

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Sundevil Power Holdings, LLC, *et al.*,

Debtors.¹

Case No. 16-10369 (KJC)

Chapter 11

(Jointly Administered)

Re: Docket Nos. 17, 84

**NOTICE OF FILING OF ASSET PURCHASE AGREEMENT
IN CONNECTION WITH DEBTORS' MOTION FOR ENTRY OF ORDERS
(I) ESTABLISHING BIDDING AND SALE PROCEDURES; (II) APPROVING THE
SALE OF ASSETS; AND (III) GRANTING RELATED RELIEF**

PLEASE TAKE NOTICE that on February 11, 2016 the Debtors filed their *Motion Pursuant to Sections 105(a), 363 and 365 of the Bankruptcy Code, and Bankruptcy Rules 2002, 6004, 6006, for Entry of an Order (A) Approving the Sale of Substantially All of the Debtors' Assets Free and Clear of Encumbrances and (B) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases* (the "**Sale Motion**") (Docket No. 17), which sought, among other things, authority from this United States Bankruptcy Court for the District of Delaware (the "**Court**") to sell substantially all of their assets. The Court granted the Sale Motion and entered an order approving the bidding procedures contained in the Sale Motion on March 3, 2016 (the "**Order**") (Docket No. 84).

PLEASE TAKE NOTICE that the Sale Motion and Order provided that the Debtors would provide a form of Asset Purchase Agreement to certain Interested Parties (as defined in

¹The Debtors in these chapter 11 cases, and the last four digits of their respective federal tax identification numbers, are Sundevil Power Holdings, LLC (2308) and SPH Holdco LLC (7777). The Debtors' service address is: 701 East Lake Street, Suite 300, Wayzata, Minnesota 55391.

the Sale Motion) if the Debtors determined, in their sole discretion, that such Interested Party met certain criteria as set forth more fully in the Sale Motion.

ATTACHED HERETO as Exhibit “A” is a copy of a form of asset purchase agreement (the “**APA**”) that the Debtors will provide to such qualified Interested Parties.

Dated: March 15, 2016
Wilmington, Delaware

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PROPOSED ATTORNEYS FOR THE DEBTORS

EXHIBIT A

Bid Draft

FORM OF ASSET PURCHASE AND SALE AGREEMENT

between

**SUNDEVIL POWER HOLDINGS, LLC
(Seller)**

and

**[_____]
(Buyer)**

Dated as of [_____], 2016

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FORM OF ASSET PURCHASE AND SALE AGREEMENT

This Asset Purchase and Sale Agreement, dated as of _____, 2016 (this "**Agreement**") is made and entered into by and between SUNDEVIL POWER HOLDINGS, LLC, a Delaware limited liability company ("**Seller**"), and [_____] a [_____] ("**Buyer**").¹

RECITALS

WHEREAS, on February 11, 2016 (the "**Petition Date**"), Seller and SPH Holdco LLC, a Delaware limited liability company and sole member of Seller, filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code (as defined below) in the United States Bankruptcy Court for the District of Delaware, and these cases are being jointly administered for procedural purposes only under Case No. 16-10369 (collectively, the "**Bankruptcy Cases**");

WHEREAS, Seller has continued in the possession of its assets and in the management of its businesses pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code;

WHEREAS, Seller owns 100% of Power Block 1 and Power Block 2 (each as defined herein) and a 50% undivided interest in the Common Facilities and Common Property (each as defined herein) (based upon the aggregate 100% interest collectively owned on the date hereof by TEPC/UNS, Entegra (each as defined herein) and Seller) at the Gila River Power Station (as defined herein);

WHEREAS, Tucson Electric Power Company, an Arizona corporation, and UNS Electric, Inc., an Arizona corporation (collectively, "**TEPC/UNS**") collectively own 100% of Power Block 3 (as defined herein), and a 25% undivided interest in the Common Facilities and Common Property (based upon the aggregate 100% interest collectively owned on the date hereof by TEPC/UNS, Entegra and Seller) at the Gila River Power Station;

WHEREAS, Gila River Power LLC, a Delaware limited liability company ("**Entegra**"), owns 100% of Power Block 4 (as defined herein), and a 25% undivided interest in the Common Facilities and Common Property (based upon the aggregate 100% interest collectively owned on the date hereof by TEPC/UNS, Entegra and Seller) at the Gila River Power Station;

WHEREAS, Seller, TEPC/UNS and Entegra are parties to that certain Second Amended and Restated Ownership Agreement, dated as of December 10, 2014 (the "**Second Amended and Restated Ownership Agreement**"), which agreement sets forth the terms and conditions governing the ownership of Seller's, TEPC/UNS's and Entegra's respective undivided ownership interest in the Common Facilities and the Common Property, the operation and

¹ NTD: This document has been drafted as a sale to a single Buyer of Power Block 1. Power Block 1 and 2 (or an undivided interest therein) may be sold together or separately to one or more buyers and the document will be revised accordingly. If Buyer is not a sufficiently creditworthy entity, Seller may require additional credit support for Buyer's obligations hereunder from a creditworthy entity in form and substance acceptable to Seller. In accordance with the Bid Procedures Order, Seller reserves the right, as applicable, to add customary provisions addressing a break-up fee, consideration of an alternative transaction and relevant termination rights related thereto.

maintenance of the Common Facilities and any future generation located at the Gila River Power Station;

WHEREAS, Buyer desires to purchase and acquire (a) the 100% interest in Power Block 1, including a 100% fee interest in the Power Block 1 Site; (b) a 25% undivided interest in the Common Facilities and Common Property (based upon the aggregate 100% interest collectively owned on the date hereof by TEPC/UNS, Entegra and Seller); (c) an easement over all real property underlying Power Blocks 2, 3 and 4; (d) a 25% limited liability company interest in Gila Bend Operations Co., LLC, a Delaware limited liability company ("**GBOC**"), in the form of one (1) LLC Unit (as defined herein); and (e) certain of Seller's contractual rights and interests related to the aforementioned items as further set forth herein, and Seller desires to sell such assets, properties, equipment and contractual rights to Buyer;

WHEREAS, as a condition and inducement to Buyer's and Seller's willingness to enter into this Agreement, Buyer and Seller desire to amend and restate the Second Amended and Restated Ownership Agreement in its entirety by entering into at Closing (as defined herein) a Third Amended and Restated Ownership Agreement (the "**Third Amended and Restated Ownership Agreement**") to set forth the rights and obligations of Buyer, Seller, TEPC/UNS and Entegra with respect to those assets and systems common to and required for the current and future operation of or generation at the existing Gila River Power Station;

WHEREAS, Seller and GBOC are parties to that certain Operation and Maintenance Agreement for the Gila River Power Station, dated as of March 30, 2012 (the "**Seller O&M Agreement**"), pursuant to which GBOC operates and maintains Power Blocks 1 and 2 and Seller's interest in the Common Facilities;

WHEREAS, as a condition and inducement to Buyer's and Seller's willingness to enter into this Agreement, Buyer desires to enter into an operation and maintenance agreement with GBOC and Ethos (the "**Buyer O&M Agreement**") pursuant to which Ethos (acting as a subcontractor for GBOC) will operate and maintain Power Block 1 and Buyer's interest in the Common Facilities, subject to the terms and conditions of the Buyer O&M Agreement;

WHEREAS, in connection with the execution of the Buyer O&M Agreement, Seller desires to amend the Seller O&M Agreement (the "**Seller O&M Agreement Amendment**") to reflect the removal of all references to Power Block 1 from the Seller O&M Agreement from and after Closing;

WHEREAS, Seller owns two (2) LLC Units and each of TEPC/UNS and Entegra owns one (1) LLC Unit and Seller, TEPC/UNS and Entegra are each a member in GBOC pursuant to that certain Second Amended and Restated Limited Liability Company Agreement of Gila Bend Operations Co., LLC, dated as of July 12, 2012 (as amended, the "**GBOC LLC Agreement**");

WHEREAS, as a condition and inducement to Buyer's and Seller's willingness to enter into this Agreement, and to give effect to Buyer's acquisition from Seller of a 25% limited liability company interest in GBOC, Buyer desires to enter into a Joinder to Operating Agreement with Seller, TEPC/UNS and Entegra with respect to the GBOC LLC Agreement (the

“**GBOC LLC Agreement Joinder**”) pursuant to which Buyer will become a member in GBOC and hold one (1) LLC Unit;

WHEREAS, as a condition and inducement to Buyer’s and Seller’s willingness to enter into this Agreement, Buyer and Seller desire to amend and restate at Closing, as needed, the Amended and Restated Reciprocal Easement Agreement between Seller, TEPC/UNS and Entegra, dated as of December 10, 2014 (the “**Amended and Restated Reciprocal Easement Agreement**”), for the purpose of adding Buyer as a party thereto and granting Buyer an easement over the Other Power Block Sites for access to, and maintenance of, the Common Facilities located within the Other Power Block Sites (as so amended and restated, the “**Second Amended and Restated Reciprocal Easement Agreement**”);

WHEREAS, Seller has determined, in the exercise of its business judgment, that it is advisable and in the best interest of the estate to consummate the Transactions (as defined herein) pursuant to the Sale Order and, in furtherance thereof, the manager of Seller has approved this Agreement; and

WHEREAS, the Transactions are subject to the approval of the Bankruptcy Court and will be consummated only pursuant to the Sale Order (as defined herein) to be entered in the Bankruptcy Cases.

NOW, THEREFORE, in consideration of the premises and the mutual representations, warranties, covenants and agreements in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1 **DEFINITIONS**

1.1 **Definitions.** As used in this Agreement, the following capitalized terms have the meanings set forth below:

“**Affiliate**” means any Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with the Person specified. For purposes of this definition, control of a Person means the power, direct or indirect, to direct or cause the direction of the management and policies of such Person whether through ownership of voting securities or ownership interests, by Contract or otherwise, and specifically with respect to a corporation, partnership or limited liability company, means direct or indirect ownership of more than 50% of the voting securities in such corporation or of the voting interest in a partnership or limited liability company or the general partner interest in a partnership. In no event shall Seller and GBOC be deemed to be “**Affiliates**”.

“**Agreed Tax Treatment**” has the meaning specified in Section 2.12(a).

“**Agreement**” has the meaning specified in the introductory paragraph.

“**Allocation**” has the meaning specified in Section 2.12(b).

“**Amended and Restated Reciprocal Easement Agreement**” has the meaning specified in the Recitals.

“**Approvals**” means notices to, and approvals, consents, authorizations and waivers from, Persons who are not Governmental Authorities, other than Buyer and Seller.

“**APS**” means Arizona Public Service, an Arizona corporation.

“**Assigned Contracts**” mean those Contracts of the Seller listed on Schedule 3.8(a) attached hereto, which Contracts shall be assumed by the Seller and assigned to the Buyer pursuant to Section 365 of the Bankruptcy Code, the Sale Order or other order of the Bankruptcy Court and each other applicable conveyance document in accordance with this Agreement.

“**Assumed Liabilities**” has the meaning specified in Section 2.3.

“**Avoidance Actions**” means any and all avoidance, recovery, subordination, or other actions or remedies that may be brought on behalf of the Debtors or their estates under the Bankruptcy Code or applicable non-bankruptcy law, including, without limitation, actions or remedies under chapter 5 of the Bankruptcy Code.

“**Bankruptcy Cases**” has the meaning specified in the Recitals.

“**Bankruptcy Code**” means chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. as amended.

“**Bankruptcy Court**” means the United States Bankruptcy Court for the District of Delaware or any other court having jurisdiction over the Bankruptcy Cases from time to time.

“**Bid Procedures**” means the bidding procedures set forth in the Bid Procedures Order.

“**Bid Procedures Order**” means the *Order (A) Authorizing And Approving Bid Procedures to be Employed in Connection with the Sale of Certain Assets of the Debtors; (B) Scheduling an Auction and Sale Hearing; (C) Authorizing and Approving Assignment Procedures to be Employed in Connection with the Identification and Assumption of Certain Prepetition Contracts; and (D) Approving the Manner and Form of Notice of the Auction, Sale Hearing and Assignment Procedures*, entered by the Bankruptcy Court on March 3, 2016 [Docket No. 84], subject to modifications or amendment as set forth therein.

“**Bill of Sale and Assignment**” has the meaning specified in Section 8.2(a).

“**Business Day**” means any day other than Saturday, Sunday, or any day on which banks located in the State of New York are authorized or obligated to close.

“**Buyer**” has the meaning specified in the introductory paragraph.

“**Buyer Approvals**” has the meaning specified in Section 4.3(c).

“**Buyer O&M Agreement**” has the meaning specified in the Recitals.

