedies set forth in Section 6.2 (Rights and Obligations of the Parties Upon Default). Accordingly, the remedies set forth in Section 6.2 (Rights and Obligations of the Parties Upon Default) shall not limit or otherwise affect Company’s right to seek specific performance, injunctions or other available equitable remedies for Supplier’s failure to perform any of its obligations under this Agreement, irrespective of whether such failure constitutes an Event of Default.
   4. Forward Contract . The Parties agree that, under U.S.C. § 362(b)(6), this Agreement is a “forward contract” and Company is a “forward contract merchant” such that upon the occurrence of an event of default by Supplier under Section 6.1(a) (Default by Supplier), this Agreement may be terminated by Company as provided in this Agreement notwithstanding any bankruptcy petition affecting Supplier.
   5. No Waiver. Notwithstanding any provision herein to the contrary, Company’s failure to declare an Event of Default within the time periods provided in this Agreement shall not constitute a waiver of the right to declare such Event of Default if such failure is the direct or indirect result of Supplier’s misstatement of a material fact or Supplier’s omission of a material fact that is necessary to make any representation, warranty, certification, guarantee or statement made (or notice delivered) by Supplier to Company in connection with this Agreement (whether in writing or otherwise) not misleading.
2. LIQUIDATED DAMAGES; OTHER REMEDIES
   1. Liquidated Damages Generally. Supplier acknowledges that the Grid Services delivered by Supplier are needed by Company to meet the requirements of Company’s customers and thus are critical to the business and operations of Company. Supplier also acknowledges that the damages Company would incur in the event of a failure of Supplier to meet the performance standards under this Agreement would be extremely difficult to quantify. Accordingly, the Parties agree that the Liquidated Damages prescribed in this Agreement (i) constitute a reasonable and good faith estimate of the anticipated or actual loss or damage that would be incurred by Company as a result of such failure, (ii) are not intended as a penalty, (iii) may be invoked by Company to ensure that the GSDS meets the performance standards established under this Agreement, and (iv) constitute Company’s sole and exclusive monetary remedy with respect to the matters for which they are assessed, except as otherwise expressly stated; provided, however, that the Company’s invoking Liquidated Damages shall not limit or otherwise affect Company’s right to seek (aa) monetary damages when Liquidated Damages are not applicable under the terms of this Agreement, and (bb) specific performance or injunctive relief when monetary damages will not provide adequate relief.
   2. When Payment is Due. Payment of any Liquidated Damages described in this Article 7 (Liquidated Damages; Other Remedies) will be due within thirty (30) days of the notice of the assessment of the Liquidated Damages.
   3. Failure to Meet Contract Capability. At the ends of Contract Year 1 (beginning of month 13) and Contract Year 2 (beginning of month 25), Company will evaluate Supplier’s compliance with Contract Capability for the Contract Year. If Supplier falls short of the stated Contract Capability for the Contract Year, Supplier will have ninety (90) days to achieve the requisite Contract Capability. If at the end of the ninety (90) days, Supplier has not met its Contract Capability for the applicable Contract Year, Company will be entitled to the following:
   4. Company will have the right to rescind the purchase of the unmet Contract Capability of each Grid Service for which the Contract Capability standard is not met, resulting in a permanent reduction in Contract Capability for the remainder of the Term; and
   5. Company, at its sole discretion, may require supplier to pay Liquidated Damages equal to the shortfall in Contract Capability for the Contract Year at the amount per kW shown on the table below.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| O‘ahu | | | | |
| GS | Fast Frequency Response | Regulating Reserve | Capacity | Replacement Reserve |
| Amount per kW | $58 | $58 | $31 | $4 |

|  |  |  |
| --- | --- | --- |
| GS | Capacity Distribution | Reliability (Back-Tie) |
| Location | East Kapolei Area | Ho‘opili |
| Amount per kW | $907 | $552 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Maui | | | | |
| GS | Fast Frequency Response | Regulating Reserve | Capacity | Replacement Reserve |
| Amount per kW | $163 | $163 | $80 | $3 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Hawai‘i Island | | | | |
| GS | Fast Frequency Response | Regulating Reserve | Capacity | Replacement Reserve |
| Amount per kW | $229 | $229 | $29 | $3 |

* + 1. Conditional Contract Capability. The remedies available to Company under Section 7.3 (Failure to Meet Contract Capability) shall not apply to the extent that Supplier is unable to realize the Conditional Contract Capability as identified in Exhibit H (Contract Capability) and so notifies Company within ninety (90) Days following the date of the PUC Approval Order.
  1. Termination Damages. If this Agreement is terminated by Company in accordance with its terms where Supplier is the defaulting Party, Supplier shall be liable for Liquidated Damages equal to the total Contract Capability at the amount per kW shown on the table below. Payment of any Liquidated Damages described in this Article 7 (Liquidated Damages; Other Remedies) will be due within thirty (30) days of the notice of the assessment of the Liquidated Damages.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| O‘ahu | | | | |
| GS | Fast Frequency Response | Regulating Reserve | Capacity | Replacement Reserve |
| Amount per kW | $58 | $58 | $31 | $4 |

|  |  |  |
| --- | --- | --- |
| GS | Capacity Distribution | Reliability (Back-Tie) |
| Location | East Kapolei Area | Ho‘opili |
| Amount per kW | $907 | $552 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Maui | | | | |
| GS | Fast Frequency Response | Regulating Reserve | Capacity | Replacement Reserve |
| Amount per kW | $163 | $163 | $80 | $3 |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Hawai‘i Island | | | | |
| GS | Fast Frequency Response | Regulating Reserve | Capacity | Replacement Reserve |
| Amount per kW | $229 | $229 | $29 | $3 |

* 1. Failure to Meet Service Level Agreement. If Supplier fails to meet the Service Level Agreement set forth in Exhibit I (GSDS Service Level Agreement), then Supplier shall be liable for Liquidated Damages as stated in said Exhibit I (GSDS Service Level Agreement).

1. CONSEQUENTIAL DAMAGES
   1. Consequential Damages. Except to the extent such damages are included in any Liquidated Damages provided in Article 7 (Liquidated Damages; Other Remedies), indemnification as provided in Article 11 (Indemnification), or are a result of a Party’s gross negligence or willful and intentional misconduct, damages from claims arising from or related to gross negligence or willful misconduct of a Party or other specified measure of damages expressly provided for herein, neither Party shall be liable to the other Party for special, punitive, indirect, exemplary or consequential damages, whether such damages are allowed or provided by contract, tort (including negligence), strict liability, statute or otherwise. Nothing in this section prevents, or is intended to prevent, Company from proceeding against or exercising its rights with respect to any secured interests in Collateral as provided in this Agreement, including, but not limited to, Company’s rights as provided in Article 21 (Security) and Exhibit Q (Security Agreement).
2. TERMINATION RIGHTS
   1. Right to Terminate.
      1. Notice of Termination. If an Event of Default under Section 6.1 (Events of Default) shall have occurred, the non-defaulting Party shall have the right to terminate this Agreement by delivering a written notice of termination, which shall be effective thirty (30) Days from the date such notice is delivered, provided that if such notice of termination is not given within ninety (90) Days of the date such right to terminate is triggered, such termination shall not be effective.
   2. Termination by Company for an Event of Default by Supplier.
      1. Company’s Assumption of Supplier’s Interest. If an Event of Default by Supplier occurs under Section 6.1(a) (Default by Supplier), and if Company delivers to Supplier the notice required under Section 6.2(b)(1) (Notice of Termination) stating that Company has elected to exercise its rights hereunder, Company may elect to assume all right, title and interest of Supplier in the GSDS and this Agreement to the extent it is legally capable of doing so, take over the deployment or operation of the GSDS forthwith and deploy or operate the GSDS during the period in which the foregoing assumption is being perfected, and complete the deployment of and/or operate the same. Upon such assumption, Company shall have no obligation to remedy or cause to be remedied the events that gave rise to the Event of Default under Section 6.1(a) (Default by Supplier) or to pay any delinquent principal, interest, penalties, or other amounts which, but for such Event of Default would not have become due. Despite such assumption of rights by Company, Supplier shall continue to be liable to Company for all obligations to Company arising from events that occurred through the date of Company’s assumption; provided, however, that such obligations shall be reduced for this purpose by an amount equal to the net present value of this Agreement. Supplier shall take all action and provide all information necessary to facilitate Company’s decision whether to exercise its rights under this Section 9.2(a) (Company’s Assumption of Supplier’s Interest) and to implement the exercise of those rights if Company so chooses.
      2. Supplier’s Obligations Upon Termination. If Company elects to exercise its rights under this Section 9.2 (Termination by Company for an Event of Default by Supplier), Supplier shall take all actions as may be necessary, at no cost to Company, (i) to convey to Company free and clear of all liens and encumbrances (other than those of Company) all of Supplier’s right, title and interest in and to the GSDS and any and all materials, equipment, design materials and supplies relating to the GSDS and (ii) to migrate or transfer the Participants under contract with Supplier to Company or to another operator designated by Company.
   3. Termination Assistance Services. Upon Company’s request and without limiting Supplier’s obligations under Section 9.2(a) (Company’s Assumption of Supplier’s Interest) and Section 9.2(b) (Supplier’s Obligations Upon Termination), which shall be performed without cost to Company, Supplier shall, for a period of ninety (90) days after the effective date of the termination, provide Termination Assistance Services to Company at a rate mutually agreed upon between Company and Supplier. The quality and level of performance of the Termination Assistance Services shall be commensurate and in accordance with all of the applicable standards of service required of Supplier during the Term and shall not be degraded during the Termination Assistance Period. After Termination Assistance Period, Supplier shall (i) answer questions from Company regarding the GSDS and the Grid Services performed by Supplier pursuant to this Agreement on an “as needed” basis at Supplier’s then-standard billing rates and (ii) promptly deliver to Company all Participant Data not previously delivered to Company and any remaining Company-owned documentation still in Supplier’s possession.
3. REPRESENTATIONS, WARRANTIES, AND COVENANTS
   1. By Supplier. Supplier represents, warrants and covenants (as applicable), as of the Execution Date and for extent of the Term, as follows:
      1. Compliance with Laws. Supplier covenants to comply with all applicable Laws, including but not limited to the Grid Service Tariff and decisions and orders of the PUC, in its performance pursuant to this Agreement.
      2. Duly Organized. Supplier represents and warrants that it is a ***[ ]*** duly organized, validly existing and in good standing under the laws of the State of***[\_\_]****.* Supplier has full power, authority and legal right to execute and deliver and perform its obligations under this Agreement. This Agreement has been duly executed and delivered by Supplier and constitutes a legal, valid and binding obligation of Supplier, enforceable in accordance with its terms, except to the extent that such enforcement may be limited by any bankruptcy, reorganization, insolvency, moratorium or similar laws affecting generally the enforcement of creditors’ rights from time to time in effect.
      3. No Conflict. Supplier represents and warrants that the execution and delivery of, and performance by Supplier of its obligations under this Agreement will not result in a violation of, or be in conflict with, any provision of its articles of incorporation, bylaws, and/or other organizational documents, or result in a violation of, or be in conflict with, or constitute a default or an event which would, with notice or lapse of time, or both, become a default under, any mortgage, indenture, contract, agreement or other instrument to which Supplier is a party or by which it or its property is bound, where such violation, conflict, default or potential default would materially adversely affect Supplier’s ability to perform its obligations under this Agreement, or result in a violation of any statute, rule, order of any court or administrative agency, or regulation applicable to Supplier or its property or by which it or its property may be bound, or result in a violation of, or be in conflict with, or result in a breach of, any term or provision of any judgment, order, decree or award of any court, arbitrator or governmental or public instrumentality binding upon Supplier or its property, where such violation, conflict, or breach would have a material adverse effect on Supplier’s ability to perform its obligations under this Agreement.
      4. No Default. Supplier represents and warrants that it is not in default, and no condition exists which, with notice or lapse of time, or both, would constitute a default by Supplier under any mortgage, loan agreement, deed of trust, indenture or other agreement with respect thereto, evidence of indebtedness or other instrument of a material nature, to which it is party or by which it is bound, or in violation of, or in default under, any rule, regulation, order, writ, judgment, injunction or decree of any court, arbitrator or federal, state, municipal or other governmental authority, commission, board, bureau, agency, or instrumentality, domestic or foreign, where such default, condition or violation would have a material adverse effect on Supplier’s ability to perform its obligations under this Agreement.
      5. No Litigation. Supplier represents and warrants that there is no action, suit, proceeding, inquiry or investigation, at law or in equity, or before or by any court, public board or body, pending against such Supplier, or of which Supplier has otherwise received official notice, or which to the knowledge of Supplier is threatened against Supplier, wherein an adverse decision, ruling or finding would have a material adverse effect on Supplier’s ability to perform its obligations under this Agreement.
      6. Experience, Qualifications and Resources. Supplier represents that it has entered into this Agreement in connection with the conduct of its business and it has the experience, qualifications and financial resources necessary to operate and maintain the GSDS in accordance with the terms and conditions of this Agreement.
      7. No Other Use. On the Execution Date, Supplier represents and warrants to Company that Supplier has not used, granted, pledged, assigned, or otherwise committed any of the Grid Services to be supplied to Company under this Agreement to any entity other than Company.
      8. Supplier Covenants. Supplier covenants that throughout the term of this Agreement:

Supplier will deliver the Grid Services to Company free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person;

Supplier has been authorized by each Participant, to act as an aggregator on behalf of such Participant and its contracted Resource(s);

Supplier will not use, grant, pledge, assign or otherwise commit any Grid Service or portion thereof to any entity other than Company during the term of this Agreement, except that Supplier may pledge or assign its interest in this Agreement and the assets used in the GSDS to a lender providing financing for the GSDS, provided that Company consents to such financing under terms that provide protection to Company, which consent shall not be unreasonably withheld.