“**Casualty Estimate**” has the meaning specified in Section 5.10(a).

“**CERCLA**” means the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*

“**Charter Documents**” means, with respect to any Person, the articles or certificate of incorporation, formation or organization and by-laws, the limited partnership agreement, the partnership agreement or the limited liability company agreement, or such other organizational documents of such Person, including those that are required to be registered or kept in the place of incorporation, organization or formation of such Person and which establish the legal personality of such Person.

“**Closing**” means the consummation of the Transactions.

“**Closing Adjustment**” has the meaning specified in Section 2.6.

“**Closing Agreements**” means the agreements to be delivered on or before Closing by the Parties pursuant to Article 8.

“**Closing Date**” has the meaning specified in Section 8.1.

“**Code**” means the United States Internal Revenue Code, as amended.

“**Common Facilities**” means those assets, comprised of personal property, and contractual rights common to, required for or used in the current or future operation and maintenance of all Power Blocks at the Gila River Power Station, all as set forth on Appendix B.

“**Common Property**” means all real property comprising the Gila River Power Station (excluding the Power Block 1 Site and the Other Power Block Sites) that is owned by the owners of the Power Block Sites as tenants in common.

“**Confidentiality Agreement**” means that certain confidentiality agreement entered into among Seller and Buyer in accordance with the Bid Procedures Order.

“**Contract**” means any legally binding written contract, lease, license, evidence of indebtedness, mortgage, indenture, security agreement, purchase order, promissory note or other legally binding contract.

“**Credit Agreement**” means that certain Credit Agreement among Beal Bank USA, as lender, CLMG Corp., as successor Administrative Agent and Collateral Agent, dated as of July 23, 2012, and all security agreements, financing statements, pledge agreements, mortgages, and all other documents executed in connection therewith, in each case as amended, amended and restated, supplemented or otherwise modified from time to time.

“**Cure Costs**” means the amounts necessary to cure all defaults, if any, and to pay all actual pecuniary losses, if any, that have resulted from such defaults, under the Contracts to be assumed and assigned, in each case as of the Petition Date and to the extent required by section 365 of the Bankruptcy Code and any order of the Bankruptcy Court, which amounts (if not

already paid or to be paid in the ordinary course of business pursuant to an order of the Bankruptcy Court) shall be identified to Buyer on Schedule 3.8(a).

“**Debtors**” means Seller and SPH Holdco LLC.

“**Deed**” or “**Special Warranty Deed**” means that Special Warranty Deed in the form attached as Exhibit E, properly executed, and acknowledged by Seller.

“**Deposit**” has the meaning specified in Section 2.8(a)(1).

“**DIP Credit Documents**” means the Senior Secured Superpriority Debtor-In-Possession Credit Agreement among Seller, CLMG Corp. and the lenders party thereto dated February 11, 2016, and all security agreements, financing statements, pledge agreements, mortgages, and all other documents executed in connection therewith, in each case as amended, amended and restated, supplemented or otherwise modified from time to time.

“**Dispute Notice**” has the meaning specified in Section 2.10(b).

“**Dollar**” and “**\$**” means the lawful currency of the United States of America.

“**Entegra**” has the meaning specified in the Recitals.

“**Environmental Law**” means CERCLA; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. § 1471 *et seq.*; the Toxic Substances Control Act, 15 U.S.C. § 8-2601 through 2629; the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et seq.*; the Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j; and any similar Laws of the State of Arizona or of any other Governmental Authority having jurisdiction over the Transferred Assets in question addressing the prevention of pollution or protection of the environment.

“**ERISA**” means the Employee Retirement Income Security Act of 1974, as amended.

“**Escrow Account**” has the meaning specified in Section 2.8(a)(1).

“**Escrow Agent**” means U.S. Bank National Association, a national banking association.

“**Escrow Agreement**” means the escrow agreement between Buyer, Seller and Escrow Agent in substantially the form attached hereto as Exhibit H.

“**Estimated Adjustments**” has the meaning specified in Section 2.9.

“**Estimated Closing Statement**” has the meaning specified in Section 2.9.

“**Estimated Purchase Price**” has the meaning specified in Section 2.9.

“**Ethos**” means EthosEnergy Power Plant Services, LLC, a Nevada company.

“**Excluded Assets**” has the meaning specified in Section 2.2.

“**Excluded Liabilities**” has the meaning specified in Section 2.4.

“**Excluded Records**” means all of Seller’s files, records, information and data whether written or electronically stored, other than the Records.

“**FERC**” means the Federal Energy Regulatory Commission.

“**Fuel Transportation Rights**” means, collectively, Seller’s rights under (i) the Firm Transportation Service Agreement under Rate Schedule FTS-5, effective as of June 1, 2015 through October 31, 2020, between Transwestern Pipeline Company, LLC and Seller and (ii) the Firm Transportation Service Agreement under Rate Schedule FT1 effective as of June 1, 2013 through March 31, 2017 between El Paso Natural Gas Company and Seller.

“**Fuel Transportation Rights Interest**” means the assignment or release of 100% of the Fuel Transportation Rights to Buyer via an instrument acceptable in form and substance to the Parties.

“**Fundamental Representations**” means the representations and warranties set forth in Sections 3.2 (Authority); 3.13 (Brokers); 4.2 (Authority); and 4.6 (Brokers).

“**GAAP**” means generally accepted accounting principles in the United States of America, applied on a consistent basis.

“**GBOC**” has the meaning specified in the Recitals.

“**GBOC Interest**” means the assignment by Seller of one (1) LLC Unit to Buyer.

“**GBOC LLC Agreement**” has the meaning specified in the Recitals.

“**GBOC LLC Agreement Joinder**” has the meaning specified in the Recitals.

“**Gila River Power Station**” means the Gila River Power Station located in Maricopa County, Arizona with a nominal rating of 2,334 MW as of the date hereof, as re-rated from time to time.

“**Governmental Authority**” means, with respect to any Person, any court, tribunal, arbitrator, authority, agency, commission, official or other instrumentality of the United States or any foreign country, or any state, county, city or other political subdivision or similar governing entity to the extent applicable to such Person, in each case acting within the scope of its authority and jurisdiction.

“**Hazardous Materials**” means any chemicals, materials, substances, or items in any form, whether solid, liquid, gaseous, semisolid, or any combination thereof, whether waste materials, raw materials, chemicals, finished products, by-products, or any other materials or articles, which are listed as hazardous, toxic or dangerous or are regulated as pollutants or contaminants under Environmental Law.

“**HSR Act**” means the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended.

“**Holdback Funds**” means an amount equal to [____] Dollars (\$[____]).²

“**Independent Accountant**” means [_____] or if such Person is unwilling or unable to serve, a mutually agreeable nationally recognized independent certified public accounting firm, independent as to both Buyer and Seller.

“**Initial Ownership Date**” means July 8, 2011.

“**Initial Purchase Price**” has the meaning specified in Section 2.6.

“**Intellectual Property**” means all United States and foreign (a) patents and patent applications, including all reissuances, continuations, continuations-in-part, divisions, supplementary protection certificates, extensions and re-examinations thereof; (b) trademarks, service marks, logos, designs, trade names, trade dress, Internet domain names, and registrations and applications for registration thereof, including the goodwill associated therewith; (c) copyrights, other rights in works of authorship, and registrations and applications for registration thereof; and (d) trade secrets and other confidential proprietary information.

“**Interconnection and Operating Agreement**” means that certain Amended and Restated Interconnection and Operating Agreement, dated December 10, 2014, by and between Entegra, Seller, TEPC/UNS and APS, as may be amended, amended and restated or otherwise modified from time to time after the date hereof.

“**Inventory**” means the “Operational Spare Parts Inventory” as defined in the Spare Parts Agreement as owned by Seller or jointly owned by Seller, Entegra and TEPC/UNS.

“**Knowledge**” means with respect to Seller, the actual knowledge of all the Persons listed on Schedule 1.1(a), without inquiry.

“**Laws**” means any or all laws, statutes, rules, regulations, ordinances and other pronouncements having the effect of law of any Governmental Authority.

“**Letter of Credit**” means an irrevocable, standby letter of credit issued by a commercial bank with ratings of at least “A-” by Standard & Poor’s and at least “A3” by Moody’s Investor Services, Inc., with an expiration date no earlier than [____], in the amount of [__] Dollars (\$[____]) and otherwise in form and substance satisfactory to Seller.³

“**Lien**” means any deed of trust, mortgage, pledge, assessment, security interest, lien or similar property interest or encumbrance.

“**LLC Unit**” is defined in the GBOC LLC Agreement.

² NTD: To be equal to a portion of the Deposit or Letter of Credit.

³ NTD: Letter of Credit to equal 10% of the Purchase Price.

“Loss” means any and all judgments, liabilities, amounts paid in settlement, damages, fines, penalties, deficiencies, losses and expenses (including interest, court costs, reasonable fees of attorneys, accountants and other experts or other reasonable out-of-pocket expenses of litigation or other proceedings or of any claim, default or assessment), but only to the extent such losses (a) are not reasonably expected to be covered by a payment from some third party or by insurance or otherwise recoverable from third parties and (b) are net of any associated benefits arising in connection with such loss, including any associated Tax benefits. For all purposes in this Agreement, the term “Losses” shall not include any Non-Reimbursable Damages.

“Major Maintenance Spare Parts” means those parts and equipment typically installed and repaired in connection with all significant maintenance performed during scheduled outages and forced outages that are considered CI, HGP or Major Inspections on the combustion turbine (as those terms are defined and more fully described in General Electric Power Systems’ publication 3620, as amended from time to time), overhaul of the steam turbine and generator, and major boiler repairs on the heat recovery steam generator, in each case solely with respect to Power Block 1.

“Material Adverse Effect” means any occurrence, condition, change, development, event or effect that materially adversely affects the business, properties, financial condition or results of operations of the Transferred Assets, taken as a whole, or the ability of Seller to consummate the transactions contemplated by this Agreement; *provided, however*, in no event shall any of the following constitute a Material Adverse Effect: any occurrence, condition, change, development, event or effect resulting from (a) any change in economic conditions generally or in the industry in which the Transferred Assets operate, including any change in markets for commodities or supplies, including electric power, capacity, transmission, natural gas or water, as applicable, used in connection with the Transferred Assets or in regional wholesale or retail markets for electric power; (b) any change in general regulatory, social or political conditions, including any acts of war, sabotage or terrorist activities; (c) the implementation of, failure to implement, revocation, or alteration in any manner of, a market for electric generation capacity by any Governmental Authority, irrespective of the form that such electric generation capacity market may take; (d) any change in the financial, banking, credit, securities or capital markets (including any suspension of trading in, or limitation on prices for, securities on any stock exchange or any changes in interest rates) or any change in the general national or regional economic or financial conditions; (e) any continuation of an adverse trend or condition; (f) any change in any Laws (including Environmental Laws); (g) any effects of weather, geological or meteorological events or other natural disaster; (h) strikes, work stoppages or other labor disturbances; (i) any increases in the costs of commodities or supplies, including fuel, or decreases in the price of electricity; (j) any change caused by the pending sale of such Transferred Assets to Buyer, including changes due to the credit rating of Buyer; (k) any actions to be taken pursuant to or in accordance with this Agreement; (l) the announcement or pendency of the transactions contemplated by this Agreement, including the impact thereof on the relationships, contractual or otherwise, with respect to the Transferred Assets in connection with employees, labor unions, customers, suppliers or partners, and including any lawsuit, action or other proceeding with respect to the transactions contemplated hereby; (m) any failure, in and of itself, by any Seller or the Transferred Assets to meet internal or published projections, forecasts, estimates or predictions in respect of revenues, earnings or other financial or operating metrics for any period; and (n) any failure to effectuate the assignment of an Assigned Contract;

provided, further, that the commencement of the Bankruptcy Cases shall not, in itself, constitute a Material Adverse Effect.

“**Memorandum of Third Amended and Restated Ownership Agreement**” means the Memorandum of Third Amended and Restated Ownership Agreement in the form included in the Third Amended and Restated Ownership Agreement and at Closing to be duly executed and acknowledged by Buyer, Seller, TEPC/UNS and Entegra and then duly recorded.

“**MW**” means megawatts.

“**Non-Reimbursable Damages**” has the meaning specified in Section 10.5(b).

“**Order**” means any writ, judgment, decree, injunction or order of any Governmental Authority.

“**Other Power Blocks**” means the three (3) Power Blocks as described on Appendix C together with all fixtures and improvements located on the Other Power Block Sites and all other electrical interconnection and metering facilities, equipment, machinery, tools, furniture, office equipment, computer hardware, information technology equipment, supplies, materials, vehicles and other items of tangible personal property of every kind owned or leased by Seller, TEPC/UNS or Entegra, whether or not located on the Other Power Block Sites, which Seller, TEPC/UNS or Entegra, as applicable, uses exclusively in connection with its ownership, operation or maintenance of Power Blocks 3 or 4 or 2, respectively.

“**Other Power Block Sites**” means the real property underlying the Other Power Blocks as described on Appendix C together with all appurtenances thereto.

“**Outside Date**” means [_____].

“**Party**” and “**Parties**” means each of Buyer and Seller.

“**Permits**” means all licenses, permits, certificates of authority, authorizations, approvals, registrations, franchises and similar consents granted by a Governmental Authority.

“**Permitted Liens**” means (a) any Lien for Taxes not yet delinquent, (b) any Lien arising in the ordinary course of business by operation of Law with respect to a liability that is not yet delinquent, (c) all matters that are disclosed (whether or not subsequently deleted or endorsed over) in any title policies, title reports or other title materials that have been made available to Buyer or obtained by or on behalf of Buyer, or that would be disclosed on a survey of the Transferred Real Property Assets, (d) any other imperfection or irregularity of title or other Lien that would not reasonably be expected to result in a Material Adverse Effect, (e) zoning, planning, and other similar limitations and restrictions, all rights of any Governmental Authority to regulate a Transferred Real Property Asset, and all other matters of public record, to the extent validly subsisting and applicable to any Transferred Real Property Asset, (f) all rights of condemnation, eminent domain or other similar rights of any Person that would not reasonably be expected to result in a Material Adverse Effect, (g) the terms and conditions of the Pipeline Easements, Transferred Permits or the Assigned Contracts, (h) with respect to the Pipeline Easements, the rights of the fee owner(s) in and to the real property underlying the Pipeline and

any Liens affecting fee title thereto, (i) any Lien to be released on or prior to the Closing, (j) any Lien securing obligations under the DIP Credit Documents and (k) the Liens identified on Appendix E.

“**Person**” means any natural person, corporation, general partnership, limited partnership, limited liability company, proprietorship, other business organization, trust, union, association or Governmental Authority.

“**Petition Date**” has the meaning specified in the Recitals.

“**Pipeline**” means the 19-mile, 30-inch natural gas pipeline, together with related appurtenances and facilities, connecting the Gila River Power Station to the El Paso Natural Gas Company main pipeline and the Transwestern Pipeline Company, LLC main pipeline.

“**Pipeline Easements**” means, collectively, those certain ownership and usage interests (including easements and lease interests) granting the right to access the real property underlying the Pipeline for, inter alia, installing and maintaining the Pipeline.

“**Pipeline Interest**” means a 25% undivided ownership interest as tenants in common in the Pipeline Easements.

“**Plat**” means that certain Final Plat for Gila River Power Blocks, recorded in the Official Records of Maricopa County, Arizona, as Instrument No. 2010-0954199, Book 1068 of Maps, Page 40.

“**Post-Closing Adjustments**” has the meaning specified in Section 2.10.

“**Post-Closing Statement**” has the meaning specified in Section 2.10.

“**Power Block**” means each of the four power blocks at the Gila River Power Station, each of which includes two (2) General Electric 7FA combustion turbines, two (2) Alstom HRSGs and one (1) General Electric D11 steam turbine, and ancillary equipment exclusively serving each such power block; and “**Power Blocks**” mean all four such power blocks collectively.

“**Power Block Sites**” means collectively the Power Block 1 Site and the Other Power Block Sites.

“**Power Block 1**” is the Power Block at the Gila River Power Station as described on Appendix A together with all fixtures and improvements located on the Power Block 1 Site and all other electrical interconnection and metering facilities, equipment, machinery, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles and other items of tangible personal property of every kind owned or leased by Seller, whether or not located on the Power Block 1 Site, which Seller owns and uses exclusively in connection with its ownership, operation or maintenance of Power Block 1, excluding any thereof that is specifically identified in Schedule 2.2(h)(v).

“**Power Block 1 Site**” means the real property underlying Power Block 1 depicted in Appendix D, according to the Plat, together with all appurtenances thereto.

“**Power Block 2**” is the Power Block at the Gila River Power Station owned by Seller and described as “Power Block 2” in Appendix C.

“**Power Block 3**” means the Power Block at the Gila River Power Station owned by TEPC/UNS and described as “Power Block 3” in Appendix C.

“**Power Block 4**” means the Power Block at the Gila River Power Station owned by Entegra and described as “Power Block 4” in Appendix C.

“**Proceeding**” means any action, suit, litigation, arbitration, audit, investigation, or other similar proceeding, including any civil, criminal, administrative, or appellate proceeding conducted by any Governmental Authority or any arbitrator or arbitration panel.

“**Prorations**” has the meaning specified in Section 2.7.

“**Purchase Price**” has the meaning specified in Section 2.6.

“**Records**” means Seller’s files, records, information and data pertaining solely to the Transferred Assets but excluding the Excluded Records.

“**Release**” means any release, spill, emission, leaking, pumping, emptying, dumping, injection, abandonment, deposit, disposal or discharge of Hazardous Materials into the environment, to the extent prohibited by Environmental Laws.

“**Remediation Measures**” means action of any kind to address a Release of Hazardous Materials, including any (a) investigation, monitoring, clean-up, containment, remediation, mitigation, removal, disposal or treatment, including the preparation and implementation of any work plans and the obtaining of any applicable Permit from Governmental Authorities with respect thereto, and (b) response to, or preparation for, any inquiry, order, hearing or other Proceeding by or before any Governmental Authority with respect to such Release of Hazardous Materials.

“**Representatives**” means, as to any Person, its officers, directors, employees, managers, members, partners, shareholders, owners, counsel, accountants, financial advisers, sources of financing (including counsel to such sources) and consultants.

“**Sale Hearing**” means a hearing held by the Bankruptcy Court regarding the Sale Motion.

“**Sale Motion**” means the *Debtors’ Motion for Entry of Orders (I) Establishing Bidding and Sale Procedures; (II) Approving the Sale of Assets; and (III) Granting Related Relief* filed with the Bankruptcy Court on February 11, 2016 Docket No. 17.

“**Sale Order**” means an order or orders of the Bankruptcy Court in the form and containing such terms, to the extent such terms pertain to the transactions contemplated by this

Agreement, as are reasonably acceptable to Buyer and Seller, approving this Agreement and all of the terms and conditions hereof, and approving and authorizing Seller to consummate the Transactions.

“**Schedule**” means a schedule to this Agreement.

“**Second Amended and Restated Ownership Agreement**” has the meaning specified in the Recitals.

“**Second Amended and Restated Reciprocal Easement Agreement**” has the meaning specified in the Recitals.

“**Seller**” has the meaning specified in the introductory paragraph.

“**Seller Approvals**” has the meaning specified in Section 3.3(c).

“**Seller Consents**” has the meaning specified in Section 3.3(b).

“**Seller Marks**” has the meaning specified in Section 2.2(b).

“**Seller O&M Agreement**” has the meaning specified in the Recitals.

“**Seller O&M Agreement Amendment**” has the meaning specified in the Recitals.

“**Spare Parts Agreement**” means that certain Spare Parts Agreement, dated November 5, 2014, by and between Seller and Entegra.

“**Straddle Property Taxes**” has the meaning specified in Section 2.7(a).

“**Tax**” or “**Taxes**” means (a) all sales, use or transaction privilege taxes, real or personal property taxes, recordation and transfer taxes, payroll deduction taxes, franchise taxes, taxes on gross or net income or other monetary obligations imposed, assessed or exacted by any Governmental Authority, and (b) any interest, penalties, adjustments and additions attributable to any of the foregoing, including any liability for any of the foregoing taxes or other items arising as a transferee, successor, by contract or otherwise.

“**Tax Return**” means any report, return, information return or other information required to be supplied to a taxing authority in connection with Taxes.

“**TEPC/UNS**” has the meaning specified in the Recitals.

“**Termination Date**” has the meaning specified in Section 9.1(c).

“**Third Amended and Restated Ownership Agreement**” has the meaning specified in the Recitals.

“**Transactions**” means the transactions contemplated by this Agreement and the other Transaction Documents.

“Transaction Documents” means this Agreement and the Closing Agreements.

“Transferred Assets” means the Transferred Real Property Assets, the Transferred Power Related Assets, a 25% undivided ownership interest as tenants in common in the Water Rights and a 25% undivided ownership interest as tenants in common in the Pipeline, collectively.

“Transferred Intellectual Property” has the meaning specified in Section 3.12.

“Transferred Permits” has the meaning specified in Section 3.4(b).

“Transferred Power Related Assets” has the meaning specified in Section 2.1(b).

“Transferred Real Property Assets” has the meaning specified in Section 2.1(a).

“Transfer Taxes” means all transfer, sales, use, goods and services, value added, documentary, stamp duty, conveyance, and other similar Taxes, duties, fees or charges.

“Transmission Rights” means Seller’s rights under the Second Revised Service Agreement between APS and Seller dated as of July 8, 2011.

“Transmission Rights Interest” means the permanent release or assignment of 550 MW of Transmission Rights to Buyer.

“Water Rights” means, to the extent applicable, (a) all well registrations for wells located on the Transferred Assets; (b) all rights to any unregistered wells located on the Transferred Assets; (c) all grandfathered groundwater and surface rights associated with, or used in connection with the operation of, the Transferred Assets; and (d) all similar water rights belonging to Seller and pertaining to the Transferred Assets.

1.2 **Certain Interpretive Matters.**

(a) All article, section, subsection, schedules and exhibit references used in this Agreement are to articles, sections, subsections, schedules and exhibits to this Agreement unless otherwise specified. The exhibits and schedules attached to this Agreement constitute a part of this Agreement and are incorporated herein for all purposes.

(b) If a term is defined as one part of speech (such as a noun), it shall have a corresponding meaning when used as another part of speech (such as a verb). Unless the context of this Agreement clearly requires otherwise, words importing the masculine gender shall include the feminine and neutral genders and vice versa. The words “includes” or “including” shall mean “including without limitation,” the words “hereof,” “hereby,” “herein,” “hereunder” and similar terms in this Agreement shall refer to this Agreement as a whole and not any particular section or article in which such words appear and any reference to a Law shall include any rules and regulations promulgated thereunder, and any reference to any Law in this Agreement shall only be a reference to such Law as of the date of this Agreement. Currency amounts referenced herein are in U.S. Dollars. Any reference to a Contract set forth in this Agreement shall be construed as a reference to such Contract as amended, supplemented or

otherwise modified from time to time, in accordance with the provisions thereof and here. Terms defined in the singular have the corresponding meaning in the plural and vice versa.

(c) Time is of the essence in this Agreement. Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified. Whenever any action must be taken hereunder on or by a day that is not a Business Day, then such action may be validly taken on or by the next day that is a Business Day.

(d) All accounting terms used herein and not expressly defined herein shall have the meanings given to them under GAAP.

(e) Each Party acknowledges that it and its attorneys have been given an equal opportunity to negotiate the terms and conditions of this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party or any similar rule operating against the drafter of an agreement shall not be applicable to the construction or interpretation of this Agreement.

1.3 **Intention Regarding Classification.** The classification of certain items as personal property and/or the inclusion or exclusion of certain items in or from the definition of the Power Block 1 Site for purposes of this Agreement is intended to be solely for the convenience of reference of the Parties and is not intended as an election to classify, or an admission regarding the classification of, such items as real or personal property, fixtures, improvements or otherwise for any other purposes, including accounting, recordation or perfection of liens, taxation, including real or personal property Taxes and transfer Taxes, title insurance coverage or any other purposes whatsoever.

ARTICLE 2 **BASIC TRANSACTIONS**

2.1 **Transferred Assets.** On the terms and subject to the conditions contained in this Agreement, at Closing, Buyer shall purchase from Seller, and Seller shall convey, assign and transfer to Buyer, to the extent permitted under the Bankruptcy Code after giving effect to the Bid Procedures Order and the Sale Order, effective as of the Effective Time, all of Seller's right, title and interest in, to and under the following:

- (a) The "**Transferred Real Property Assets**" consisting of:
 - (i) the Power Block 1 Site;
 - (ii) a 25% undivided ownership interest as tenants in common in all Common Property; and
 - (iii) the Pipeline Interest.
- (b) The "**Transferred Power Related Assets**" consisting of:
 - (i) Power Block 1;

- Facilities;
- (ii) a 25% undivided ownership interest as tenants in common in the Common
 - (iii) the GBOC Interest;
 - (iv) the Transmission Rights Interest;
 - (v) the Fuel Transportation Rights Interest;
 - (vi) the Assigned Contracts and all rights thereunder (to the extent transferrable to Buyer);
 - (vii) a 25% undivided ownership interest as tenants in common in the Inventory;
 - (viii) the Transferred Permits (to the extent transferrable to Buyer) as set forth in Section 3.4(b);
 - (ix) the Transferred Intellectual Property (to the extent transferrable to Buyer) as set forth in Section 3.12;
 - (x) the Third-Party IP as set forth in Section 5.4; and
 - (xi) any Major Maintenance Spare Parts.
- (c) A 25% undivided ownership interest as tenants in common in the Water Rights.
- (d) A 25% undivided ownership interest as tenants in common in the Pipeline.