* + 1. Continuing Obligation. Supplier’s representations, warranties and covenants as set forth in this Article 10 (Representations, Warranties and Covenants) are continuous for the extent of the term of this Agreement. Supplier shall provide notice to Company of the occurrence or nonoccurrence of any event that compromises its representations, warranties and covenants made herein within five (5) Business Days of Supplier’s knowledge thereof.
  1. By Company. Company represents, warrants, and covenants (as applicable) as of the Execution Date and for the extent of the Term, as follows:
     1. Duly Organized. Company represents and warrants that it is a corporation duly organized, validly existing and in good standing under the laws of the State of Hawai‘i. Company has full power, authority and legal right to execute and deliver and perform its obligations under this Agreement. This Agreement has been duly authorized, executed and delivered by Company and constitutes a legal, valid and binding obligation of Company, enforceable in accordance with its terms, except to the extent that such enforcement may be limited by any bankruptcy, reorganization, insolvency, moratorium or similar laws affecting generally the enforcement of creditors’ rights from time to time in effect.
     2. No Conflict. Company represents and warrants that the execution and delivery of, and performance by Company of its obligations under this Agreement will not result in a violation of, or be in conflict with, any provision of the articles of incorporation or bylaws of Company, or result in a violation of, or be in conflict with, or constitute a default or an event which would, with notice or lapse of time, or both, become a default under, any mortgage, indenture, contract, agreement or other instrument to which Company is a party or by which it or its property is bound, where such violation, conflict, default or potential default would materially adversely affect Company’s ability to perform its obligations under this Agreement, or result in a violation of any statute, rule, order of any court or administrative agency, or regulation applicable to Company or its property or by which it or its property may be bound, or result in a violation of, or be in conflict with, or result in a breach of, any term or provision of any judgment, order, decree or award of any court, arbitrator or governmental or public instrumentality binding upon Company or its property, where such violation, conflict, or breach would have a material adverse effect on Company’s ability to perform its obligations under this Agreement.
     3. No Default. Company represents and warrants that it is not in default, and no condition exists which, with notice or lapse of time, or both, would constitute a default by Company under any mortgage, loan agreement, deed of trust, indenture or other agreement with respect thereto, evidence of indebtedness or other instrument of a material nature, to which it is party or by which it is bound, or in violation of, or in default under, any rule, regulation, order, writ, judgment, injunction or decree of any court, arbitrator or federal, state, municipal or other governmental authority, commission, board, bureau, agency, or instrumentality, domestic or foreign, where such default, condition or violation would have a material adverse effect on Company’s ability to perform its obligations under this Agreement.
     4. No Litigation. Company represents and warrants that there is no action, suit, proceeding, inquiry or investigation, at law or in equity, or before or by any court, public board or body, pending against such Company, or of which Company has otherwise received official notice, or which to the knowledge of Company is threatened against Company, wherein an adverse decision, ruling or finding would have a material adverse effect on Company’s ability to perform its obligations under this Agreement.
     5. Continuing Obligation. Company’s representations, warranties and covenants as set forth in this Article 10 (Representations, Warranties and Covenants) are continuous for the extent of the term of this Agreement. Company shall provide notice to Supplier of the occurrence or nonoccurrence of any event that compromises its representations, warranties and covenants made herein within five (5) Business Days of Company’s knowledge thereof.
  2. Limitations. Nothing in this Agreement shall limit Company’s ability to exercise its rights as specified in the Tariff as filed with the PUC, or as specified in General Order No. 7 of the PUC’s Standards for Electric Utility Service in the State of Hawai‘i, as either may be amended from time to time.