2.2 **Excluded Assets**. Notwithstanding anything to the contrary in this Agreement, no assets, rights, Permit, Contracts or other property of Seller or any of its Affiliates shall be sold, conveyed, assigned, transferred or delivered to Buyer, other than the Transferred Assets, and such Transferred Assets specifically shall not include any of the following assets, rights, Permits, Contracts or other property of Seller or any of its Affiliates (collectively, the “**Excluded Assets**”):

- (a) personnel and employment records of or related to persons employed at Gila River Power Station;
- (b) rights of Seller and its Affiliates to the names “Sundevil” and “Wayzata” and any and all other trade names, trademarks, service marks, corporate names, domain names or logos, or any part, derivative or combination thereof used by Seller, TEPC/UNS, Entegra and/or its Affiliates and names similar thereto and, except for the Transferred Intellectual Property, all Intellectual Property contained therein or embodied thereby (collectively, the “**Seller Marks**”);
- (c) any cash, cash equivalent items, accounts receivable, deposits and pre-paid expenses (to the extent an adjustment to the Initial Purchase Price is not made in respect of such deposits and pre-paid expenses pursuant to Section 2.7), including checking accounts, bank

accounts, certificates of deposit and securities or interests of Seller and its Affiliates (other than the GBOC Interest);

(d) any minute books, records, charter documents or financial statements of Seller or its Affiliates, including the Excluded Records;

(e) all (i) Avoidance Actions and proceeds thereof and (ii) claims, counterclaims, cross-claims, offsets or defenses, causes of action, choses in action, recoveries, judgments and similar rights in favor of or for the benefit of Seller solely to the extent relating to any Excluded Assets, Excluded Records or Excluded Liabilities;

(f) all intercompany receivables, payables, and loans between Seller and any of its Affiliates;

(g) Intellectual Property owned, licensed or used by Seller or any of its Affiliates other than the Transferred Intellectual Property;

(h) any and all of Seller's or any of its Affiliates' rights arising under or with respect to:

(i) the Gila River Power Station other than the Transferred Assets;

(ii) any Contracts or undivided interests therein of Seller or any Affiliate of Seller, other than Contracts or undivided interests therein included among the Transferred Assets;

(iii) any Permit of Seller or any Affiliate of Seller, other than the Transferred Permits;

(iv) any refund of Taxes;

(v) any spare parts inventory and any asset, property, right, license or Contract that is specifically identified in Schedule 2.2(h)(v);

(vi) any amounts received by, or credited to, Seller or any of its Affiliates pursuant to any pending lawsuits or other Proceedings involving Seller that do not involve the Transferred Assets or are otherwise set forth in Schedule 2.2(h)(vi);

(vii) any interest in real property owned by Seller or any of its Affiliates other than the Power Block 1 Site, the interest in Common Property transferred to Buyer hereunder and the rights granted under the Amended and Restated Reciprocal Easement Agreement and the Pipeline Interest;

(viii) any proceeds of business interruption or other insurance maintained by or on behalf of Seller or any of its Affiliates;

(ix) the rights which accrue or will accrue to Seller under this Agreement or any of the other Transaction Documents; and

(x) any communications between Seller and any of its Affiliates and their respective counsel or advisors, including attorney-client privileged or work product material, in the books, records, documents and other information relating to the Transferred Assets.

2.3 **Assumed Liabilities.** From and after Closing, Buyer shall assume and pay, discharge and perform all the obligations and liabilities of Seller (or its Affiliates) in respect of, or otherwise arising from or relating to, the ownership, lease, maintenance, construction, modification, operation or use of the Transferred Assets regardless of when the events or occurrences or actions or actions took place, including those relating to Environmental Laws, Environmental Permits, the Assigned Contracts and Taxes but excluding the Excluded Liabilities (collectively, the “**Assumed Liabilities**”).

2.4 **Excluded Liabilities.** Buyer shall not assume or be responsible for the performance of any of the following obligations and liabilities of Seller (collectively, the “**Excluded Liabilities**”):

(a) Any obligation or liability of Seller in respect of or arising from the operation or use of the Excluded Assets or other assets of Seller that are not part of the Transferred Assets;

(b) any obligation or liability of Seller with respect to Taxes (other than Straddle Property Taxes) with respect to (i) the ownership, sale, operation or use of the Transferred Assets prior to Closing, (ii) any net income of Seller, or (iii) any Excluded Assets; *provided, however, that* a Tax shall not be an Excluded Liability to the extent Buyer receives a credit to the Purchase Price or other payment from Seller on account of such Tax or Seller has otherwise borne the economic burden of such Tax;

(c) liabilities to third parties for personal injury, tort or any other causes of action associated with or arising from the use or operation of the Transferred Assets prior to Closing;

(d) any liability of Seller representing indebtedness for money borrowed of Seller, including any liabilities arising from or relating to the Credit Agreement or the DIP Credit Documents; and

(e) any costs or expenses for which Seller is expressly liable under this Agreement.

2.5 **Cure Costs.** At the Closing, Buyer shall fund and pay all Cure Costs. Buyer may revise Schedule 3.8(a) to exclude any Contracts at any time on or prior to the Sale Hearing, and, upon notification to Seller, Seller shall be required to give reasonable notice to the counter parties to any such Contract; provided that no such change shall reduce the amount of the Purchase Price. If any Contract is excluded from the Transferred Assets as permitted by this Section 2.5, Seller shall promptly take such steps as are reasonably necessary, including, if applicable, prompt delivery of notice to the non-debtor counterparty, to cause such Contracts to be excluded under the Sale Order and this Agreement.

2.6 **Purchase Price.** The purchase price for the Transferred Assets shall be [_____] Dollars (\$[____]) (the “**Initial Purchase Price**”). At Closing, the Initial Purchase Price shall be adjusted, without duplication, to account for the Prorations (which shall be accounted for as a reduction of the Initial Purchase Price for amounts allocable to Seller under Section 2.7) (as

defined below and each, a “**Closing Adjustment**” and collectively, referred to as the “**Closing Adjustments**”), the sum of which is hereinafter referred to as the “**Purchase Price**”.

2.7 **Prorations.** In addition to any adjustments necessary as a result of Section 5.10, Buyer and Seller agree that, solely for the purpose of determining the Purchase Price, the following items relating to the Transferred Assets shall be prorated without duplication of any such items as of the Closing Date between Buyer and Seller with any amounts related to any time period prior to the Closing Date allocated to Seller and any amounts related to periods commencing on or after the Closing Date allocated to Buyer (measured in the same units used to compute the item in question, otherwise measured by calendar days) (the “**Prorations**”):

(a) real estate Taxes, personal property Taxes, and any other ad valorem Taxes imposed with respect to the Transferred Assets in respect of a Tax period beginning prior to the Closing and ending after the Closing (the “**Straddle Property Taxes**”), in each case without regard for whether such Taxes are assessed or due and payable as of the Closing Date;

(b) rent, licensing fees or other fixed regular charges or registration fees payable under leases or licenses;

(c) any prepayments under Assigned Contracts, prepaid expenses and deposits relating to the Transferred Assets, including security deposits, if any, and rents;

(d) any charges for water, sewer, telephone, electricity and other utilities, and common area maintenance; and

(e) any other periodic or recurring charges imposed on or assessed against the Transferred Assets by any Governmental Authority, other than fines and penalties imposed for violations of Law.

In the event that the actual amount of a Straddle Property Tax is not known on the Closing Date, for purposes of determining the Estimated Purchase Price, Seller shall, in good faith, estimate the amount of such Straddle Property Tax, taking into account all reasonably ascertainable information, including the actual amount of such Tax paid for the most recent Tax period for which such actual amount is known, respective amounts accrued through the Closing Date, and any changes in appraised or fair market values of the relevant property, Tax rates and other relevant circumstances. In the event that actual figures for any of the other Prorations are not known or available on the Closing Date, for purposes of determining the Estimated Purchase Price, the Prorations shall be based upon the most recent information available in estimating such Proration. If any Proration is estimated as of the Closing Date, then such Proration shall be promptly finalized by Seller, in good faith, upon the actual amounts underlying such Proration becoming known. Once a Proration has been finalized, such Proration shall be (i) if finalized prior to the preparation and delivery of the Post-Closing Statement pursuant to Section 2.10, set forth in the Post-Closing Statement, in which case any amounts owed by one Party to another shall be paid in accordance with Section 2.10, or (ii) if not finalized at the time the Post-Closing Statement is prepared and delivered in accordance with Section 2.10, promptly delivered by Seller to Buyer, and any amounts owed by one Party to the other Party shall be paid to the other Party within ten (10) Business Days of such delivery; provided that any payment to be made by

Seller to Buyer pursuant to this Section 2.7 shall only be made as a payment from the Holdback Funds in the Escrow Account in accordance with the terms of the Escrow Agreement, and in the event such amounts are not sufficient to pay an amount owed by Seller to Buyer, Buyer shall be solely responsible for the shortfall. To the extent a Proration is made based on calendar days, such Proration shall be based on the actual number of days elapsed (prior to the Closing Date, on the one hand, and from and after the Closing Date, on the other hand) in the year or other applicable period. Seller and Buyer agree to furnish each other such documents and other records as may be reasonably requested in order to confirm all adjustments and Prorations calculated pursuant to this Section 2.7.

2.8 Deposit or Letter of Credit.

(a) Upon the execution of this Agreement, Buyer shall either (1) deposit [_____] Dollars (\$[_____])⁴ by wire transfer of immediately available funds (the “**Deposit**”) into an escrow account (the “**Escrow Account**”) established pursuant to the Escrow Agreement entered into on the date hereof or (2) deliver to the Seller a Letter of Credit, in each case to be drawn, released, delivered or returned, as applicable (together with all accrued investment income on the Deposit, if used) to either Seller or Buyer, as applicable, as described in this Agreement, and in accordance with the Escrow Agreement or the Letter of Credit, as applicable. If a deposit in the amount of [_____] Dollars (\$[_____])⁵ is deposited by Buyer to an escrow account pursuant to an escrow agreement between Buyer, Seller and the applicable escrow agent in connection with Buyer’s bid consistent with the Bid Procedures Order, such deposit shall be deemed the “Deposit,” such escrow agreement, the “Escrow Agreement” and such escrow account, the “Escrow Account,” for all purposes under this Agreement and no additional deposit or letter of credit is required to be deposited or posted upon the execution of this Agreement in connection with this Section 2.8. The Deposit, if used, and the Escrow Account, if used, shall not be subject to any lien, attachment, trustee process or any other judicial process of any creditor of any Party, provided, however, that any contractual right of Seller to receive the Deposit pursuant to the terms of this Agreement may be subject to a lien. The Deposit and the Escrow Account, if used, shall be held and disbursed solely for the purposes and in accordance with the terms of the Escrow Agreement and this Agreement. The Escrow Account, if used, may be interest-bearing or non-interest bearing, but any interest earned thereon shall inure solely to the benefit of the Party that receives the Deposit (and the Parties shall treat such interest as income of Buyer for all U.S. federal, state and local income tax purposes). Seller and Buyer shall take such action as is necessary to cause the Escrow Agent to distribute the Deposit or Letter of Credit, as applicable, as follows:

(i) If Closing shall occur, (A) if a Deposit is delivered pursuant to Section 2.8(a)(1), the Deposit, less the Holdback Funds, shall be returned to Buyer at Closing by wire transfer of immediately available funds to an account designated in writing by Buyer no later than two (2) Business Days prior to Closing or (B) if Buyer posts a Letter of Credit pursuant to Section 2.8(a)(2), (1) Buyer shall deposit the Holdback Funds in an Escrow Account established

⁴ NTD: Deposit or letter of credit to equal 10% of the Purchase Price.