1. INDEMNIFICATION
   1. Indemnification of Company.
      1. Indemnification Against Third Party Claims. In addition to any other indemnification obligations Supplier may have elsewhere in this Agreement, which are hereby incorporated in this Section 11.1(a) (Indemnification Against Third Party Claims), Supplier shall indemnify, defend, and hold harmless Company, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, servants and agents, including but not limited to contractors, subcontractors and the employees of any of them (collectively, “Indemnified Company Party”), from and against any Losses suffered, incurred or sustained by any Indemnified Company Party or to which any Indemnified Company Party becomes subject, resulting from any Claim (whether or not well founded, meritorious or unmeritorious) by a third party not controlled by, or under common ownership and/or control with, Company relating to (i) Supplier’s development, permitting, deployment, ownership, operation and/or maintenance of the GSDS; (ii) any breach made by Supplier of its representations, warranties and covenants in Article 10 (Representations, Warranties and Covenants); (iii) Supplier’s obligation to its Participant(s) pursuant to any Participant Service Agreement entered into by and between Supplier and its Participant(s); or (iv) any actual or alleged personal injury or death or damage to property, in any way arising out of, incident to, or resulting directly or indirectly from the acts or omissions of any Indemnified Supplier Party or its agents or subcontractors, except as and to the extent that any of the foregoing such Loss is attributable to the gross negligence or willful misconduct of an Indemnified Company Party.
      2. Indemnification for Failure to Comply with Laws. Any Losses incurred by an Indemnified Supplier Party for noncompliance by Supplier or an Indemnified Supplier Party with applicable Laws shall not be reimbursed by Company but shall be the sole responsibility of Supplier. Supplier shall indemnify, defend and hold harmless each Indemnified Company Party from and against any and all Losses in any way arising out of, incident to, or resulting directly or indirectly from the failure of Supplier to comply with any Laws.
      3. Indemnification Against Joint Employer Claims. Supplier shall indemnify, defend, and hold harmless the Indemnified Company Parties, from and against all Claims that any personnel supplied by Supplier, its affiliates and/or their subcontractors pursuant to this Agreement is an employee or agent of Company, to the extent such Claims arise from the acts or omissions of Supplier, including, but not limited to; (i) the cost of any additional compensation or employee benefits Company is required to provide to or pay for on behalf of any personnel supplied by Supplier, its affiliates and/or their subcontractors; and (ii) any Claim brought by any personnel supplied by Supplier, its affiliates and/or subcontractors against Company based upon the employer-employee relationship, to the extent such Claims arise from the acts or omissions of Supplier, and except for any such Claims and related Losses that arise out of or result from any acts or omissions of the Company.
      4. Notice. If Supplier shall obtain knowledge of any Claim subject to Section 11.1(a) (Indemnification Against Third Party Claims), Section 11.1(b) (Indemnification Against Third Party Claims Compliance with Laws) or otherwise under this Agreement, Supplier shall give prompt notice thereof to Company, and if Company shall obtain any such knowledge, Company shall give prompt notice thereof to Supplier.
      5. Indemnification Procedures.
         1. Notice. In case any Claim subject to Section 11.1(a) (Indemnification Against Third Party Claims) or Section 11.1(b) (Indemnification Against Third Party Claims Compliance with Laws) or otherwise under this Agreement, shall be brought against an Indemnified Company Party, Company shall notify Supplier of the commencement thereof and, provided that Supplier has acknowledged in writing to Company its obligation to an Indemnified Company Party under this Section 11.1(e)(1) (Indemnification of Company), Supplier shall be entitled, at its own expense, acting through counsel acceptable to Company, to participate in and, to the extent that Supplier desires, to assume and control the defense thereof; provided, however, that Supplier shall not compromise or settle a Claim against an Indemnified Company Party without the prior written consent of Company which consent shall not be unreasonably withheld.
         2. No Right to Assume. Supplier shall not be entitled to assume and control the defense of any such Claim subject to Section 11.1(a) (Indemnification Against Third Party Claims), Section 11.1(b) (Indemnification Against Third Party Claims Compliance with Laws) or otherwise under this Agreement, if and to the extent that, in the opinion of Company, such Claim involves the potential imposition of criminal liability on an Indemnified Company Party or a conflict of interest between an Indemnified Company Party and Supplier, in which case Company shall be entitled, at its own expense, acting through counsel acceptable to Supplier to participate in any Claim, the defense of which has been assumed by Supplier. Company shall supply Supplier with such information and documents requested by Supplier as are necessary or advisable for Supplier to possess in connection with its participation in any Claim to the extent permitted by this Section 11.1(e)(2) (No Right to Assume). An Indemnified Company Party shall not enter into any settlement or other compromise with respect to any Claim without the prior written consent of Supplier, which consent shall not be unreasonably withheld or delayed.
         3. Subrogation. Upon payment of any Losses by Supplier pursuant to Section 11.1 (Indemnification of Company) or other similar indemnity provisions contained herein to or on behalf of Company, Supplier, without any further action, shall be subrogated to any and all claims that an Indemnified Company Party may have relating thereto.
         4. Cooperation. Company shall fully cooperate and cause all Company Indemnified Parties to fully cooperate, in the defense of or response to any Claim subject to Section 11.1 (Indemnification of Company).
   2. Indemnification of Supplier.
      1. Indemnification Against Third Party Claims. Company shall indemnify, defend, and hold harmless Supplier, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, servants and agents, including but not limited to contractors, subcontractors and their employees of any of them (collectively, “Indemnified Supplier Party”), from and against any Losses suffered, incurred or sustained by any Indemnified Supplier Party or to which any Indemnified Supplier Party becomes subject, resulting from, arising out of, or relating to any Claim by a third party not controlled by or under common ownership and/or control with Supplier (whether or not well founded, meritorious or unmeritorious) relating to any actual or alleged personal injury or death or damage to property, in any way arising out of, incident to, or resulting directly or indirectly from the acts or omissions of Company, except to the extent that any such Loss is attributable to the gross negligence or willful misconduct of an Indemnified Supplier Party.
         1. Indemnity by Company. To the full extent allowed by applicable law, Company will indemnify and hold harmless the Indemnified Supplier Parties, on demand, from and against any and all Losses incurred by any of them as a result of the following third-party claims, and shall defend the Indemnified Supplier Parties against the following claims:
            1. all claims that any item, information, system, deliverable, software or service provided or used in relation to the Grid Services provided by Company (or any Company affiliate, agent, contractor, subcontractor or representative) to Supplier pursuant to this Agreement, or Supplier’s use thereof (or access or other rights thereto) authorized by Company in any circumstance, infringes or misappropriates a United States patent, trademark or copyright of a third party provided however, Company shall have no liability or obligation to any of the Indemnified Supplier Parties under this Section 11.2(a)(1)(A) (Indemnity by Company) to the extent the claim of infringement or misappropriation is caused by such Indemnified Supplier Party’s unauthorized use or modification of such item or such Indemnified Supplier Party’s use of such item in combination with any product or equipment not owned, developed, contemplated or authorized by Company or with respect to any item provided by Company. If any deliverable or item provided by Supplier hereunder is held to constitute, or in Company’s reasonable judgment is likely to constitute, an infringement or misappropriation, Company will in addition to its indemnity obligations, at its expense and option, and after consultation with Supplier regarding Supplier’s preference in such event, either procure the right for Indemnified Supplier Parties to continue using such deliverable or item, replace such deliverable or item with a non-infringing equivalent, provided that such replacement does not result in a degradation of the functionality, performance or quality of the deliverable or item, modify such deliverable or item, or have such deliverable or item modified, to make it non-infringing, provided that such modification does not result in a degradation of the functionality, performance or quality of the deliverable or item, or create a feasible workaround that would not have any adverse impact on the Company. THIS IS THE EXCLUSIVE REMEDY AVAILABLE TO SUPPLIER AS WELL AS COMPANY’S ENTIRE OBLIGATION AND LIABILITY IN CASE OF AN INFRINGEMENT OR MISAPPROPRIATION CLAIM.
      2. Knowledge of Claim. If Company shall obtain knowledge of any Claim subject to Section 11.2(a) (Indemnification Against Third Party Claims) or otherwise under this Agreement, Company shall give prompt notice thereof to Supplier, and if Supplier shall obtain any such knowledge, Supplier shall give prompt notice thereof to Company.
      3. Indemnification Procedures.
         1. Notice. In case any action, suit or proceeding subject to Section 11.2(a) (Indemnification Against Third Party Claims), or otherwise under this Agreement, shall be brought against an Indemnified Supplier Party, Supplier shall notify Company of the commencement thereof and, provided that Company has acknowledged in writing to Supplier its obligation to an Indemnified Supplier Party under Section 11.2 (Indemnification of Supplier), Company shall be entitled, at its own expense, acting through counsel acceptable to Supplier, to participate in and, to the extent that Company desires, to assume and control the defense thereof, provided, however, Company shall not compromise or settle a Claim against an Indemnified Supplier Party without the prior written consent of Supplier which consent shall not be unreasonably withheld.
         2. Assumption and Control of Defense. Company shall not be entitled to assume and control the defense of any such Claim subject to Section 11.2 (Indemnification Against Third Party Claims), or otherwise under this Agreement, if and to the extent that, in the opinion of Supplier, such Claim involves the potential imposition of criminal liability on an Indemnified Supplier Party or a conflict of interest between an Indemnified Supplier Party and Company, in which case Supplier shall be entitled, at its own expense, acting through counsel acceptable to Company, to participate in any Claim the defense of which has been assumed by Company. An Indemnified Supplier Party shall supply Company with such information and documents requested by Company as are necessary or advisable for Company to possess in connection with its participation in any Claim, to the extent permitted by this Section 11.2(c)(2) (Assumption and Control of Defense). An Indemnified Supplier Party shall not enter into any settlement or other compromise with respect to any Claim without the prior written consent of Company, which consent shall not be unreasonably withheld or delayed.
         3. Subrogation. Upon payment of any Losses by Company pursuant to Section 11.2 (Indemnification of Supplier) or other similar indemnity provisions contained herein to or on behalf of Supplier, Company, without any further action, shall be subrogated to any and all claims that an Indemnified Supplier Party may have relating thereto.
         4. Cooperation. Supplier shall fully cooperate and cause all Supplier Indemnified Parties to fully cooperate, in the defense of or response to any Claim subject to Section 11.2 (Indemnification of Supplier).
2. GOVERNING LAW; DISPUTE RESOLUTION
   1. Governing Law, Jurisdiction, and Venue. Interpretation and performance of this Agreement shall be in accordance with, and shall be controlled by, the laws of the State of Hawai‘i, other than the laws thereof that would require reference to the laws of any other jurisdiction. By entering into this Agreement, Supplier submits itself to the personal jurisdiction of the courts of the State of Hawai‘i and agrees that the proper venue for any civil action arising out of or relating to this Agreement shall be Honolulu, Hawai‘i.
   2. Good Faith Negotiations. Except as otherwise expressly set forth in this Agreement, before submitting any claims, controversies or disputes (“Dispute(s)”) under this Agreement to the Dispute Resolution Procedures set forth in Section 12.4 (Dispute Resolution Procedures), the presidents, vice presidents, or authorized delegates from both Supplier and Company having full authority to settle the Dispute(s), shall personally meet in Hawai‘i and attempt in good faith to resolve the Dispute(s) ( “Management Meeting”), within thirty (30) days after a request by either Party.
   3. Continuity of Service. Supplier acknowledges that the timely and complete performance of its obligations pursuant to this Agreement is critical to the business and operations of Company. Accordingly, in the event of a Dispute between Company and Supplier, Supplier shall continue to perform its obligations under this Agreement in good faith during the resolution of such Dispute unless and until this Agreement is terminated in accordance with the provisions hereof.
   4. Dispute Resolution Procedures.
      1. Mediation. Except as otherwise expressly set forth in this Agreement and subject to Section 12.2 (Good Faith Negotiations), any and all Dispute(s) arising out of or relating to this Agreement, (i) which remain unresolved for a period of twenty (20) Days after the Management Meeting takes place or (ii) for which the Parties fail to hold a Management Meeting within sixty (60) Days of the date that a Management Meeting was requested by a Party, may upon the agreement of the Parties, first be submitted to confidential mediation in Honolulu, Hawai‘i pursuant to the administration by, and in accordance with the Mediation Rules, Procedures and Protocols of, Dispute Prevention & Resolution, Inc. (or its successor) or, in their absence, the American Arbitration Association (“DPR”) then in effect. If the Parties agree to submit the dispute to confidential mediation, the Parties shall each pay fifty (50) percent of the cost of the mediation (i.e., the fees and expenses charged by the mediator (“Mediator” and DPR) and shall otherwise each bear their own costs and attorney’s fees. If settlement of the Dispute(s) is not reached within sixty (60) Days after commencement of the mediation, either Party may initiate formal action.
      2. Procedures for Appointing a Mediator. The Parties hereby agree that the choice of Mediator, process and procedure for the mediation and any desired outcome from the mediation shall be as the Parties agree in conjunction with their agreement to enter into the mediation. If the Parties cannot agree upon such matters within sixty (60) Days (or as the Parties may subsequently agree), either Party may withdraw from the mediation process and proceed to initiate formal action.
3. INSURANCE
   1. Workers’ Compensation.
      1. Supplier and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full force at all times during the term of this Agreement, Workers’ Compensation and other similar insurance required by state or federal laws. In the event that Supplier fails to maintain such insurance as required by law, Supplier acknowledges and agrees that it will not seek or and that it is not entitled to any coverage under Company’s insurance. Permissible self-insurance will be acceptable subject to submission of a copy of appropriate governmental authorization and qualification by Supplier.
      2. In addition, if Workers’ Compensation is required, Supplier and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full force at all times during the term of this Agreement, Employers Liability insurance with minimum limits for bodily injury from accident of ONE MILLION DOLLARS ($1,000,000) - each accident; for bodily injury from disease of ONE MILLION DOLLARS ($1,000,000) - each employee; and for bodily injury from disease of ONE MILLION DOLLARS ($1,000,000) - each policy limit.
      3. If there is an exposure for injury to Supplier’s employees under the U.S. Longshoremen’s and Harbor Workers’ Compensation Act, the Jones Act or other laws, regulations or statutes applicable to maritime employees, coverage shall be included for such injuries or claims.
   2. Commercial General Liability Insurance. Supplier and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full force at all times during the term of this Agreement, Commercial General Liability insurance with a bodily injury and property damage combined single limit of liability of at least FIVE MILLION DOLLARS ($5,000,000) for any occurrence. Such insurance will include coverage in like amount for products/completed operations, contractual liability, and personal and advertising injury. “Claims made” policies are not acceptable under this Section unless coverage is continued for three (3) years after completion of the contract.
   3. Automobile Liability Insurance. Supplier and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full effect at all times during the term of this Agreement, Automobile Liability insurance with a bodily injury and property damage combined single limit of at least ONE MILLION DOLLARS ($1,000,000) per accident.
   4. Cyber/Network Security/Privacy Liability Insurance**.** Provider and anyone acting under its direction or control or on its behalf shall at its own expense procure and maintain in full force at all times during the term of this AgreementCyber/Network Security/Privacy Liability insurance, with minimum limits of FIVE MILLION DOLLARS ($5,000,000) per occurrence and per policy aggregate. Such insurance shall include, but not be limited to cyber and network risks such as security breaches, data theft or loss, unauthorized access/use, negligent transmission of a computer virus, identity theft, and any invasion, violation, breach or infringement of any right to privacy resulting from both electronic and non-electronic events with respect to any confidential or non-public personal information. The retroactive coverage date of the insurance policy shall be no later than the Effective Date of this Agreement. Such insurance shall remain in effect after termination of this Agreement in order to respond to any claims or losses subsequently made. Insurance required by this subsection shall be maintained in full effect at all times during the term of this Agreement and for three (3) years thereafter.
   5. Builders’ Risk Insurance. Supplier may be required to provide Builders’ Risk Insurance during the course of construction of this Agreement. This insurance will cover the interests of Company and Supplier and its subcontractors. If Builders’ Risk Insurance is required, the terms of such coverage shall be acceptable to Company.
   6. Excess and/or Umbrella Insurance. The limits for the above coverages may be satisfied through the use of umbrella and/or excess liability insurance sufficient to meet these requirements.
   7. Waiver of Subrogation. Supplier and anyone acting under its direction will cause its insurers to waive all rights of subrogation which Supplier or its insurers may have against Company, Company’s agents, or Company’s employees.
   8. Company as Additional Insured. Insurance policies (except Workers’ Compensation) providing the insurance coverage required in this Agreement will name Company, Company’s agents, and/or Company’s employees as an additional insured, as appropriate. Coverage must be primary in respect to the additional insured. Any other insurance carried by the Company will be excess only and not contribute with this insurance.
   9. Subcontractors. Supplier shall ensure that each subcontractor shall either be covered by the insurance procured by Supplier, or by insurance procured by the subcontractor. Should a subcontractor be responsible for procuring its own insurance, Supplier shall ensure that each such subcontractor shall, commensurate with the work performed by such subcontractor, procure and maintain insurance required of Supplier, except that, as between Supplier and Company, Supplier shall have the sole responsibility for determining the limits of coverage to require such subcontractors to obtain in accordance with reasonably prudent business practices. All such insurance shall be provided for at the sole cost of Supplier or its subcontractors.
   10. Certificates of Insurance. Concurrent with the execution of this Agreement or as agreed upon by Company, Supplier shall provide Company with a certificate of insurance (“COI”) certifying that each of the foregoing insurance coverages is in force. If the COI is not affixed to this Agreement, then Supplier shall provide a copy of the COI (and any subsequent updates during the term of this Agreement or as required by Company) to Company’s Legal Department (at: PO Box 2750, Honolulu HI 96840-001). The COI MUST reference this Agreement contract number and the date of this Agreement and it shall reference Supplier by name. Supplier will immediately provide written notice to the Company should any of the insurance policies required herein be cancelled, limited in scope, or not renewed upon expiration. Receipt of any certificate showing less coverage than requested is not a waiver of the Supplier’s obligation to fulfill the requirements.
   11. Revisions to Insurance Coverages. Company reserves the right to add or modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other circumstances. In which event, Supplier shall obtain such required insurance.
4. FORCE MAJEURE
   1. Definition of Force Majeure. The term “Force Majeure” as used in this Agreement means any occurrence that:
      1. In whole or in part delays or prevents a Party’s performance under this Agreement;
      2. Is not the direct or indirect result of the fault or negligence of that Party;
      3. Is not within the control of that Party notwithstanding such Party having taken all reasonable precautions and measures in order to prevent or avoid such event; and
      4. The Party has been unable to overcome by the exercise of due diligence.
   2. Events That Could Qualify as Force Majeure. Subject to the foregoing, events that could qualify as Force Majeure include, but are not limited to, the following:
      1. acts of God, flooding, lightning, landslide, earthquake, fire, drought, explosion, epidemic, quarantine, storm, hurricane, tornado, volcano, other natural disaster or unusual or extreme adverse weather related events;
      2. war (declared or undeclared), riot or similar civil disturbance, acts of the public enemy (including acts of terrorism), sabotage, blockade, insurrection, revolution, expropriation or confiscation; or
      3. except as set forth in Section 14.3 (Exclusions from Force Majeure), strikes, work stoppage or other labor disputes (in which case the affected Party shall have no obligation to settle the strike or labor dispute on terms it deems unreasonable).
   3. Exclusions From Force Majeure. Force Majeure, however, does not include any of the following:
      1. A strike, work stoppage, or labor dispute limited only to any of the Indemnified Supplier Parties or any other third party employed by Supplier to work on the Project;
      2. any acts or omissions of any third party, including, without limitation, any vendor, materialman, customer, or supplier of Supplier, unless such acts or omissions are themselves caused by an event of Force Majeure as herein defined;
      3. any full or partial reduction in the Supplier’s provision of Grid Services that is caused by or arises from a mechanical or equipment breakdown or other conditions attributable to normal wear and tear;
      4. changes in market conditions that affect the cost of the Supplier’s supplies, or that otherwise render this Agreement uneconomic or unprofitable for the Supplier;
      5. Supplier’s inability to obtain Government Approvals or approvals of any type for the development, deployment, ownership, operation, or maintenance of the GSDS, or Supplier’s loss of any such Governmental Approvals once obtained;
      6. the lack of wind, sun or any other resource of an inherently intermittent nature;
      7. Supplier’s inability to obtain sufficient power or materials to operate the GSDS, except if Supplier’s inability to obtain sufficient power or materials is caused by an event of Force Majeure as herein defined;
      8. Supplier’s failure to obtain additional funds, including funds authorized by a state or the federal government or agencies thereof, to supplement the payments made by Company pursuant to this Agreement;
      9. a forced outage except where such forced outage is caused by an event of Force Majeure as herein defined;
      10. litigation or administrative or judicial action pertaining to Supplier’s interest in this Agreement, the GSDS, Supplier’s relationship to its Participants, any Government Approvals, or the design, development, deployment, ownership, maintenance or operation of the GSDS; or
      11. any full or partial reduction in either the ability of the GSDS to deliver the Grid Services or in the ability of Company to accept the Grid Services which is caused by any action or inaction of a third party, including but not limited to any vendor or supplier of the Supplier or Company, except to the extent such action or inaction is caused by an event of Force Majeure as herein defined.
   4. Consequences of Force Majeure.
      1. Satisfaction of Certain Conditions. Section 14.5 (Effect of Force Majeure on Events of Default) and Section 14.6 (Effect of Force Majeure) defer or limit certain liabilities of a Party for delay and/or failure in performance to the extent such delay or failure is the result of conditions or events of Force Majeure; provided, however, that a Non-performing Party is only entitled to such limitations or deferrals of liabilities as and to the extent the following conditions are satisfied:

The non-performing Party gives the other Party, within forty-eight (48) hours after the Force Majeure condition or event begins, written notice stating that such non-performing Party considers such condition or event to constitute a Force Majeure and describing the particulars of such Force Majeure condition or event;

The non-performing Party gives the other Party, within fourteen (14) Days after the Force Majeure condition or event begins, a written explanation of the Force Majeure condition or event and its effect on the non-performing Party’s performance, which explanation shall include evidence reasonably sufficient to establish that the occurrence constitutes Force Majeure;

The suspension of performance is of no greater scope and of no longer duration than is required by Force Majeure;

The non-performing Party proceeds with due diligence to remedy its inability to perform and provides weekly progress reports to the other Party describing actions taken to end or minimize the effects of the Force Majeure and the anticipated duration of the Force Majeure; and

When the non-performing Party is able to resume performance of its obligations under this Agreement, such Party shall give the other Party written notice to that effect.

* + 1. Duty to Mitigate. The Party so excused shall make all reasonable efforts, to cure, mitigate or remedy such Force Majeure event. Any payments due as compensation for the obligation so excused shall also be excused for so long as the obligation is not performed due to Force Majeure. The burden of proof shall be on the Party claiming Force Majeure pursuant to this Article 14 (Force Majeure).
    2. Limited Relief. Other than as provided in Section 14.5 (Effect of Force Majeure on Events of Default), neither Party shall be responsible or liable for any delays or failures in its performance under this Agreement as and to the extent such delays or failures are substantially caused by conditions or events of Force Majeure.
  1. Effect of Force Majeure on Events of Default. If an occurrence of Force Majeure results in what would otherwise be deemed an Event of Default under Section 6.1 (Events of Default), no Event of Default shall be deemed to have occurred if and for so long as the conditions set forth in Section 14.4(a) (Satisfaction of Certain Conditions) are satisfied, as long as the condition or event that would otherwise be an Event of Default is cured within the lesser of (i) the duration of the Force Majeure plus any additional time reasonably necessary to remedy the effects of the Force Majeure or (ii) three hundred sixty-five (365) Days from the occurrence or inception of the Force Majeure, as noticed pursuant to Section 14.4 (Consequences of Force Majeure).
  2. Effect of Force Majeure. Other than as provided in Section 14.5 (Effect of Force Majeure on Events of Default), neither Party shall be responsible or liable for any delays or failures in its performance under this Agreement as and to the extent (i) such delays or failures are substantially caused by conditions or events of Force Majeure, and (ii) the conditions of Section 14.4(a) (Satisfaction of Certain Conditions) are satisfied.
  3. Obligations Remaining After Event of Force Majeure. No monetary obligations of either Party which arose before the occurrence of an event of Force Majeure causing the suspension of performance shall be excused as a result of such occurrence. In the event of a Force Majeure which reduces or limits Supplier’s capability to deliver Grid Services and subject to the provisions of this Agreement, Company shall be obligated to pay for Grid Services only to the extent it accepts such Grid Services as made available by Supplier. Except as otherwise expressly provided for in this Agreement, the existence of a condition or event of Force Majeure shall not relieve the Parties of their obligations under this Agreement (including, but not limited to, payment obligations, except as limited above) to the extent that performance of such obligations is not precluded by the condition or event of Force Majeure.
  4. Effect on Term. A Party experiencing an event of Force Majeure and not otherwise in default under this Agreement may elect to extend this Agreement equivalent to the duration of such event of Force Majeure; provided, however that under no circumstance shall such extension exceed one hundred eighty (180) Days from the conclusion of the original Term.

1. EQUAL EMPLOYMENT OPPORTUNITY
   1. Equal Employment Opportunity. (Applicable to all contracts of $10,000 or more in the whole or aggregate (41 CFR 60-1.4 and 41 CFR 60-741.5)). Supplier is aware of and is fully informed of Supplier’s responsibilities under Executive Order 11246 (reference to which include amendments and orders superseding in whole or in part) and shall be bound by and agrees to the provisions as contained in Section 202 of said Executive Order and the Equal Opportunity Clause as set forth in 41 CFR 60-1.4 and 41 CFR 60-741.5(a), which clauses are hereby incorporated by reference.
   2. Equal Opportunity For Disabled Veterans, Recently Separated Veterans, Other Protected Veterans and Armed Forces Service Medal Veterans. (Applicable to (i) contracts of $25,000 or more entered into before December 31, 2003 (41 CFR 60-250.4) or (ii) each federal government contract of $100,000 or more, entered into or modified on or after December 31, 2003 (41 CFR 60 300.4) for the purchase, sale or use of personal property or nonpersonal services (including construction)). If applicable to Supplier under this Agreement, Supplier agrees that it is, and shall remain, in compliance with the rules and regulations promulgated under The Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, including the requirements of 41 CFC 60-250.5(a) (for orders/contracts entered into before December 31, 2003) and 41 CFR 60-300.5(a) (for orders/contracts entered into or modified on or after December 31, 2003) which are incorporated into this Agreement by reference.
2. REGULATORY APPROVALS
   1. PUC Approval for Use of Model Contract. At the time of execution of this Agreement, Company intends to apply to the PUC for an order (i) approving the form of this Agreement as a model contract for all Grid Services Purchase Agreements and (ii) confirming that no approval need be sought from the PUC for each ensuing new Grid Services Purchase Agreement so long as the new agreement is substantially in the form of this Agreement (“PUC Model Order”).
      1. If (v) Company decides in its sole discretion not to apply for the PUC Model Order, or (x) the PUC declines to issue the PUC Model Order, or (y) the PUC Model Order is not issued for any reason or within such reasonable time as Company shall decide in its sole, but nonarbitrary, discretion, or (z) the PUC issues the PUC Model Order but the said order contains terms and conditions deemed to be unacceptable to Company and is in a form deemed to be reasonable by Company, in its sole, but nonarbitrary, discretion, then the terms of Appendix 1 (PUC Approval of Grid Services Purchase Agreement) attached to this Agreement are incorporated into the Agreement as if fully set forth herein, and the issuance of a Non-Appealable PUC Approval Order (as described in Appendix 1) shall be a Condition Precedent. In addition, this Agreement shall not become effective until the PUC Approval Date (as described in Appendix 1), and the System Integration Date Deadline shall be adjusted as determined by Company to accommodate the addition of the new Condition Precedent.
      2. If the PUC Model Order is issued, then Appendix 1 is of no further force or effect.
3. ASSIGNMENT
   1. Assignment. Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent may be withheld in the exercise of its sole discretion; provided, however, either Party may, without the consent of the other Party (and without relieving itself from liability hereunder), (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements, (ii) transfer or assign this Agreement to an affiliate of such Party which affiliate’s creditworthiness is equal to or higher than that of such Party, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party; provided, however, that in each such case, any such assignee shall agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party delivers such tax and enforceability assurance as the non-transferring Party may reasonably request.
4. NOTICES
   1. Notices.
      1. Method of Delivery. Any written notice provided under this Agreement shall be delivered personally, sent by electronic mail (Email) (provided receipt thereof is confirmed via Email or in writing by the recipient) or sent by registered or certified first class mail, with postage prepaid, to the other Party as follows (or to such other addresses or Email addresses as a Party may designate by notice to the other Party):

|  |  |
| --- | --- |
| TO COMPANY | |
| By Mail: | Hawaiian Electric Company, Inc. **[or HELCO or MECO as appropriate]**  P.O. Box 2750  Honolulu, Hawai‘i 96840  Attn: Director, Demand Response Program |
| Delivered By Hand or Overnight Delivery: | Hawaiian Electric Company, Inc. **[or HELCO or MECO as appropriate]**  American Savings Bank Tower  1001 Bishop Street, Suite 1050  Honolulu, Hawai‘i 96813  Attn: Director, Demand Response Programs |
| By Email to: |  |
| With a copy to: | |
| By Mail: | Hawaiian Electric Company, Inc.  Legal Department  P.O. Box 2750  Honolulu, Hawai‘i 96840 |
| By Email to: | Legalnotices@hawaiianelectric.com |
| TO SUPPLIER | |
| By Mail: |  |
| Delivered By Hand or Overnight Delivery: |  |
| By Email to: |  |

* + 1. Date of Delivery. Notice sent by mail shall be deemed to have been given on the date of actual delivery or at the expiration of the fifth (5th) Day after the date of mailing, whichever is earlier. Any Party hereto may change its address for written notice by giving written notice of such change to the other Party hereto.
    2. Email Notice. Any notice delivered by Email shall request a receipt thereof confirmed by Email or in writing by the recipient and followed by personal or mail delivery of such correspondence and any attachments as may be requested by the recipient, and the effective date of such notice shall be the date of receipt, provided such receipt has been confirmed by the recipient.
    3. Additional Means. The Parties may agree in writing upon additional means of providing notices, consents and waivers under this Agreement in order to adapt to changing technology and commercial practices.