⁵ NTD: To equal 10% of the Purchase Price.

pursuant to an Escrow Agreement to be entered into at Closing and (2) the Letter of Credit shall be cancelled at Closing subject to Seller's receipt of the Purchase Price and the Holdback Funds;

(ii) If Seller validly terminates this Agreement pursuant to Section 9.1(e), (A) if a Deposit is delivered pursuant to Section 2.8(a)(1), Seller shall thereupon be entitled to receive the Deposit as liquidated damages by wire transfer of immediately available funds to an account designated in writing by Seller or (B) if Buyer posts a Letter of Credit pursuant to Section 2.8(a)(2), Seller shall thereupon be entitled to immediately draw upon the full amount of the Letter of Credit as liquidated damages without the need for any consent, approval or other action of the part of Buyer or any other Person. The Parties agree that (x) damages suffered by Seller in the event Seller validly terminates this Agreement pursuant to Section 9.1(e) are incapable or very difficult to accurately estimate, (y) the Deposit or the amount of the Letter of Credit, as applicable, is a reasonable forecast of just compensation for such termination and (z) receipt of the Deposit or the amount of the Letter of Credit, as applicable, shall be the sole remedy of Seller in the event of a termination of this Agreement by Seller pursuant to Section 9.1(e); or

(iii) if this Agreement is validly terminated prior to Closing for any reason other than as stated in Section 2.8(a)(ii) above, (A) the Deposit, if used, shall be returned to Buyer following such termination by wire transfer of immediately available funds to an account designated in writing by Buyer or (B) the Letter of Credit, if used, shall be cancelled by the Parties.

(b) Upon the occurrence of Closing, the Holdback Funds shall remain in the Escrow Account until the final determination of the Post-Closing Statement pursuant to Section 2.10 and Section 2.11. Following such determination and any payment to be made from Seller to Buyer in connection therewith from the Holdback Funds, the Parties shall promptly cause the Escrow Agent to deliver the Holdback Funds to Seller to the extent not otherwise paid to Buyer pursuant to Section 2.10 and Section 2.11.

2.9 **Estimated Closing Statement.** Within three (3) Business Days prior to the expected Closing Date, Seller shall in good faith prepare and deliver to Buyer a written estimated closing statement (the "**Estimated Closing Statement**") that shall set forth the Initial Purchase Price, as adjusted to take into account Seller's good faith estimate of all Prorations pursuant to Section 2.7 (the "**Estimated Adjustments**") and the revised, estimated Purchase Price ("**Estimated Purchase Price**"). The existence of any such dispute with respect to the Estimated Adjustments shall not delay or otherwise affect the Closing, it being understood that the amounts determined by Seller pursuant to this Section 2.9 shall be used for purposes of determining the amount to be paid by Buyer pursuant to Section 2.6.

2.10 **Post-Closing Statement.**

(a) Within forty-five (45) days following the Closing Date, Buyer in good faith and with the assistance and participation of, and in consultation with, Seller, shall prepare and deliver to Seller a written post-closing statement ("**Post-Closing Statement**"), including reasonable supporting information and calculations, that shall set forth its proposed final Prorations pursuant

to Section 2.7, including the amount, if any, by which the final Purchase Price (as proposed by Buyer) differs from the Estimated Purchase Price (the “**Post-Closing Adjustments**”).

(b) If Seller objects to the Post-Closing Statement, then it shall provide Buyer with written notice thereof (a “**Dispute Notice**”) within thirty (30) days after receiving the Post-Closing Statement and shall include reasonable detail regarding such specific objections together with supporting documentation. If Seller does not object to the Post-Closing Statement within the time period and in the manner set forth in the first sentence of this Section 2.10(b) or if Seller accepts the Post-Closing Statement, then the Post-Closing Adjustments as set forth in the Post-Closing Statement shall become final and binding upon the Parties for all purposes hereunder. If Seller does object to the Post-Closing Statement within the time period and in the manner set forth in the first sentence of this Section 2.10(b), then the Post-Closing Statement shall become final and binding for all purposes hereunder except with respect to, and only to the extent of, those matters expressly objected to by Seller in the Dispute Notice.

(c) If the final Purchase Price (as agreed between Buyer and Seller or as determined by the Independent Accountant pursuant to Section 2.11 or otherwise) is (i) greater than the Estimated Purchase Price provided by Seller pursuant to Section 2.9, then Buyer shall pay to Seller within five (5) Business Days after such amounts are so agreed or determined, by wire transfer of immediately available funds to an account or accounts designated by Seller, the amount of such difference or (ii) less than the Estimated Purchase Price provided by Seller pursuant to Section 2.9, then Seller shall pay to Buyer, from the Holdback Funds, within five (5) Business Days after such amounts are agreed or determined, by wire transfer of immediately available funds to an account designated by Buyer, the amount of such difference. Once the payments set forth in the immediately preceding sentence are made and all Prorations are finally determined (if not determined by the time the Post-Closing Statement is delivered by Buyer), if any Proration amounts are owed to Buyer, such amounts will be paid to Buyer from the Holdback Funds, and the remainder of the Holdback Funds (if any) shall be returned to Seller.

2.11 **Independent Accountant.** If Buyer and Seller are unable to agree on such disputed items set forth in a Dispute Notice on or prior to the one hundredth (100th) day following the Closing Date, then either Party may refer such dispute to the Independent Accountant, which shall make a final and binding determination as to all matters in dispute (and only such matters) on a timely basis (and in any event within one hundred forty five (145) days following the Closing Date) and promptly shall notify the Parties in writing of its resolution; *provided* that such firm may not assign a value to any particular item greater than the greatest value for such item claimed by either Party or less than the lowest value claimed by either Party. The Independent Accountant shall not have the power to modify or amend any term or provision of this Agreement. All fees and expenses charged by the Independent Accountant pursuant to this Section 2.11 will be allocated between the Parties by the Independent Accountant in inverse proportion of the dollar value of the disputed items resolved in favor of such Party (i.e., so that the prevailing Party bears a lesser amount of such fees and expenses); *provided*, that any fees and expenses allocated to Seller shall be paid exclusively from the Holdback Funds in the Escrow Account in accordance with the Escrow Agreement.

2.12 **Agreed Tax Treatment and Purchase Price Allocation.**

(a) The Parties agree to treat the transactions contemplated by the Transaction Documents as a purchase of assets (other than the LLC Units, which the Parties shall treat as partnership interests in GBOC) for U.S. federal, state and local income tax purposes (the “**Agreed Tax Treatment**”).

(b) Consistent with the Agreed Tax Treatment, the Purchase Price (and any other amounts constituting consideration for U.S. federal income tax purposes, to the extent known on the date hereof) shall be allocated among the Transferred Assets in accordance with the allocation set forth on Schedule 2.12 (the “**Allocation**”). The Parties agree that the Allocation has been prepared in accordance with the principles of Section 1060 of the Code and the Treasury regulations promulgated thereunder. Following any adjustment to the Purchase Price (or any other amounts constituting consideration for U.S. federal income tax purposes, to the extent known at such time) pursuant to this Agreement, Seller or one of its Representatives shall, in good faith, update the Allocation in a manner consistent with Schedule 2.12 and the principles of Section 1060 of the Code and the U.S. Treasury regulations promulgated thereunder.

(c) The Parties shall, and shall cause their Affiliates to, (i) report consistently with the Allocation and Agreed Tax Treatment in all Tax returns, including IRS Form 8594, which if applicable, Buyer and Seller shall timely file with the IRS, (ii) not take any position for any Tax purpose that is inconsistent with the Allocation or Agreed Tax Treatment, and (iii) promptly advise each other regarding the existence of any Tax audit, controversy or litigation related to the Allocation or the Agreed Tax Treatment, in each case, unless required to do otherwise by a final determination (as defined in Section 1313 of the Code).

ARTICLE 3
REPRESENTATIONS AND WARRANTIES OF SELLER

Seller hereby represents and warrants to Buyer as of the date of this Agreement that, except as disclosed in the Schedules:

3.1 **Organization.**

(a) Seller is a limited liability company duly formed, validly existing and in good standing under the Laws of its jurisdiction of formation.

(b) GBOC is a limited liability company duly formed, validly existing and in good standing under the Laws of its jurisdiction of formation. GBOC is duly qualified or licensed to do business in each jurisdiction in the State of Arizona, except where the failure to be so duly qualified or licensed would not reasonably be expected to result in a Material Adverse Effect.

3.2 **Authority.** Subject to entry of the Bid Procedures Order and the Sale Order, Seller has (or, in the case of its Closing Agreements to be entered into at Closing, will have at Closing) all requisite limited liability company power and authority to execute and deliver this Agreement and its Closing Agreements, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated by this Agreement. The execution and delivery by Seller of this Agreement and its Closing Agreements, and the performance by Seller of its

obligations hereunder and thereunder, have been (or, in the case of its Closing Agreements to be entered into at Closing, will at Closing have been), duly and validly authorized by all necessary limited liability company action. Subject to entry of the Bid Procedures Order and the Sale Order, this Agreement and Seller's Closing Agreements have been (or, in the case of Seller's Closing Agreements to be entered into at Closing, will at Closing have been) duly and validly executed and delivered by Seller and constitute (or, in the case of its Closing Agreements to be entered into at Closing, will at Closing constitute) the legal, valid and binding obligation of Seller enforceable against Seller in accordance with their terms, except as the same may be limited by bankruptcy, insolvency, reorganization, fraudulent conveyance, arrangement, moratorium or other similar Laws relating to or affecting the rights of creditors generally, or by general equitable principles.

3.3 **No Conflicts; Consents and Approvals.** Subject to entry of the Bid Procedures Order and the Sale Order, the execution and delivery by Seller of this Agreement and the performance by Seller of its obligations under this Agreement do not:

(a) violate or result in a breach of any of the Charter Documents of any Project Company;

(b) assuming the consents disclosed on Schedule 3.3(b) (the "**Seller Consents**") have been obtained, violate or result in a default under any material Contract, except for any such violation or default which would not reasonably be expected to result in a Material Adverse Effect;

(c) assuming (x) all required filings, waivers, approvals, consents, authorizations and notices disclosed on Schedule 3.3(c) (collectively, the "**Seller Approvals**"), the Seller Consents and other notifications provided in the ordinary course of business have been made, obtained or given and (y) any Approvals by GBOC, TPEC/UNS or Entegra to the Closing Agreements to which such Person is a party have been obtained, (i) violate or result in a breach of any Law or Order applicable to Seller or the Transferred Assets which would reasonably be expected to result in a Material Adverse Effect or (ii) require the consent or approval of any Governmental Authority under any Law or Order applicable to Seller or the Transferred Assets other than any such consent or approval which, if not made or obtained, would not reasonably be expected to result in a Material Adverse Effect.

3.4 **Permits.**

(a) Seller, its Affiliates or GBOC possess all Permits (other than Permits required under Environmental Laws, which are addressed in Section 3.6) that are required for the ownership and operation of Power Block 1 in the manner in which it is currently owned and operated, except any such Permit (i) relating exclusively to the construction (and not operation) of Power Block 1, (ii) held solely by Seller or its Affiliates that are required under applicable Laws to be held solely by Seller or its Affiliates, or (iii) and any such Permit, the absence of which would not reasonably be expected to result in a Material Adverse Effect. To Seller's Knowledge, all such Permits are in full force and effect and Seller is in compliance with each such Permit, except where any such failure to be in full force and effect or non-compliance would not reasonably be expected to result in a Material Adverse Effect. As of the date of this

Agreement, Seller has not received, since the Initial Ownership Date, any written notification from any Governmental Authority alleging that it is in violation of any of such Permits, except where any such violation would not reasonably be expected to result in a Material Adverse Effect.

(b) Each Permit held by Seller exclusively for Power Block 1 is listed in Schedule 3.4(b) (the “**Transferred Permits**”).

3.5 **Compliance with Laws and Orders.** Except as set forth on Schedule 3.5 and except for actions taken by TPEC/UNS, Entegra or their respective Affiliates, each of Power Block 1 and, to Seller’s Knowledge, the Pipeline is currently operated in compliance with all Laws and Orders applicable to it except where any such non-compliance would not reasonably be expected to result in a Material Adverse Effect; provided, however, that this Section 3.5 does not address Environmental Laws, which are exclusively addressed by Section 3.6, matters relating to Taxes, which are exclusively addressed by Section 3.10, or matters relating to Permits which are exclusively addressed in Section 3.4.

3.6 **Environmental Matters.**

(a) Except as set forth in Schedule 3.6(a), Buyer has been provided with copies of, or access to, all material final environmental site assessment reports prepared since the Initial Ownership Date in the possession of Seller or its Affiliates that are not subject to a claim of legal privilege by Seller or its Affiliates, not subject to a confidentiality or other obligation, and that relate to environmental matters in connection with operation of Power Block 1 and, to Seller’s Knowledge, the Pipeline.

(b) Except as disclosed on Schedule 3.6(b) or as disclosed in the assessments and documents made available to Buyer as described in Section 3.6(a) above, to Seller’s Knowledge:

(i) Each of Power Block 1 and, to Seller’s Knowledge, the Pipeline is currently operated in compliance with all applicable Environmental Laws, including all Permits issued under Environmental Laws, except for any failure to comply that would not reasonably be expected to result in a Material Adverse Effect; and

(ii) no Proceeding related to Power Block 1 or, to Seller’s Knowledge, the Pipeline is pending against Seller before or by any Governmental Authority under any applicable Environmental Law that would reasonably be expected to result in a Material Adverse Effect.

(c) Notwithstanding any other provision of this Agreement to the contrary, this Section 3.6 contains the sole and exclusive representations and warranties of Seller with respect to the environment, occupational health and workplace safety, including, but not limited to, matters related to Environmental Laws, Hazardous Materials, Remediation Measures and Proceedings related to Environmental Laws.

3.7 **Transferred Assets.**

(a) Appendix D contains a depiction of the Power Block 1 Site. Seller owns the Transferred Real Property Assets, free and clear of all Liens created by, through or under Seller,

except for Permitted Liens, Liens created pursuant to this Agreement or as otherwise set forth on Schedule 3.7(a).

(b) Seller owns the Transferred Power Related Assets, free and clear of all Liens created by, through or under Seller, except for Permitted Liens, Liens created pursuant to this Agreement or as otherwise set forth on Schedule 3.7(b).

3.8 Assigned Contracts.

(a) All the Assigned Contracts are listed on Schedule 3.8(a). Seller has provided to Buyer a copy of or access to each Assigned Contract.

(b) Except as set forth on Schedule 3.8(b) (and except with respect to Assigned Contracts that expire in accordance with their terms), subject to entry of the Sale Order and payment of all Cure Costs, each of the Assigned Contracts is in full force and effect in all material respects and constitutes a legal, valid and binding obligation of Seller, except where such failure to be in full force and effect or to constitute a legal, valid and binding obligation would not reasonably be expected to result in a Material Adverse Effect.

3.9 Legal Proceedings. Except as set forth in Schedule 3.9, other than the Bankruptcy Cases and Proceedings pending in the Bankruptcy Cases, there is no Proceeding pending or, to the Knowledge of Seller, threatened against Seller before or by any Governmental Authority that would reasonably be expected to result in a Material Adverse Effect or that seeks an Order restraining, enjoining or otherwise prohibiting or making illegal any of the transactions contemplated by this Agreement; *provided, however*, that this Section 3.9 does not address Proceedings under Environmental Laws, which are exclusively addressed by Section 3.6, or matters relating to Taxes, which are exclusively addressed by Section 3.10.

3.10 Tax Matters. To the Knowledge of Seller, except to the extent an inaccuracy of the following would not result in an Lien (other than a Permitted Lien) on any of the transferred Assets, Seller has (i) filed or caused to be filed on its behalf all material Tax Returns required to be filed by it with respect to the Transferred Assets on or prior to the date hereof (taking into account any valid extension of the due date for filing); (ii) timely paid all Taxes shown as due and payable on such Tax Returns; and (iii) paid all other material Taxes attributable to the Transferred Assets that have become due and payable on or prior to the date hereof. There are no Liens (other than Permitted Liens) currently existing, pending or, to the Knowledge of Seller, threatened with respect to any Transferred Assets attributable to any unpaid Taxes.

3.11 Labor and Employment Matters. Seller has no employees as of the date of this Agreement. Seller does not sponsor, maintain or contribute to any “employee benefit plan” as such term is defined in Section 3(3) of ERISA.

3.12 Intellectual Property Rights. All Intellectual Property exclusively owned by Seller or its Affiliates which is exclusively used in connection with Power Block 1 is set forth on Schedule 3.12 and is collectively referred to herein as the “**Transferred Intellectual Property**”.

3.13 **Brokers.** Seller has no liability or obligation to pay fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which Buyer could become liable or obligated at or after the Closing.

3.14 **Insurance.** Schedule 3.14 sets forth as of the date of this Agreement a list of all material insurance policies held by or issued specifically on behalf of and for the benefit of the Seller in connection with the ownership and operation of the Transferred Assets.

3.15 **Water.** To Seller's Knowledge, Seller has provided to Buyer all relevant statements of claimant, well registrations and the aquifer protection permit related to the Water Rights.

ARTICLE 4

REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer hereby represents and warrants to Seller as of the date of this Agreement that:

4.1 **Organization.** Buyer is a [_____] duly formed, validly existing and in good standing under the Laws of the jurisdiction of its formation.

4.2 **Authority.** Buyer has (or, in the case of its Closing Agreements to be entered into at Closing, will at Closing have) all requisite [_____] power and authority to enter into this Agreement and its Closing Agreements to which it is a party, to perform its obligations hereunder and thereunder and to consummate the transactions contemplated hereby. The execution and delivery by Buyer of this Agreement and of its Closing Agreements and the performance by Buyer of its obligations hereunder and thereunder have been (or, in the case of its Closing Agreements to be entered into at Closing, will at Closing have been) duly and validly authorized by all necessary company action on behalf of Buyer. This Agreement and the Buyer's Closing Agreements have been (or, in the case of its Closing Agreements to be entered into at Closing, will at Closing have been) duly and validly executed and delivered by Buyer and constitute (or, in the case of its Closing Agreements to be entered into at Closing, will at Closing constitute) the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with their terms except as the same may be limited by bankruptcy, insolvency, reorganization, fraudulent conveyance, arrangement, moratorium or other similar Laws relating to or affecting the rights of creditors generally or by general equitable principles.

4.3 **No Conflicts; Consents and Approvals.** The execution and delivery by Buyer of this Agreement and the performance by Buyer of its obligations hereunder and the consummation by Buyer of the transactions contemplated by this Agreement do not:

- (a) violate or result in a breach of the Charter Documents of Buyer;
- (b) violate or result in a breach or default under any material Contract to which Buyer is a party, except for any such violation or default which would not reasonably be expected to result in a material adverse effect on Buyer's ability to consummate the transactions contemplated by this Agreement; or

(c) assuming (x) all required filings, waivers, approvals, consents, authorizations and notices disclosed in Schedule 4.3 (collectively, the “**Buyer Approvals**”) have been made, obtained or given and (y) Approvals by GBOC, TPEC/UNS or Entegra to the Closing Agreements to which such Person is a party have been obtained, (i) violate or result in a breach of any Law or Order applicable to Buyer, except as would not reasonably be expected to result in a material adverse effect on Buyer’s ability to consummate the transactions contemplated by this Agreement or (ii) require any consent or approval of any Governmental Authority under any Law or Order applicable to Buyer, other than in each case any such consent or approval which, if not made or obtained, would not reasonably be expected to result in a material adverse effect on Buyer’s ability to consummate the transactions contemplated by this Agreement.

4.4 **Legal Proceedings.** There is no Proceeding (filed by any Person other than Seller or any of its Affiliates) pending or, to Buyer’s knowledge, threatened, against Buyer before or by any Governmental Authority, which seeks an Order restraining, enjoining or otherwise prohibiting or making illegal any of the transactions contemplated by this Agreement.

4.5 **Compliance with Laws and Orders.** Buyer is not in violation of, or in default under, any Law or Order applicable to Buyer or its assets the effect of which, in individually or in the aggregate, would reasonably be expected to hinder, prevent or delay Buyer from consummating the transactions contemplated by this Agreement.

4.6 **Brokers.** Buyer and its Affiliates do not have any liability or obligation to pay fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement for which Seller or any of its Affiliates could become liable or obligated after the Closing.

4.7 **Opportunity for Independent Investigation.** Prior to its execution of this Agreement, Buyer and its Affiliates have conducted to their satisfaction an independent investigation and verification of the current condition of, title to the Transferred Assets and the Pipeline. In making its decision to execute this Agreement and to purchase the Transferred Assets, Buyer has relied and will rely solely upon the results of such independent investigation and verification and the terms and conditions of this Agreement. Without limiting the generality of the foregoing, Buyer acknowledges, on behalf of itself and its Affiliates, that none of Seller, or any of its Representatives or Affiliates makes any representations or warranties with respect to (a) any projection, estimate or budget delivered or made available to Buyer or its Affiliates or Representatives of future revenues, future results of operations (or any component thereof), future cash flows or future financial condition (or any component thereof) of the Transferred Assets or the future business or operations of the Transferred Assets or (b) any other information or documents made available to Buyer or its Representatives with respect to the Transferred Assets, except as expressly set forth in Article 3 of this Agreement. Buyer further acknowledges, on behalf of itself and its Affiliates, that it has not relied on any representation not expressly set forth in Article 3 of this Agreement.

4.8 **Financial Resources.** Buyer has cash on hand or credit unconditionally available, and will have cash on hand at and after the Closing, in an aggregate amount sufficient to enable it to pay the Purchase Price and to consummate the Transactions.

4.9 **No Conflicting Contracts.** Except as set forth in Schedule 4.9, neither Buyer nor any of its Affiliates is a party to any Contract to build, develop, acquire or operate any power facility that would reasonably be expected to cause a delay in or failure to obtain any Governmental Authority's granting of a Buyer Approval or a Seller Approval, and neither Buyer nor any of its Affiliates has any plans to enter into any such Contract prior to the Closing Date.

4.10 **Exon Florio.** Buyer is not a "foreign person" for purposes of Section 721 of the Defense Production Act of 1950, as amended, the Foreign Investment and National Security Act or any executive orders, rules or regulations relating thereto.

ARTICLE 5 **COVENANTS**

5.1 Efforts to Close; Regulatory and Other Approvals.

(a) Subject to any requirements or limitations resulting from the Bankruptcy Cases, each of Seller and Buyer shall (and each shall cause its respective applicable Affiliates to) use commercially reasonable efforts to obtain as promptly as practicable all Seller Approvals and Buyer Approvals applicable to such Person, and all other material consents and approvals that any of Seller, Buyer or their respective Affiliates are required to obtain in order for such Person to consummate the transactions contemplated hereby; provided that for purposes of clarification, and notwithstanding anything to the contrary in this Agreement, the obtaining of such consents and approvals shall not be a condition to Closing except to the extent expressly set forth in Article 6 or Article 7, as applicable.

(b) Each of Seller and Buyer shall and shall cause its respective Affiliates to (i) make or cause to be made the filings required of such Person or any of its applicable Affiliates under any Laws applicable to it with respect to the transactions contemplated by this Agreement and to pay any fees due of it in connection with such filings, as promptly as is reasonably practicable, *provided* that for purposes of clarification, and notwithstanding anything to the contrary in this Agreement, such filings and payments shall not be conditions to Closing except to the extent expressly set forth in Article 6 or Article 7, as applicable, (ii) cooperate with the other Party and furnish the information in such Person's possession that is necessary in connection with such other Person's filings, (iii) use commercially reasonable efforts to cause the expiration of the notice or waiting periods under any Laws applicable to it with respect to the consummation of the transactions contemplated by this Agreement as promptly as is reasonably practicable, (iv) promptly inform the other of any communication from or to, and any proposed understanding or agreement with, any Governmental Authority in respect of such filings, (v) reasonably consult and cooperate with the other Person in connection with any analyses, appearances, presentations, memoranda, briefs, arguments and opinions made or submitted by or on behalf of any Person in connection with all meetings, actions and proceedings with Governmental Authorities relating to such filings, (vi) comply, as promptly as is reasonably practicable, with any requests received by such Person or any of its Affiliates under any Laws for additional information, documents or other materials with respect to such filings, (vii) use commercially reasonable efforts to resolve any objections as may be asserted by any Governmental Authority with respect to the transactions contemplated by this Agreement and (viii) use commercially reasonable efforts to contest and resist any action or proceeding instituted (or threatened in writing to be instituted) by

any Governmental Authority challenging the transactions contemplated by this Agreement as violative of any Law. If Seller or Buyer (or any of their applicable Affiliates) intends to participate in any material meeting with any Governmental Authority with respect to such filings and if permitted by, or acceptable to, the applicable Governmental Authorities, it shall give the other Party reasonable prior notice of, and an opportunity to participate in, such meeting.

(c) In connection with any such filings or applications made pursuant to this Section 5.1, each Party shall cooperate in good faith with Governmental Authorities and use its commercially reasonable efforts to complete lawfully the transactions contemplated by this Agreement.