COMMERCIAL

1. RIGHTS AND OBLIGATIONS
   1. Rights and Obligations of Both Parties.
      1. Sale and Purchase of Grid Services. During the Term of this Agreement, Supplier shall aggregate, sell, and deliver to Company and Company shall take from and pay Supplier for the Grid Services subject to and in accordance with terms and conditions of this Agreement.
         1. Rejected Export of Contract Capability. In the event that Supplier’s export of its Contract Capability is rejected by Company as a result of Company’s supplemental screening and review of a Resource as provided in Exhibit A-1 (Fast Frequency Response Grid Service Description and Requirements), Exhibit A-2 (Regulating Reserve Grid Service Description and Requirements), Exhibit A-3 (Capacity Grid Service Description and Requirements), Exhibit A-4 (Replacement Reserve Grid Service Description and Requirements), Exhibit A-11 (Reliability (back-tie) Description and Requirements) and Exhibit A-12 (Capacity Distribution Description and Requirements) Supplier may reduce its Contract Capability for the remainder of the Term but only to the extent and in the amount that such Contract Capability is drawn from the Resource rejected under Company’s supplemental screening and review. A reduction of Supplier’s Contract Capability pursuant to this Section 19.1(a)(1) (Rejected Export of Contract Capability) shall not be considered a failure by Supplier to meet its Contract Capability for the purpose of Section 7.3 (Failure to Meet Contract Capability).
         2. Addition of Capability. No later than five (5) Days following the first day of each of Contract Year 2 and Contract Year 3 as established pursuant to this Agreement or such longer period of time as may be agreed upon by the Parties, Supplier may propose to provide to Company additional Capability of up to twenty (20) percent of Supplier’s total Contract Capability as of the date that such proposal is made. Company, at its sole discretion, may accept or reject Supplier’s proposal by providing written notice to Supplier within thirty (30) Days of Company’s receipt of Supplier’s proposal.
   2. Rights and Obligations of Supplier.
      1. Co-Branding; Use of Company’s Trademarks. In connection with the activities set forth in Section 19.2(a)(1) (Marketing Material), and Section 19.2(a)(2) (Participant Engagement Portal) and subject to the terms and conditions related to Supplier’s use of Company’s name(s), trademarks, and logos (“Company Trademarks”) set forth in Exhibit O (Trademark License Agreement), Supplier shall co-brand certain media with Company.
         1. Marketing Material. All marketing material of any form created by Supplier in relation to this Agreement and any agreement between Supplier and its Participants shall be co-branded with Company Trademarks as approved by Company.
         2. Participant Engagement Portal. The online participant engagement portal developed by Supplier in relation to this Agreement or any agreement between Supplier and its Participants shall be co-branded with Company Trademarks as approved by Company.
         3. No use of Company Trademarks or co-branding is allowed other than as described in Section 19.2(a) (Co-Branding; Use of Company’s Trademarks). Without limiting the generality of the foregoing sentence, none of Supplier’s employee uniforms, equipment, or vehicles shall use Company Trademarks.
      2. Participant Installation Protection and Control Equipment. Supplier shall, at no cost to Company, ensure that all equipment related to the GSDS, including but not limited to protective and control equipment, internal breakers, relays, switches, and synchronizing equipment installed by or for each Participant is properly installed, constructed, configured, secured, operated, and maintained to ensure the standard of reliability, quality, and safety as required by this Agreement, all applicable Laws and Government Approvals, and in compliance with Rule 14.H (Interconnection of Distributed Generating Facilities Operating in Parallel with the Company’s Distribution System) of the Tariff and all other applicable rules thereof. No part of the equipment related to the GSDS shall be allowed to limit the operation of said Rule 14.H. Supplier shall respond promptly to all requests by Participants, whether communicated directly to Supplier or whether communicated to Company, for repairs and maintenance.
         1. Company’s Right to Review Participant Installation. Company shall have the right, but not the obligation, to inspect and approve the installation, construction, and setting of all Participant protective and control equipment at any time during the progress of installation, construction, setting, and testing. Company may elect to inform Supplier of any problem Company observes and any recommendations it has for correcting such problems with the Participant equipment, and Supplier shall address such problems to the reasonable satisfaction of Company.
         2. No Endorsement, Warranty or Waiver. Neither Company’s inspection and/or approval of Participants’ equipment and settings nor Company’s reporting and recommendations to Supplier regarding its inspections shall be construed as endorsing the design thereof, as any warranty of the safety, durability, or reliability of said equipment and settings, or as a waiver of any of Company’s rights. In no event shall any failure by Company to exercise its rights under Section 19.2(b)(1) (Company’s Right to Review Participant Installation) constitute a waiver by Company of, or otherwise release Supplier from, any provision of this Agreement.
         3. Cooperation. Supplier and Company shall cooperate with each other in good faith in agreeing upon design standards for any equipment or settings referred to in Section 19.2(b) (Participant Installation Protection and Control Equipment).
         4. Timing for Implementation of Company Proposals. Within a reasonable time after receipt of Company’s comments referred to in Section 19.2(b) (Participant Installation Protection and Control Equipment) or notification by Company of problems related to Supplier’s obligations under Section 19.2(b) (Participant Installation Protection and Control Equipment), but no later than ninety (90) Days after such notification (unless such condition is causing a safety hazard or damage to the Company System or the facilities of any of Company’s customers, in which event the correction must be made promptly by Supplier), Supplier shall implement Company’s proposals. If Supplier disagrees with Company’s proposals, the Parties shall proceed to the dispute resolution procedures described in Article 12 (Governing Law; Dispute Resolution).
      3. Reporting. Supplier shall comply with the requirements set forth in Exhibit J (Reporting). Unless a different time is provided, all reports must be delivered no later than five (5) Business Days after the last Day of the month.
      4. Operational Forecast. Supplier shall provide the Operational Forecast to Company in compliance with Exhibit F (Operational Forecast).
      5. Compliance with Law. Supplier shall take all appropriate action against a Participant, including disenrollment of a Participant and termination of the applicable Participant Service Agreement, in the event that such Participant is in violation of any applicable Law.
      6. Meter Data. Supplier shall provide to Company all data regarding Participant Resources (“Grid Services Data”) required pursuant to this Agreement. Supplier shall require each of its Participants to expressly authorize Supplier to provide the Grid Services Data to Company.
      7. GSDS Testing.
         1. Data, Integration, and Testing. Supplier shall perform all testing and comply with all requirements set forth in Exhibit G (Data, Integration, and Testing Requirements).
         2. Compensation. Unless otherwise stated in Exhibit G (Data, Integration, and Testing Requirements), Company shall compensate Supplier as provided in Article 20 (Invoicing and Payment) for any Grid Service provided during testing as if it were a GS Event. However, minimum incentives and additional incentives shall not be paid for Grid Services provided as a result of testing.
   3. Standards of Conduct for Supplier.
      1. Compliance with Company’s Corporate Code of Conduct. Supplier has implemented and will maintain and require its employees and Supplier Agents to comply with standards that are no less stringent than those that are set forth in Company’s Corporate Code of Conduct in all aspects relevant to Supplier’s performance under this Agreement (“Supplier Policies”). Company’s Corporate Code of Conduct is available at https://www.hawaiianelectric.com/Prebuilt/contractors/code\_of\_conduct.pdf.
         1. If a Participant’s Resource is managed by a third party not retained by Supplier, Supplier shall have no responsibility for said third party’s compliance with the Supplier Policies in its management of the Resource.
      2. Acknowledgment of Supplier Policies. Supplier agrees to cooperate with and provide assistance to Company in the investigation of any security breach that relates to this Agreement and may involve Supplier, Supplier’s employees, or Supplier Agents. In the event that Company notifies Supplier that a particular employee of Supplier or a Supplier Agent is not conducting himself or herself in accordance with any of the Supplier Policies, Supplier shall promptly investigate the matter and take appropriate action, which may include (i) removing the applicable individual from any work associated with this Agreement, providing Company with prompt notice of such removal, and replacing such individual with a similarly qualified individual, or (ii) taking other appropriate disciplinary action to prevent a recurrence.
   4. Customer Service. Supplier shall provide customer service to its Participants in accordance with Exhibit M (Customer Service Requirements).
   5. Project Manager and Participant Contact. Supplier shall appoint a project manager with suitable training and skills to manage and oversee Supplier’s performance under this Agreement and serve as Supplier’s primary representative under this Agreement. The project manager shall be authorized to act for and on behalf of Supplier with respect to all matters relating to this Agreement and shall be available twenty four (24) hours per day or shall make arrangements for back-up outside of normal working hours. Supplier shall provide Company with any changes in contact information for the project manager as soon as reasonably possible. Supplier shall notify Company as soon as possible after the project manager position is vacated for any reason, and Supplier shall, as soon as reasonably practicable, fill the position in accordance with this Section 19.5 (Project Manager and Participant Contact). Supplier shall promptly replace any project manager to whom Company raises a reasonable objection. Supplier shall provide all Participants with 24 hour contact information to which Participants may direct questions, complaints, and emergencies.
   6. Obligations of Participants.
      1. Dual Participation Restriction. All Resources connected to the same meter shall only be enrolled with Supplier and no other supplier of a GSDS or any other Company demand response program. In connection with entering into a Participant Service Agreement with any party, Supplier shall ensure that such party has not enrolled its Resource in a participant service agreement with another supplier of Grid Services to the Company or enrolled the Resources in any other Company demand response program.
      2. Participant Service Agreement. Supplier shall ensure that any Participant Service Agreement executed by Supplier with a Participant includes all of the requirements set forth in Exhibit N (Participant Service Agreement Requirements). Company, at its sole discretion, reserves the right, but has no obligation, to review and approve Supplier’s forms of Participant Service Agreement to ensure Supplier’s conformance with the requirements of Exhibit N (Participant Service Agreement Requirements) and any other terms of this Agreement. If Company finds that Supplier’s forms of Participant Service Agreement do not conform with the requirements of Exhibit N (Participant Service Agreement Requirements), Company may elect to inform Supplier thereof and Supplier shall address such nonconformity to the reasonable satisfaction of Company. Company further reserves the right to review any executed Participant Service Agreement. Notwithstanding the foregoing, Company’s approval of the Supplier forms of Participant Service Agreement and review of any executed Participant Service Agreement shall not be construed as approval or endorsement thereof and Supplier shall advise Participants of the foregoing limitation.
      3. Participant Survey. Company may, but is not required to, conduct surveys of Participants regarding engagement, use, or satisfaction with the GSDS during or after the Term. Company is not obligated to share any information about the surveys or results or analysis of the surveys with Supplier. Supplier shall inform Company of any survey of Participants that it conducts, including the terms and content of each survey, distribution information, and complete survey results together with any analysis thereof.
   7. Rights and Obligations of Company.
      1. Dispatch of Grid Services.
         1. Company shall have the right to dispatch the Grid Services delivered by Supplier to the Company System as it deems appropriate in its reasonable discretion, subject to and consistent with this Agreement.
         2. Company Dispatch will be by either Supplier’s manual control under the direction of the Company System Operator or by computerized control by the EMS or AGC, in each case at Company’s reasonable discretion.
      2. Company Right to Defer the System Integration Date.
         1. Deferral Right. At any time up until the System Integration Date, Company may choose once to defer the System Integration Date by up to six (6)months beyond the then-current System Integration Date Deadline by giving Supplier written notice of its decision to defer and the extent of the deferral period.
         2. Deferral Costs. Subject to Supplier’s obligation to minimize the cost resulting from such deferral as provided below, Company shall bear all reasonable, actual, verifiable, approved costs incurred by Supplier with respect to the GSDS that directly result from a deferral (“Deferral Costs”). Supplier shall provide Company monthly with an accounting of all Deferral Costs. Company shall pay to Supplier the Deferral Costs within thirty (30) Days of each such accounting. If Company decides not to approve any requested Deferral Costs and Supplier disagrees with that decision, the Parties shall proceed to the dispute resolution procedures described in Article 12 (Governing Law; Dispute Resolution).
            1. Duty To Minimize Deferral Costs. Upon the commencement of the deferral period, Supplier shall take such steps as may be reasonably necessary to minimize Deferral Costs, including negotiated deferral fees, penalties or similar charges to be owed by Supplier to Supplier Agents, excluding from such obligation to minimize, however, deferral fees, penalties or similar charges by such parties that have been approved by Company or, if applicable, included in any Pre-Deferral Estimate. Prior to entering into agreements with Supplier Agents, Supplier shall use commercially reasonable efforts to minimize deferral fees, penalties or charges to be paid by Supplier. Company shall not be obligated to pay any costs that Supplier is not obligated to pay arising out of such deferral by Company.
            2. Reasonable Steps. Consistent with Supplier’s obligation to minimize Deferral Costs, Supplier shall take such steps as it reasonably deems necessary during the deferral period to assure the timely occurrence of the System Integration Date (as so deferred), including attainment or renewal of applicable Government Approvals, contracts or rights, and Company shall cooperate with Supplier in such effort.
            3. Pre-Deferral Estimate. Upon the written request (and at the expense) of Company given not more often than once in any six (6) month period and before a deferral notice under Section 19.7(b)(1) (Company Right to Defer the System Integration Date) has been given, Supplier shall within thirty (30) Days after the date of such notice provide an estimate (“Pre-Deferral Estimate”) of the anticipated costs (to the extent then known by Supplier) to be submitted to Company as Deferral Costs under Section 19.7(b)(2) (Deferral Costs) if a deferral notice were given at or about the time of such request.
      3. Company Right to Terminate for Convenience. At any time up until the System Integration Date, if Company determines that it no longer needs the Grid Services to be provided by Supplier, Company may choose to cancel this Agreement by giving Supplier written notice of its decision to cancel. No cause need be cited or demonstrated by Company.
         1. Termination after commencement of development. If Company exercises its right to terminate this Agreement pursuant to this Section 19.7(c) (Company Right to Terminate for Convenience) after Supplier has commenced development activity on the GSDS for this Agreement, immediately upon receipt of such termination notice, Supplier shall cease all development activity and proceed to take such steps as may be necessary to mitigate the losses due to such termination. Supplier shall use commercially reasonable efforts to salvage the value of any equipment or materials purchased or contracts signed for the GSDS. All such mitigation efforts shall be made in consultation with Company. After the completion of all such mitigation efforts, Contractor will be paid its actually incurred costs of performance under this Agreement, including administrative and general overhead costs and demobilization costs, determined in accordance with generally accepted accounting principles consistently applied, plus an amount equal to eight (8) percent of those costs to account for profit, plus the costs incurred as a direct result of the termination, less the value of any salvaged materials or equipment retained by Supplier, all subject to approval by Company. Payment will be made by Company within thirty (30) days after such approval. If Company does not approve all amounts requested by Supplier as compensation for the termination, and Supplier disagrees with that decision, the Parties shall proceed to the dispute resolution procedures described in Article 12 (Governing Law; Dispute Resolution).
         2. Termination before commencement of development. If Company exercises its right to terminate this Agreement pursuant to this Section 19.7(c) (Company Right to Terminate for Convenience) before Supplier has commenced development activity on the GSDS for this Agreement, Supplier shall not be paid any amount.
2. PAYMENT AND INVOICING
   1. Pricing; Incentives. Subject to the provisions of this Agreement, commencing on the System Integration Date, for each Settlement Month, Company shall pay Supplier for Grid Services provided by Supplier and accepted by Company. The price to be paid by Company to Supplier and the incentives to be paid by Supplier to Participants (through credit on Participant’s electricity bill from Company) for each type of Grid Service is set forth in Exhibit K (Settlement).
   2. Monthly Invoice. As soon as practicable, but not later than the fifth (5th) Business Day of each Calendar Month, Supplier shall provide Company with the Monthly Invoice Report (MIR) as described in Exhibit J (Reporting) and any other data required under Exhibit K (Settlement) to compute the payment due as set forth in said Exhibit K (Settlement).
   3. Taxes.
      1. Hawai‘i General Excise Tax. Company shall not be liable for payment of the applicable Hawai‘i General Excise Tax levied and assessed against Supplier as a result of this Agreement. The rates and charges in this Article 20 (Invoicing and Payment) shall not be adjusted by reason of any subsequent increase or reduction of the applicable Hawai‘i General Excise Tax.
         1. Payment of Taxes. Supplier shall, when making payments to Company under this Agreement, pay such additional amount as may be necessary to reimburse Company for the Hawai‘i general excise tax on gross income and all other similar taxes imposed on Company by any Governmental Authority with respect to payments in the nature of gross receipts tax, sales tax, privilege tax or the like (including receipt of any payment made under Section 20.3 (Taxes)), but excluding federal or state net income taxes. By way of example and not limitation, as of the Execution Date, all payments subject to the 4.5% Hawai‘i general excise tax on O‘ahu would be set at a rate of 4.712% so that the underlying payment will be net of such tax liability.
      2. Other Taxes or Fees. Company shall not be liable for payment of nor reimbursement of any Supplier payment of any new or modified tax or fee imposed by any Government Authority.
   4. Payment.
      1. Date Due. No later than thirty (30) days after the receipt of the MIR and all information necessary to perform the settlement as described in Exhibit K (Settlement), Company shall pay, in immediately available funds, the payment owed computed as set forth in said Exhibit K (Settlement) or provide to Supplier an itemized statement of its objections to all or any portion of the MIR and pay any undisputed amount. If any payments are made after the date due as described in the foregoing sentence, Company shall also include interest on such payments, which shall be computed at the average Prime Rate for the period between the date due and the date of payment. Notwithstanding the foregoing, the time in which Company must make payment to Supplier shall be increased on a Business Day-for-Business Day basis for each Business Day that Supplier is delinquent in providing to Company the MIR or any information necessary to perform the settlement.
      2. Offset. Company at any time may offset against any and all amounts that may be due and owed to Supplier under this Agreement, any and all undisputed amounts, including damages, insurance premiums, and other payments, that are owed by Supplier to Company pursuant to this Agreement or are past due under other accounts Supplier has with Company for other services. Undisputed and non-offset portions of amounts invoiced under this Agreement shall be paid on or before the relevant due date.
      3. Set-off. Company shall have the right to set off any payment due and owing by Supplier, including but not limited to any payment under this Agreement and any payment due under any award made under Article 12 (Governing Law; Dispute Resolution), against Company’s payments of monthly invoices as necessary.
      4. Other Payments. Any amounts due from either Party under this Agreement other than monthly Grid Services charges shall be paid or objected to within thirty (30) Days following receipt from either Party of an itemized invoice from the other Party setting forth, in reasonable detail, the basis for such invoice.
   5. Invoice Disputes. Either Party may dispute invoiced amounts, but shall pay to the other Party at least the undisputed portion of invoiced amounts on or before the invoice due date. To resolve any invoice dispute, the Parties shall use the procedures set forth in Article 12 (Governing Law; Dispute Resolution). When the invoice dispute is resolved, the Party owing shall pay the amount owed within thirty (30) Days of the date of such resolution, with interest from the date that such disputed amount was payable until the date that the amount owed is paid at the average Prime Rate for the period.
   6. Adjustments Due to Inaccuracies in Settlement. In the event adjustments are required to correct inaccuracies in settlement under Exhibit K (Settlement), whether as a result of inaccuracies in the settlement process or inaccuracies in the data used in the settlement process, the Party requesting adjustment shall determine the correct measurements or processes and shall recompute the amounts due during the period of such inaccuracies. The difference between the amount paid and that recomputed for the invoice shall either be (i) paid to Supplier or set-off by Company, as appropriate, in the next invoice payment to Supplier, or (ii) objected to by the Party responsible for such payment within thirty (30) Days following its receipt of such request. If the Party responsible for such payment objects to the request, then the Parties shall work together in good faith to resolve the objection. If the Parties are unable to resolve the objection, the matter shall be resolved pursuant to Article 12 (Governing Law; Dispute Resolution). All claims for adjustments shall be waived for any deliveries of Grid Services made more than thirty-six (36) months preceding the date of any such request.
3. SECURITY
   1. Security for the Performance of Supplier’s Obligations. To secure the performance of Supplier’s obligations under this Agreement, Supplier shall provide financial security to Company (“Security”). The Security shall be in the form of the Security Agreement described below and the Letter of Credit described below.
   2. Security Agreement. As required in Section 2.2(b) (Conditions Precedent to Company’s Obligations), Supplier shall execute and deliver to Company a Security Agreement substantially in the form of Exhibit Q (Security Agreement) attached hereto. The Security Agreement shall grant Company a lien on and security interest in, all of Supplier’s right, title and interest in and to all accounts established pursuant to this Agreement, and any agreements between Supplier and Participants, all insurance proceeds in respect of the GSDS, and all proceeds of the foregoing, as the same may be modified or amended from time to time in accordance with the terms thereof. The Security Agreement shall be subordinate only to the mortgage and security interest of Supplier’s primary financier (if any) and only in an amount and to the extent that such security interest and mortgage secure such amounts financed by Supplier’s lender to Supplier and shall be required to finance the actual development price of Supplier’s GSDS. Notwithstanding the immediately preceding sentence, Company’s right to receive or set off any unsubordinate claims against payments it otherwise is obligated to make under this Agreement shall in no respect be subordinate to the interest of Supplier’s financier (if any) under its Financing Documents (if any). No part of this section shall be construed to require Company to assume the obligations of Supplier under any agreement or account related to the GSDS.
   3. Letter of Credit. No less than sixty (60) Days prior to the System Integration Date Deadline, Supplier shall deliver to Company an irrevocable standby letter of credit in the amount of the lesser of (a) \_\_ ( ) percent of the total value of this Agreement as calculated at the rate set by Company for the Contract Capability amounts set forth in Exhibit H (Contract Capability), or [INSERT AMOUNT] $\_\_\_\_\_\_\_\_\_\_, substantially in the form of Exhibit R (Form of Letter of Credit) attached hereto from a bank or other financial institution located in the United States with a credit rating of “A‑” or better (“Letter of Credit”). If the rating (as measured by Standard & Poors) of the bank or financial institution issuing the Letter of Credit falls below A-, Supplier shall, upon request by Company, replace such Letter of Credit with an irrevocable standby letter of credit from another bank or financial institution located in the United States with a credit rating of “A-” or better. The Letter of Credit must be issued for a minimum term of one (1) year and must be renewed prior to the end of each term so that at the time of such renewal, the remaining term shall not be less than one (1) year. The Letter of Credit shall include a provision for at least thirty (30) Days advance notice to Company of any expiration or earlier termination of the Letter of Credit so as to allow Company sufficient time to exercise its rights under said Letter of Credit if Supplier fails to extend or replace the Letter of Credit. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Supplier.
   4. Maintain and Replenish the Letter of Credit. Supplier shall replenish the Letter of Credit within fifteen (15) Business Days after any draw on the Letter of Credit by Company or any reduction in the value of the Letter of Credit below the required level for any other reason.
   5. Company’s Right to Draw From Letter of Credit or Enforce Security Agreement. In addition to any other remedy available to it, Company may, before or after termination of this Agreement, in its sole discretion, exercise any right or remedy under the Security Agreement and/or draw from the Letter of Credit pursuant to this Article 21 (Security), and from all such forms, and in any sequence Company may select for payment; such amounts as are necessary to recover amounts Company is owed pursuant to this Agreement, including, without limitation, any damages due Company and any amounts for which Company is entitled to indemnification under this Agreement. Any failure to enforce the Security Agreement or draw upon the Letter of Credit for any damages or other amounts due Company shall not prejudice Company’s rights to recover such damages or amounts in any other manner.
   6. Release of Security Funds. Promptly following the end of the Term and the complete performance of all of Supplier’s obligations under this Agreement, including, but not limited to, the obligation to pay any and all damages owed by Supplier to Company, under this Agreement, Company shall release its interest in the Security.
4. TERM
   1. Term and Effectiveness of Certain Obligations. Promptly following the end of the Term and the complete performance of all of Supplier’s obligations under this Agreement, including, but not limited to, the obligation to pay any and all damages owed by Supplier to Company, under this Agreement, Company shall release its interest in the Security.
      1. Term. The initial term of this Agreement shall commence upon the Execution Date and shall remain in effect for sixty (60) months from the System Integration Date Deadline (“Initial Term”), unless terminated earlier as provided herein. The Initial Term and any extensions thereof constitute the Term. If the Agreement is terminated prior to the end of the Initial Term, as provided herein, then the period from the System Integration Date to the effective date of such termination constitutes the Term. Upon expiration of the Term, the Parties hereto shall no longer be bound by the terms and conditions of this Agreement, except as set forth in Section 28.14 (Survival of Obligations).
      2. Effectiveness of Certain Obligations. Prior to the System Integration Date: (i) in no event shall Supplier be obligated to provide Grid Services to Company, or have any other obligations to Company other than those set forth in this Section 21.1(b) (Term and Effectiveness of Certain Obligations), Section 2.2 (Conditions Precedent to Company’s Obligations), Article 11 (Indemnification), Article 12 (Governing Law; Dispute Resolution), Article 13 (Insurance), Article 14 (Force Majeure),and Article 29 (Miscellaneous), and (ii) in no event shall Company be obligated to make any payments provided for herein to Supplier or have any other obligations to Supplier other than those set forth in this Section 21.1(b) (Term and Effectiveness of Certain Obligations), Article 11 (Indemnification), Article 12 (Governing Law; Dispute Resolution), Article 14 (Force Majeure), and Article 29 (Miscellaneous).