(d) Each of Seller and Buyer shall provide prompt notification to the other when it becomes aware that any such consent or approval referred to in this Section 5.1 is obtained, taken, made, given or denied, as applicable.

(e) In furtherance of the foregoing covenants:

(i) Each of Seller and Buyer shall prepare, as soon as is practicable following the execution of this Agreement, all necessary filings applicable to it in connection with the transactions contemplated by this Agreement that may be required by FERC or under the HSR Act or any other federal, state or local Laws; *provided* that for purposes of clarification, and notwithstanding anything to the contrary in this Agreement, such filings shall not be conditions to Closing except to the extent expressly set forth in Article 6 or Article 7, as applicable. Each of Buyer and Seller shall submit such filings applicable to it as soon as practicable, but in no event later than five (5) Business Days after the execution hereof for filings under FERC or the HSR Act. The Persons making such filings shall request expedited treatment of any such filings, shall promptly furnish each other with copies of any notices, correspondence or other written communication received by it from the relevant Governmental Authority, shall promptly make any appropriate or necessary subsequent or supplemental filings required of it and shall cooperate in the preparation of such filings as is reasonably necessary and appropriate. Any filing fees, costs or expenses arising out of or relating to such filings shall be for the account of Buyer.

(ii) Buyer and Seller shall not, and shall cause their respective Affiliates not to, take any action that could reasonably be expected to adversely affect the approval of any Governmental Authority of any of the filings or applications referred to in this Section 5.1.

(iii) Buyer shall cooperate in good faith with all applicable Governmental Authorities and undertake promptly any and all actions required to complete lawfully the transactions contemplated by this Agreement, including proffering and consenting to a governmental order providing for the sale or other disposition, or the holding separate, of particular Transferred Assets, categories of Transferred Assets or lines of business, of either Transferred Assets or lines of business of Buyer or any of its Affiliates in order to remedy any material competition concerns that any Governmental Authority may have. The entry by any Governmental Authority in any legal proceeding of a governmental order permitting the consummation of the transactions contemplated hereby, but requiring any of the Transferred Assets or lines of business of Buyer or its Affiliates to be held separate or sold or disposed of

thereafter, shall not be deemed a failure to satisfy the conditions specified in Article 6 or Article 7.

(iv) During the Interim Period, neither Buyer nor any of its Affiliates shall enter into any Contract to build, develop, acquire or operate any power facility that would reasonably be expected to cause a delay in or failure to obtain any Governmental Authority's granting of a Buyer Approval or a Seller Approval.

5.2 Access of Buyer.

(a) During the Interim Period, Seller will (i) use commercially reasonable efforts to cause Ethos to provide Buyer and its Representatives with reasonable access, upon reasonable prior notice and during normal business hours, to Ethos' current Plant Manager and Maintenance Manager for Power Block 1 and (ii) upon reasonable prior notice to Seller, during normal business hours and with the consent of Seller, provide Buyer with access to the Transferred Assets, but only to the extent that such access (1) does not unreasonably interfere with the business of Seller or any of its Affiliates or the safe commercial operations of the Transferred Assets and (2) is reasonably related to Buyer's obligations and rights hereunder; provided, however, that (a) Seller shall have the right to have a Representative present for any communication with employees or officers of Seller or its Affiliates and (b) Buyer shall, and shall cause its Representatives to, observe and comply with all health, safety and security requirements at the Pipeline, the Gila River Power Station or any Transferred Asset. For purposes of clarification, Buyer shall not be entitled to collect any air, soil, surface water or ground water samples nor to perform any invasive or destructive sampling on, under, at or from any Transferred Asset and, for purposes of clarification, the conducting of such physical inspections shall not be a condition to Closing. Buyer shall hold in confidence all information disclosed to Buyer or its Representatives hereunder on the terms and subject to the conditions contained in the Confidentiality Agreement. Notwithstanding anything to the contrary in this Section 5.2, Buyer shall have no right of access to, and neither Seller nor any of its Affiliates shall have any obligation to provide any information the disclosure of which could reasonably be expected to (1) jeopardize any privilege available to Seller or its Affiliates, (2) cause Seller or its Affiliates to breach a confidentiality obligation or (3) result in a violation of Law. Promptly upon completion of any such access, Buyer shall repair at its sole expense any damage caused by such access.

(b) Buyer agrees to defend, indemnify and hold harmless Seller, its Affiliates and their respective Representatives for any and all liabilities, losses, costs or expenses incurred by Seller, its Affiliates or their respective Representatives arising out of the access rights under this Section 5.2, including any claims by any of Buyer's Representatives for any injuries or property damage while present on the site of any Transferred Asset.

5.3 Certain Restrictions. Except (x) as required or permitted hereby or required by the terms of this Agreement, any Transferred Permit or Assigned Contract or any requirements or limitations resulting from the Bankruptcy Cases, the Bankruptcy Court, or the Bankruptcy Code, (y) as consented to by Buyer (which consent shall not be unreasonably withheld, conditioned or delayed), or (z) as otherwise set forth in Schedule 5.3, during the Interim Period, Seller will use commercially reasonable efforts to operate Power Block 1 in the ordinary course

of business except for any failure to operate in the ordinary course which would not reasonably be expected to have a Material Adverse Effect. Without limiting the foregoing (except (i) as otherwise required or permitted hereby or required by the terms of this Agreement, any Transferred Permit or Assigned Contract or any requirements or limitations resulting from the Bankruptcy Cases, the Bankruptcy Court, or the Bankruptcy Code (ii) as consented to by Buyer (which consent shall not be unreasonably withheld, conditioned or delayed), (iii) as otherwise set forth on Schedule 5.3 and/or (iv) that none of this Section 5.3 shall apply to Excluded Assets, Excluded Liabilities, Excluded Records, insurance policies, or Contracts for which no Transferred Asset will be bound or have liability after Closing), Seller will use commercially reasonable efforts, during the Interim Period, not to undertake any of the following without the consent of Buyer (which consent shall not be unreasonably withheld, conditioned or delayed):

(a) create any Lien (other than a Permitted Lien) against any of the material Transferred Assets;

(b) grant any material waiver or consent of any material term under any Assigned Contract other than in the ordinary course of business;

(c) incur, assume, guaranty, or otherwise become liable in respect of any obligation or liability pertaining to the Transferred Assets resulting in material Assumed Liabilities except in the ordinary course of business;

(d) sell, transfer, convey or otherwise dispose of any material Transferred Assets outside the ordinary course of business;

(e) terminate or materially amend any Assigned Contract or enter into any new Contract relating to the Transferred Assets (other than the Spare Parts Agreement and the DIP Credit Documents) outside the ordinary course of business;

(f) amend or materially modify its Charter Documents in a manner that would have a material adverse effect on the ability of Seller to consummate the transactions contemplated by this Agreement; or

(g) agree or commit to do any of the foregoing.

Notwithstanding the foregoing, Seller may take commercially reasonable actions with respect to (i) emergency situations (including to mitigate or remedy the endangerment of health or safety of any Person or the environment or in connection with any forced outage) or (ii) regulatory requirements and/or other requirements of Law (including preliminary curtailment or similar operating decisions taken as a safety precaution) and Seller shall, upon receipt of notice of any such actions, promptly inform Buyer of any such actions taken outside the ordinary course of business.

5.4 **Use of Name.** Within thirty (30) days following Closing, Buyer shall cease using any Seller Marks, including eliminating the Seller Marks from the Transferred Assets and disposing of any unused stationery and literature included in the Transferred Assets bearing the Seller Marks, and thereafter, Buyer shall not, and shall cause its Affiliates not to, use the Seller Marks or any other logos, trademarks, trade names or other Intellectual Property (except for the

Transferred Intellectual Property) belonging to Seller or any Affiliate thereof, and Buyer acknowledges that it, and its Affiliates have no rights whatsoever to use such Intellectual Property. Without limiting the foregoing, within thirty (30) days after the Closing Date, Buyer shall provide evidence to Seller, in a format acceptable to Seller, that Buyer has provided notice to all Governmental Authorities and all counterparties to the Assigned Contracts regarding the sale of the Transferred Assets to Buyer and the new address for notice purposes, as applicable.

5.5 **Tax Matters.**

(a) Buyer shall pay all Transfer Taxes imposed on any Party by Law as a result of the transactions contemplated by this Agreement and the Closing Agreements. Accordingly, if Seller is required by Law to pay any such Transfer Taxes, Buyer shall promptly reimburse Seller for any such amounts. Each Party shall timely file their own Transfer Tax returns as required by Law and shall notify the other Party when such filings have been made. Each Party shall cooperate and consult with each other prior to filing such Transfer Tax returns to ensure that all such returns are filed in a consistent manner.

(b) Seller shall be entitled to prepare and timely file any and all Tax Returns relating to Taxes included in Excluded Liabilities. Notwithstanding the foregoing, Buyer shall be responsible for remitting any payments and filing any Tax Returns (subject to review and comment by Seller) associated with any Straddle Property Tax. If any Tax Return prepared by a Party relates to Taxes for which the other Party is responsible, the first-mentioned Party shall provide copies of such Tax Returns and evidence of payment to the second-mentioned Party, and such second-mentioned Party shall promptly reimburse the first-mentioned Party for any Taxes reflected on any such Tax Return that are the responsibility of the second-mentioned Party (except to the extent the Purchase Price has been adjusted thereof, including as provided in Section 2.7, or such Party has otherwise borne the economic burden of such Tax). If either Party receives any notice of any claim or Proceeding pending in respect of a Tax for which the other Party is responsible (or any significant developments with respect to ongoing claims or Proceedings in respect of such a Tax), the first-mentioned Party shall promptly inform the other Party of such notice or development.

(c) Each Party shall use commercially reasonable efforts to cooperate fully with the other Party, as and to the extent reasonably requested by the other Party, in connection with the filing of Tax Returns pursuant to this Agreement and any Proceeding with respect to Taxes associated with the Transactions. Such cooperation shall include the retention and (upon the other Party's request) the provision of records and information which are reasonably relevant to any such Proceeding and making employees (to the extent such employees were responsible for the preparation, maintenance or interpretation of information and documents relevant to Tax matters or to the extent required as witnesses in any Tax Proceedings), available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. Each Party agrees to retain all of its books and records with respect to Tax matters pertinent to the Transferred Assets relating to any taxable period beginning before the Closing Date until the expiration of the applicable statute of limitations and to abide by all record retention agreements entered into with any taxing authority.

5.6 **Post-Closing Delivery and Retention of Records.** After the Closing Date, Buyer shall grant Seller (or its respective designees) access at all reasonable times to all of the Records relating to the Transferred Assets in its possession or the possession of its Affiliates, and shall afford Seller the right (at Seller's expense) to take extracts therefrom and to make copies thereof, to the extent reasonably necessary to implement the provisions of, or to investigate or defend any claims among the Parties and/or their Affiliates arising under, this Agreement. Buyer shall maintain such Records until the seventh anniversary of the Closing Date (or for such longer period of time as Seller shall advise Buyer is necessary in order to have Records available with respect to Tax matters), or if any of the Records pertain to any claim or dispute pending on the seventh anniversary of the Closing Date, Buyer shall maintain any of the Records designated by Seller or its Representatives until such claim or dispute is finally resolved and the time for all appeals has been exhausted. Notwithstanding anything herein to the contrary, in the event of a dispute, the furnishing of, or access to, the Records shall be subject to applicable rules relating to discovery. In addition, if Seller or any of its Affiliates reasonably believes it is necessary or prudent to disclose any such documents or information to comply with any Law or Order or any request made by any Governmental Authority or in connection with any legal, regulatory or administrative proceeding or process, Seller and any of its Affiliates may do so, without liability hereunder, provided that Seller will, and will cause its Affiliates to, to the extent reasonably practicable, provide Buyer with prompt notice so that Buyer may seek an appropriate protective order or other remedy, and Seller will, and will cause its Affiliates to, to the extent reasonably practicable and at the expense of Buyer, cooperate with Buyer to obtain any protective order or other remedy.

5.7 **Support Obligations.** Prior to Closing, Buyer shall effect the full and unconditional release, effective as of the Closing, of the Seller and/or any of its Affiliate, as applicable, from all outstanding credit support obligations provided by Seller or any of its Affiliates with respect to the Transferred Assets ("**Support Obligations**"), including by offering within ten Business Days following the date hereof replacement guaranties, letters of credit, and/or cash collateral, as needed, to effect the replacement of such Support Obligations by the Closing.