OPERATIONAL

1. AUDIT
   1. Rights of Company. Without limitation of other audit rights described in this Agreement, Company shall have the right throughout the Term and for a period of three (3) years following the end of the Term, as extended, upon reasonable prior notice, to audit the books and records of Supplier to the limited extent necessary to verify the basis for any claim by Supplier for payments from Company or to determine Supplier’s compliance with the terms of this Agreement. Company shall not have the right to audit other financial records of Supplier. Supplier shall make such records available at its offices in *\_\_\_\_\_\_\_\_\_*, State of Hawai‘i during normal business hours. Company shall pay Supplier’s reasonable actual, verifiable costs for such audits, including allocated overhead.
   2. Rights of Supplier. Supplier shall have the right throughout the Term and for a period of three (3) years following the end of the Term, as extended, upon reasonable prior notice, to audit the books and related records of Company to the limited extent necessary to verify the basis for charges invoiced by Company to Supplier under this Agreement. Supplier shall not have the right to audit other records of Company. Company shall make such information available during normal business hours at its offices in \_\_\_\_\_\_\_\_, State of Hawai‘i. Supplier shall pay Company’s reasonable actual, verifiable costs for such audits, including allocated overheads.
2. PROVISION OF GRID SERVICES
   1. Compliance With Grid Services Description and Requirements. Supplier shall provide the Grid Services in compliance with the specifications set forth in Exhibit A-1 (Fast Frequency Response Grid Service Description and Requirements), Exhibit A-2 (Regulating Reserve Grid Service Description and Requirements), Exhibit A-3 (Capacity Grid Service Description and Requirements), Exhibit A-4 (Replacement Reserve Grid Service Description and Requirements), Exhibit A-11 (Reliability (back-tie) Description and Requirements) and Exhibit A-12 (Capacity Distribution Description and Requirements) relevant to each of the Grid Services being provided throughout the Term.
   2. Telemetry Requirements.
      1. Metering and Communications Equipment. Supplier shall comply with the requirements set forth in Exhibit E (Advanced Metering) for each Resource. Notwithstanding Company’s obligation to install meters as stated in said Exhibit E (Advanced Metering), Supplier shall ensure that each Participant shall have an installed and operational meter compliant with Exhibit E (Advanced Metering) with appropriate meter communication equipment prior to the Resource being included in the Grid Services. Supplier shall provide Company with any telemetry data for a Resource that is required by Exhibit E (Advanced Metering) that Company’s meter does not provide.
      2. Meter Requirements for C&I Customer. In addition to the requirements in Section 24.2(a) (Metering and Communications Equipment), each C&I Customer shall be required to have a Company-approved meter that is capable of recording usage in 5-minute intervals and being read remotely by a remote meter reading system approved by Company. If a C&I Customer does not have a meter that meets such requirements, Supplier shall supply and install such meter at Supplier’s or Participant’s expense.
      3. Additional Company Meter. Supplier may request that Company install an additional Company-owned meter at a Participant’s Resource. Supplier’s request shall be supported by a detailed explanation regarding the need for an additional Company-owned meter. If Company, in its sole discretion, approves Supplier’s request for additional Company-owned meter, Supplier shall be responsible for all costs and expenses related supply and installation of the meter.
      4. Company Access to Participant Meters. Supplier shall ensure that Participants grant to Company in the Participant Service Agreement the right physically to access the telemetry equipment connected to any Resource to retrieve Grid Service Data.
3. TESTING
   1. Data, Integration, and Testing. Supplier shall perform all testing and comply with all requirements set forth in Exhibit G (Data, Integration, and Testing Requirements) and Exhibit I (GSDS Service Level Agreement). Supplier and Company shall coordinate all GSDS testing.
   2. Compensation for Testing. Unless otherwise stated in Exhibit G (Data, Integration, and Testing Requirements), Company shall compensate Supplier as provided in Article 20 (Invoicing and Payment) for any Grid Service provided during testing as if it were a GS Event. However, minimum incentives and additional incentives shall not be paid by Company for Grid Services provided as a result of testing.
4. INFORMATION SECURITY
   1. Information Security Requirements.
      1. Safety and Security Procedures. Supplier shall maintain and enforce safety and security procedures to safeguard Company Data, Participant Data and Company Confidential Information in Supplier’s possession, including any Company Data, Participant Data or Company Confidential Information that Supplier provides to any Supplier Agents in the course of Supplier’s performance pursuant to this Agreement. Supplier warrants that it shall (i) use NIST industry best practices for physical and systems security measures to prevent destruction, loss, alteration or unauthorized access to, use of, or tampering with, the Grid Services, GSDS, software, Company Data, Participant Data and Company’s Confidential Information, including to protect the confidentiality and integrity of any of Company’s Confidential Information, operation of Company’s systems, and to prevent viruses and similar destructive code from being placed in any software provided to Company, on Supplier’s or Company’s website, or in Supplier’s or Company’s programming; and (ii) use NIST industry best practices physical security and precautionary measures to prevent unauthorized access or damage to a facility under its control or that of its subcontractors, including to protect the confidentiality and integrity of any of Company’s Confidential Information as well as the operation of Company’s systems. Supplier shall, at a minimum, protect Company’s Confidential Information and provide the standard of care required by NIST cybersecurity requirements, and the same measures it uses to protect its own Confidential Information.
      2. Security Reporting. Commencing no less than thirty (30) Days prior to the System Integration Date, and thereafter annually during the Term of this Agreement, Supplier shall deliver to Company evidence of Supplier’s information security safeguards, including but not limited to current ISO27001 reports, SSAE 16 SOC2 Type 2 reports and annual third-party penetration tests, within thirty (30) days of each such report’s completion, and any and all such other similar reports, as completed. Supplier shall, at no cost to Company, mitigate all critical and high-risk findings within ten (10) Days of receiving such findings and provide Company with evidence of such mitigation to the reasonable satisfaction of Company.
      3. Malware. Supplier will (consistent with the following sentence) ensure that no Malware or malicious software, or similar items are coded or introduced into any aspect of the Grid Services, the GSDS, the DERMS, and the Supplier information systems and operating environments and processes used or relied upon by Supplier to provide the Grid Services, including the information, data and other materials delivered by or on behalf of Supplier to Company, the customers of Company, Participants and/or third party providers (collectively, Environment). Supplier will continue to implement improvements to and upgrades of its Malware prevention and correction programs and processes consistent with the then‑current NIST technology industry’s standards and, in any case, no less robust than the programs and processes implemented by Supplier with respect to its own information systems and, on a regular basis as requested by Company, Supplier shall provide Company with sufficient evidence of the same. Supplier shall furthermore ensure that all Supplier Agents comply with the obligations of Supplier as set forth in this Section 27.1 (c) (Malware). If Malware is found to have been introduced into the Environment, Supplier will promptly notify Company, and Supplier shall take immediate action to eliminate and remediate the effects of the Malware at Supplier’s expense. Supplier shall not modify or otherwise take corrective action with respect to the Company Systems except at Company’s request. Supplier will promptly report to Company the nature and status of all security incidents, Malware detection, elimination and remediation efforts. On a regular basis as requested by the Company, Supplier shall provide Company with sufficient evidence of its efforts at continuous monitoring to evaluate the effectiveness of Supplier’s information security safeguards.
      4. Media. Supplier shall remove all Company Confidential Information from any media taken out of service and shall destroy or securely erase such media in accordance with Company’s security requirements and otherwise in a manner designed to protect against unauthorized access to or use of any Company Confidential Information. Prior to the System Integration Date, Supplier shall develop and provide to Company its plan detailing how it will accomplish such removal, destructions, and erasure.
      5. Security Breach. In the event that Supplier discovers or is notified of a breach or potential breach of security related to Company Data, Participant Data or Company’s Confidential Information, Supplier shall immediately (i) notify Company of such potential, suspected or actual security breach, whether or not such breach has compromised any of Company’s Confidential Information, (ii) investigate and promptly remediate the effects of the breach, whether or not the breach was caused by Supplier, (iii) cooperate with Company with respect to any such breach or unauthorized access or use; (iv) comply with all applicable privacy and data protection laws governing Company’s or any other individual’s or entity’s data; and (v) to the extent such breach was caused by Supplier, provide Company with reasonable assurances satisfactory to Company that such breach or potential breach shall not reoccur. Supplier shall preserve and provide to Company any forensic evidence obtained as a result of its investigation and remediation of such breach. Any remediation of any such breach will be at Supplier’s sole expense. If any Personally Identifiable Information is breached, notification of individuals affected will be at Company discretion and at the sole expense of Supplier. Supplier shall pay for two (2) years of credit monitoring services for each individual whose Personally Identifiable Information was breached and, if approved or requested by Company, provide other remedies that become commercially available or required by law.
      6. Data Destruction. Except as otherwise provided in this Agreement, within ten (10) Business Days after any request by Company during the Term and upon termination of this Agreement, Supplier shall destroy, delete, and erase all Company Data and Participant Data in its possession by using industry standard data elimination methods used to prevent unauthorized disclosure of information, and for Personally Identifiable Information, such methods shall be consistent with Hawaii Revised Statutes, Chapter 487-R. A duly authorized representative of Supplier shall certify in writing that all Company Data and Participant Data has been destroyed, deleted, and erased upon completion of such data elimination and immediately forward such certification to Company for its records. Prior to the System Integration Date, Supplier shall develop and provide to Company a detailed plan of how it intends to accomplish any such destruction, deletion, and erasure. Notwithstanding the foregoing, Supplier may retain system-wide historical archived backups for disaster recovery/business continuity purposes. Any Company Data and Participant Data in the disaster recovery backups shall be deleted from the disaster recovery backup upon expiration of the retention period for such backup.
      7. Business Continuity Plan. Supplier agrees to implement and maintain during the Term of this Agreement, a business continuity plan, a disaster recovery plan, and an incident response plan (collectively the “Business Continuity Plans”) consistent with the level of risk associated with the work under this Agreement. The Business Continuity Plans shall be provided to Company on or before the System Integration Date. Supplier shall update the Business Continuity Plans during the Term to reflect lessons learned from real recovery events and as required due to significant changes in risk or business or regulatory environment. The Company shall have the right to review the Business Continuity Plans at any time during the Term and Supplier shall make such Business Continuity Plans available to Company immediately upon request.
      8. Compliance with Laws. Supplier shall cause its employees and Supplier Agents to comply, at no cost to Company, with all applicable Laws related to the obligations assumed by Supplier under this Agreement, including those related to data privacy, data security, and the transmission of technical or personal data.
5. IMPLEMENTATION OF GSDS
   1. Design and Deployment of GSDS.
      1. General. Supplier shall furnish all financial resources, labor, tools, materials, equipment, transportation, supervision, and other goods and services necessary to completely design, develop, deploy, maintain and operate the GSDS to fulfill the requirements of this Agreement. The design, development, deployment, maintenance, and operation of the GSDS shall be certified to meet applicable Underwriters Laboratory applicable standards and shall meet the information technology and information assurance standards, based on the NIST Cybersecurity Framework and 800-53 standards, set forth in Section 26.1 (Information Security Requirements) and the service level agreement as more fully described in Exhibit I (GSDS Service Level Agreement). The GSDS shall have an operational life equal to at least the Term of this Agreement. Supplier agrees that no modifications to the GSDS shall be made after the System Integration Date without prior written approval by the Company, unless such modifications could not reasonably be expected to have a material effect on the assumptions used in performing the tests described in Exhibit G (Data, Integration, and Testing Requirements). In no event will Supplier make any modifications to the GSDS that cause the GSDS to fall below the information technology and information assurance standards set forth in Section 26.1 (Information Security Requirements).
      2. System Integration Requirements. The GSDS shall comply with the network and communication requirements set forth in Exhibit E (Advanced Metering) and Exhibit G (Data, Integration, and Testing Requirements). The GSDS shall be capable of sending telemetry data to the Company System, receiving load dispatch signals from the Company System, and responding with appropriate Grid Services within the response requirements set forth in Exhibit A-1 (Fast Frequency Response Grid Service Description and Requirements), Exhibit A-2 (Regulating Reserve Grid Service Description and Requirements), Exhibit A-3 (Capacity Grid Service Description and Requirements), Exhibit A-4 (Replacement Reserve Grid Service Description and Requirements), Exhibit A-11 (Reliability (back-tie) Description and Requirements) and Exhibit A-12 (Capacity Distribution Description and Requirements) and Exhibit G (Data, Integration, and Testing Requirements).
      3. Status Meeting. At least once every year during the Term, or on request following at least thirty (30) days’ notice from Company, Supplier shall meet with representatives of Company to review the status of the GSDS program, including but not limited to Participant satisfaction and Supplier’s compliance with the service level agreements set forth in Exhibit I (GSDS Service Level Agreement). Supplier may also be required to explain the operations of the GSDS and to provide such training and documentation as Company may require for Company to understand and operate the Company System efficiently and safely with the GSDS.

MISCELLANEOUS

1. MISCELLANEOUS
   1. Entire Agreement. This Agreement, including all Exhibits, (together with any confidentiality or non-disclosure agreements entered into by the Parties during the process of negotiating this Agreement and/or discussing the specifications of the GSDS) constitutes the entire agreement between the Parties relating to the subject matter hereof, superseding all prior agreements, understandings or undertakings, oral or written. Each of the Parties confirms that in entering into this Agreement, it has not relied on any statement, warranty or other representation (other than those set out in this Agreement) made or information supplied, by or on behalf of the other Party.
   2. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors, legal representatives, and permitted assigns.
   3. Relationship of the Parties. Nothing in this Agreement shall be deemed to constitute either Party hereto as partner, agent or representative of the other Party or to create any fiduciary relationship between the Parties. Supplier does not hereby dedicate any part of GSDS to serve Company, Company’s customers or the public.
   4. Further Assurances. If either Party determines in its reasonable discretion that any further instruments, assurances or other things are necessary or desirable to carry out the terms of this Agreement, the other Party will execute and deliver all such instruments and assurances and do all things reasonably necessary or desirable to carry out the terms of this Agreement.
   5. Severability. If any term or provision of this Agreement or the application thereof to any person, entity or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law, and the Parties will take all commercially reasonable steps, including modification of the Agreement, to preserve the economic “benefit of the bargain” to both Parties notwithstanding any such aforesaid invalidity or unenforceability.
   6. Modification or Amendment. No modification, amendment or waiver of all or any part of this Agreement shall be valid unless it is reduced to a writing on paper and signed via manual signature by both Parties.
   7. Electronic Transmittal and Counterparts. The Parties agree that this Agreement and any subsequent writings, including amendments, may be executed and delivered by exchange of executed copies via Email or other acceptable electronic means, and in electronic formats such as Adobe PDF or other formats mutually agreeable between the Parties which preserve the final terms of this Agreement or such writing. A Party’s signature transmitted by facsimile, email or other acceptable electronic means shall be considered an “original” signature which is binding and effective for all purposes of this Agreement. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which shall together constitute one and the same instrument binding all Parties notwithstanding that all of the Parties are not signatories to the same counterparts. For all purposes, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.
   8. Computation of Time. In computing any period of time prescribed or allowed under this Agreement, the Day of the act, event or default from which the designated period of time begins to run shall not be included. If the last Day of the period so computed is not a Business Day, then the period shall run until the end of the next Day which is a Business Day.
   9. Headings. The paragraph headings of the various sections and exhibits have been inserted in this Agreement as a matter of convenience for reference only and shall not modify, define or limit any of the terms or provisions hereof and shall not be used in the interpretation of any term or provision of this Agreement.
   10. Definitions. Capitalized terms used in this Agreement not otherwise defined in the context in which they first appear are defined in Article 1 (Definitions)
   11. No Third Party Beneficiaries. Nothing expressed or referred to in this Agreement will be construed to give any person or entity other than the Parties any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the Parties and their successors and permitted assigns.
   12. Proprietary Rights. Supplier agrees that in fulfilling its responsibilities under this Agreement, it will not use any process, program, design, device or material that infringes on any United States patent, trademark, copyright or trade secret (“Proprietary Rights”). Supplier agrees to indemnify, defend and hold harmless Company from and against all losses, damages, claims, fees and costs, including but not limited to reasonable attorneys’ fees and costs, arising from or incidental to any suit or proceeding brought against Company for infringement of third party Proprietary Rights arising out of Supplier’s performance under this Agreement, including but not limited to patent infringement due to the use of technical features of the GSDS to perform under this Agreement.
   13. Exhibits. Each exhibit to this Agreement (collectively, “Exhibits”) constitutes an essential and necessary part of this Agreement.
   14. Survival of Obligations. The rights and obligations that are intended to survive a termination of this Agreement are all of those rights and obligations that this Agreement expressly provides shall survive any such termination and those that arise from Supplier’s or Company’s covenants, agreements, representations, and warranties applicable to, or to be performed, at or during any time prior to or as a result of the termination of this Agreement, including, without limitation:
       1. Supplier’s obligations under Section 9.2(b) (Termination by Company);
       2. The requirements of Article 23 (Audit);
       3. The indemnity obligations to the extent provided in Article 11 (Indemnification), Section 28.12 (Proprietary Rights) and Exhibit N (Participant Service Agreement Requirements);
       4. The requirements of Article 12 (Governing Law; Dispute Resolution); and
       5. The limitation of damages under Article 8 (Consequential Damages).
   15. Negotiated Terms. The Parties agree that the terms and conditions of this Agreement are the result of negotiations between the Parties and that this Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or its professional advisors participated in the preparation of this Agreement.
   16. Change in Standard, System or Organization.
       1. Consistent With Original Intent. If, during the Term of this Agreement, any standard, system or organization referenced in this Agreement should be modified or replaced in the normal course of events, such modification or replacement shall from that point in time be used in this Agreement in place of the original standard, system or organization, but only to the extent such modification or replacement is mutually agreed by the Parties and generally consistent with the original spirit and intent of this Agreement.
       2. Eliminated or Inconsistent With Original Intent. If, during the Term of this Agreement, any standard, system or organization referenced in this Agreement should be eliminated or cease to exist, or is modified or replaced and such modification or replacement is inconsistent with the original spirit and intent of this Agreement, then in such event the Parties will negotiate in good faith to amend this Agreement to a standard, system or organization that is mutually agreeable to the Parties and would be consistent with the original spirit and intent of this Agreement.
   17. Certain Rules of Construction. For purposes of this Agreement:
       1. The phrase “breach of a representation” includes a misrepresentation and the failure of a representation to be accurate.
       2. “Including” and any other words or phrases of inclusion will not be construed as terms of limitation, so that references to “included” matters will be regarded as non‑exclusive, non‑characterizing illustrations.
       3. “Copy” or “copies” means that the copy or copies of the material to which it relates are true, correct and complete.
       4. When “Article,” “Section” or “Exhibit” is capitalized in this Agreement, it refers to an article, section or exhibit to this Agreement.
       5. “Will” has the same meaning as “shall” and, thus, connotes an obligation and an imperative and not a futurity.
       6. Titles and captions of or in this Agreement, the cover sheet and language in parenthesis following section references are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this Agreement or the intent of any of its provisions.
       7. Whenever the context requires, the singular includes the plural and plural includes the singular, and the gender of any pronoun includes the other genders.
       8. Each Exhibit to this Agreement is hereby incorporated by reference into this Agreement and is made a part of this Agreement as if set out in full in the first place that reference is made to it.
       9. Any reference to any statutory provision includes each successor provision and all applicable law as to that provision.
       10. Acknowledging that the Parties have participated jointly in the negotiation and drafting of this Agreement, if an ambiguity or question or intent or interpretation arises as to any aspect of this Agreement, then it will be construed as if drafted jointly by the Parties and no presumption or burden of proof will arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.
   18. Electric Services by Company. This Agreement does not provide for any electric services by Company to Supplier. If Supplier requires any electric services from Company, Company shall provide such service on a non-discriminatory basis in accordance with Company’s applicable Tariff schedule, as of the Execution Date, as amended or revised from time to time by Company or successors thereof.

IN WITNESS WHEREOF, Company and Supplier have caused this Agreement to be executed by their respective duly authorized officers as of the date first above written.

|  |  |
| --- | --- |
| Company: | Supplier: |
| By:  Name:  Its:  By:  Name:  Its: | By:  Name:  Its:  By:  Name:  Its: |

Appendix 1

PUC APPROVAL OF GRID SERVICES PURCHASE AGREEMENT

* + 1. PUC Approval Order. The Parties acknowledge and agree that this Agreement is subject to approval by the PUC and the Parties’ respective obligations hereunder are conditioned upon receipt of such approval, except as specifically provided otherwise herein. Upon execution of this Agreement, the Parties shall use good faith efforts to obtain, as soon as practicable, an order from the PUC (“PUC Approval Order”) that does not contain terms and conditions deemed to be unacceptable to Company, and is in a form deemed to be reasonable by Company, in its sole, but nonarbitrary, discretion, ordering that:

(i) This Agreement is approved; and order (i) approving the form of this Agreement as a template for all Grid Services Purchase Agreements and (ii) confirming that no approval need be sought from the PUC for each ensuing new Grid Service Purchase Agreement so long as the new agreement is substantially in the form of this Agreement.

(ii) The purchased cost of Grid Services to be incurred by Company as a result of this Agreement are reasonable;

(iii) Company’s purchased Grid Services under this Agreement are prudent and in the public interest;

(iv) Company may include the Grid Services purchase costs incurred by Company pursuant to this Agreement, in Company’s revenue requirements for ratemaking purposes and for the purposes of determining the reasonableness of Company’s rates during the Term of this Agreement.

* + 1. Non-appealable PUC Approval Order. The term “Non-appealable PUC Approval Order “ means a PUC Approval Order that is not subject to appeal to any Circuit Court of the State of Hawai‘i, Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, because the period permitted for such an appeal ( “Appeal Period”) has passed without the filing of notice of such an appeal, or that was affirmed on appeal to any Circuit Court of the State of Hawai‘i, Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, or was affirmed upon further appeal or appellate process, and that is not subject to further appeal, because the jurisdictional time permitted for such an appeal and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari has passed without the filing of notice of such an appeal or the filing for further appellate process.
    2. Company’s Written Statement. Not later than thirty (30) Days after the issuance of a PUC Approval Order, Company shall provide Supplier with a copy of such PUC Approval Order together with a written statement as to whether the conditions set forth in Section (a) (PUC Approval Order) and Section (b) (Non-appealable PUC Approval Order) have been satisfied.
    3. PUC Approval Date. As used in this Agreement, the term “PUC Approval Date” shall be defined as follows:

(i) If Company provides the written statement referred to in Section (c) (Company’s Written Statement) to the effect that the conditions referred to in Section (a) (PUC Approval Order) and Section (b) (Non-appealable PUC Approval Order) have been satisfied, the PUC Approval Date shall be the date of the issuance of the PUC Approval Order; or

(ii) If Company provides the written statement referred to in Section (c) (Company’s Written Statement) to the effect that only the conditions referred to in Section (a) (PUC Approval Order) have been satisfied, the PUC Approval Date shall be as follows:

* + - * 1. If a PUC Approval Order is issued and is not made subject to a motion for reconsideration filed with the PUC or an appeal, the PUC Approval Date shall be the date one Day after the expiration of Appeal Period following the issuance of the PUC Approval Order;
        2. If the PUC Approval Order became subject to a motion for reconsideration, and the motion for reconsideration is denied or the PUC Approval Order is affirmed after reconsideration, and such order is not made subject to an appeal, the PUC Approval Date shall be deemed to be the date one Day after the expiration of the Appeal Period following the order denying reconsideration of or affirming the PUC Approval Order; or
        3. If the PUC Approval Order, or an order denying reconsideration of the PUC Approval Order or affirming approval of the PUC Approval Order after reconsideration, becomes subject to an appeal, then the PUC Approval Date shall be the date upon which the PUC Approval Order becomes a non‑appealable order within the meaning of the definition of a Non-Appealable PUC Approval Order in Section (b) (Non-appealable PUC Approval Order).
    1. Unfavorable PUC Order. The term “Unfavorable PUC Order” means an order from the PUC concerning this Agreement that: (i) dismisses Company’s application; (ii) denies Company’s application; or (iii) approves Company’s application but contains terms and conditions deemed unacceptable by Company in its sole discretion and therefore does not meet the definition of a PUC Approval Order as set forth in Section (a) (PUC Approval Order). If Company receives an Unfavorable PUC Order, Company may, but is not required to, file a motion for reconsideration and/or an appeal. If Company files a motion for reconsideration or an appeal, the Parties’ respective obligations remain conditioned upon the receipt of the items enumerated in Section (a) (PUC Approval Order) and Section (b) (Non-applicable PUC Approval Order). If, after receipt of an Unfavorable PUC Order, Company files neither a motion for reconsideration nor an appeal, this Agreement is null and void, and neither Party owes any further obligation to each other.

End of Appendix 1