5.8 **Failure to Obtain Consent.** Notwithstanding anything to the contrary contained in this Agreement or any Closing Agreement, to the extent that the transfer to Buyer of any Assigned Contract, Transferred Intellectual Property or Transferred Permit requires the authorization, approval, consent or waiver of, any Governmental Authority or any other Person, and Buyer, acting in its reasonable discretion, agrees to waive the requirement that such Assigned Contract, Transferred Intellectual Property or Transferred Permit be conveyed as a condition to Closing and the Closing occurs without such authorization, approval, consent or waiver having been obtained, then (i) neither this Agreement nor the transactions contemplated by any Closing Agreement shall constitute a transfer of such Assigned Contract, Transferred Intellectual Property or Transferred Permit, or an attempt thereof and (ii) such Assigned Contract, Transferred Intellectual Property or Transferred Permit shall be retained by Seller and deemed to be an Excluded Asset and subject to the terms of Section 2.3 and 2.4, the obligations of Seller associated therewith shall thereupon be deemed Excluded Liabilities.

5.9 **Bulk Sales Laws.** The Parties hereby waive compliance with the provisions of any bulk sales, bulk transfer or similar Laws of any jurisdiction that may otherwise be applicable with respect to the sale of any or all of the Transferred Assets to Buyer.

5.10 **Casualty and Condemnation.**

(a) If during the Interim Period any of the Transferred Assets are damaged or destroyed by any casualty event or are taken by any condemnation event, then Seller shall prepare an estimate (or in the event Buyer acting reasonably objects to Seller's estimate within five days of receipt of such estimate and within such five day period Buyer specifies such objection and the basis for such objection in reasonable detail, Seller shall request [_____] or, if that firm declines to act, such other qualified independent firm reasonably acceptable to Seller and Buyer to prepare) within thirty (30) days following such event (i) in the case of such a casualty event, the sum of (a) the cost of restoring the Transferred Assets damaged or destroyed by such event to a condition reasonably comparable to their condition immediately prior to such casualty event plus (b) the amount of any lost profits with respect to such Transferred Assets reasonably expected to accrue after Closing as a result of such casualty event, or (ii) in the case of such a condemnation event, the condemnation value therefor, in the case of clauses (i) and (ii) net of and after giving effect to (i) any insurance, condemnation award or other third party proceeds reasonably expected to be available with respect to such Transferred Assets for such event, (ii) any tax benefits related thereto, and (iii) any amounts expended by Seller prior to Closing to restore damage caused by such casualty event (as applicable, such estimate being a "**Casualty Estimate**"). Any Casualty Estimate shall be prepared based on the best reasonably available information as of the date of such Casualty Estimate and if the Closing is expected to occur prior to the 30 day period referenced above, then the determination of such Casualty Estimate shall not delay, impair or otherwise affect the Closing Date except that the Closing Date and, if the Termination Date would occur prior to such extended Closing Date, the Termination Date shall be extended to the third Business Day after such Casualty Estimate is made.

(b) If a Casualty Estimate with respect to a casualty or condemnation event is greater than \$5,000,000 but does not exceed 10% of the Initial Purchase Price, then Seller may, by written notice to Buyer, elect to reduce the Purchase Price by an amount equal to such Casualty Estimate minus \$5,000,000, in which case Seller and its Affiliates shall have no further liability hereunder due to such casualty or condemnation event and such casualty or condemnation event shall not otherwise affect the Closing. If either (i) a Casualty Estimate with respect to a casualty or condemnation event is greater than \$5,000,000 but does not exceed 10% of the Initial Purchase Price and Seller does not elect before the expected Closing Date (as such Closing Date has been extended pursuant to Section 5.10(a) to reduce the Purchase Price pursuant to the foregoing sentence or (ii) Buyer requests from Seller but Seller does not prepare a Casualty Estimate pursuant to Section 5.10(a) and Buyer and Seller reasonably believe that such Casualty Estimate, if prepared, would have exceeded \$5,000,000, then Buyer may, by written notice to Seller on or before such expected Closing Date (as such Closing Date has been extended pursuant to Section 5.10(a)), elect to terminate this Agreement in accordance with Article 9.

(c) If a Casualty Estimate with respect to a casualty or condemnation event is greater than 10% of the Initial Purchase Price, Seller may, by written notice to Buyer before the

expected Closing Date (as such Closing Date has been extended pursuant to Section 5.10(a)), elect to (i) reduce the Purchase Price by an amount equal to such Casualty Estimate minus \$5,000,000, in which case Seller and its Affiliates shall have no further liability hereunder due to such casualty or condemnation event and such casualty or condemnation event shall not otherwise affect the Closing, or (ii) terminate this Agreement in accordance with Article 9; provided, however, that if Seller does not elect to terminate this Agreement as provided in this sentence, then Buyer may, by written notice to Seller on or before the expected Closing Date (as such Closing Date has been extended pursuant to Section 5.10(a)), terminate this Agreement in accordance with Article 9.

(d) If a Casualty Estimate with respect to a casualty or condemnation event is \$5,000,000 or less, (i) neither Buyer nor Seller shall have the right or option to terminate this Agreement as a result of such casualty or condemnation event, (ii) there shall be no reduction in the amount of the Purchase Price with respect to such casualty or condemnation event, (iii) there shall be no liability for Seller and its Affiliates hereunder due to such casualty or condemnation event and (iv) such casualty or condemnation event shall not delay, impair or otherwise affect the Closing.

(e) Notwithstanding anything in this Agreement to the contrary, this Section 5.10 shall be the sole and exclusive remedy of the Parties with respect to any casualty or condemnation event that damages, impairs or destroys during the Interim Period any of the Transferred Assets.

5.11 **Insurance**. From and after the Closing, Buyer shall be solely responsible for providing insurance with respect to the Transferred Assets for any claims made with respect to any Transferred Asset regardless of when the event or occurrence relating to the claim arose.

5.12 **Schedule Update**. From time to time prior to the Closing, Seller may at its option supplement or amend and deliver updates to (or add schedules to) the Schedules as necessary to complete or correct any information in such Schedules or in any representation or warranty in Article 3. Any such update made pursuant to this Section 5.12 shall be deemed to cure any inaccuracy of any representation or warranty made in this Agreement for purposes of Article 6 only, except to the extent such update would reasonably be expected to result in a Material Adverse Effect.

5.13 **Resale Certificate**. Buyer agrees to furnish to Seller any resale certificate or certificates or other similar documents reasonably requested by Seller to comply with pertinent sales and use tax Laws.

5.14 **Public Announcements**. Except in connection with the Bankruptcy Cases as otherwise required by Law or, each of Buyer and Seller will, and will cause their Affiliates (as applicable) to, consult with the other regarding the timing and content of any press releases or public statements with respect to this Agreement or the transactions contemplated hereby; provided, however, that notwithstanding the foregoing in no event will Buyer issue any press release or public statement naming or containing any information with respect to Seller or its Affiliates without the prior written consent of Seller.

5.15 **Further Assurances.** Subject to the terms and conditions of this Agreement, at any time or from time to time after the Closing, at either Party's request and without further consideration, the other Party shall execute and deliver to such Party such other instruments of sale, transfer, conveyance, assignment and confirmation, provide such materials and information and take such other actions as such Party may reasonably request in order to consummate the transactions contemplated by this Agreement; provided, however, no such instruments, materials, information or actions shall increase either Party's liability, or decrease its rights, under this Agreement.

ARTICLE 6

BUYER'S CONDITIONS TO CLOSING

The obligation of Buyer to consummate the Closing is subject to the fulfillment of each of the following conditions (except to the extent waived in writing by Buyer in its sole discretion):

6.1 Representations and Warranties.

(a) The representations and warranties (other than the Fundamental Representations of Seller) made by Seller in Article 3 (without giving effect to any materiality or Material Adverse Effect qualifier contained therein) shall be true and correct on and as of the Closing Date as though made on and as of the Closing Date (other than those representations and warranties that speak to an earlier date, which representations and warranties shall be true and correct as of such earlier date; *provided* that for purposes of this Section 6.1(a), the reference to "as of the date of this Agreement" in the lead in to Article 3, which precedes Section 3.1, shall be disregarded), except where the failure to be true and correct would not reasonably be expected to have a Material Adverse Effect.

(b) The Fundamental Representations made by Seller shall be true and correct in all material respects on and as of the Closing Date as though made on and as of the Closing Date (other than those representations and warranties that speak to an earlier date, which representations and warranties shall be true and correct as of such earlier date; *provided* that for purposes of this Section 6.1(b), the reference to "as of the date of this Agreement" in the lead in to Article 3, which precedes Section 3.1, shall be disregarded).

6.2 **Performance.** Seller shall have performed and complied, in all material respects, with the covenants required by this Agreement to be performed or complied with by Seller at or before the Closing, except for any failure that is not material in the aggregate to the transactions contemplated by this Agreement.

6.3 **Officer's Certificate.** Seller shall have delivered to Buyer at the Closing an officer's certificate, dated as of the Closing Date, as to the matters set forth in Sections 6.1 and 6.2.

6.4 **Consents and Approvals.** The Buyer Approvals listed on Schedule 6.4 shall have been duly obtained, made or given and shall be in full force and effect, and all terminations or expirations of waiting periods imposed by any Governmental Authority with respect to the Buyer Approvals shall have occurred; *provided, however*, that the absence of any appeals and the

expiration of any appeal period with respect to any of the foregoing shall not constitute a condition to Closing hereunder.

6.5 **Orders and Laws.** There shall not be any Law or Order (except for any such Order issued in connection with a Proceeding instituted by Buyer or its Affiliates) restraining, enjoining or otherwise prohibiting or making illegal the consummation of the transactions contemplated by this Agreement.

6.6 **Third Amended and Restated Ownership Agreement.** Buyer, Seller, TEPC/UNS and Entegra shall have finalized the Third Amended and Restated Ownership Agreement.

6.7 **Other FERC Approvals.** The Parties shall have received FERC acceptance of all agreements related to transfer of the Transmission Rights Interest (as filed by APS) and FERC acceptance of all agreements related to the amendment of the Interconnection and Operating Agreement.

6.8 **Sale Order.** The Bankruptcy Court shall have entered the Sale Order and the Sale Order shall not have been reversed, stayed, modified, amended, enjoined, set aside, annulled or suspended.

ARTICLE 7

SELLER'S CONDITIONS TO CLOSING

The obligation of Seller to consummate the Closing is subject to the fulfillment of each of the following conditions (except to the extent waived in writing by Seller in its sole discretion):

7.1 Representations and Warranties.

(a) The representations and warranties (other than the Fundamental Representations of Buyer) made by Buyer in Article 4 (without giving effect to any materiality or material adverse effect qualifier contained therein) shall be true and correct on and as of the Closing Date as though made on and as of the Closing Date (other than those representations and warranties that speak to an earlier date, which representations and warranties shall be true and correct as of such earlier date; *provided* that for purposes of this Section 7.1(a), the reference to “as of the date of this Agreement” in the lead in to Article 4, which precedes Section 4.1, shall be disregarded), except where the failure to be true and correct would not reasonably be expected have a material adverse effect on the ability of Buyer to consummate the transactions contemplated hereby.

(b) The Fundamental Representations made by Buyer shall be true and correct in all material respects on and as of the Closing Date as though made on and as of the Closing Date (other than those representations and warranties that speak to an earlier date, which representations and warranties shall be true and correct as of such earlier date; *provided* that for purposes of this Section 7.1(b), the reference to “as of the date of this Agreement” in the lead in to Article 4, which precedes Section 4.1, shall be disregarded).

7.2 **Performance.** Buyer shall have performed and complied, in all material respects, with the covenants required by this Agreement to be so performed or complied with by Buyer at or before the Closing, except for any failure that is not material in the aggregate to the transactions contemplated by this Agreement (and for purposes of clarification the failure by Buyer to pay any amounts pursuant to Section 2.6 shall be deemed to be a material failure by Buyer).

7.3 **Officer's Certificate.** Buyer shall have delivered to Seller at the Closing a certificate of an officer of Buyer, dated as of the Closing Date, as to the matters set forth in Sections 7.1 and 7.2.

7.4 **Orders and Laws.** There shall not be any Law or Order (except for any such Order issued in connection with a Proceeding instituted by Seller or its Affiliates) restraining, enjoining or otherwise prohibiting or making illegal the consummation of the transactions contemplated by this Agreement.

7.5 **Consents and Approvals.** The Seller Approvals listed on Schedule 7.5 shall have been duly obtained, made or given and shall be in full force and effect, and all terminations or expirations of waiting periods imposed by any Governmental Authority with respect to the Seller Approvals shall have occurred; *provided, however*, that the absence of any appeals and the expiration of any appeal period with respect to any of the foregoing shall not constitute a condition to Closing hereunder.

7.6 **Third Amended and Restated Ownership Agreement.** Buyer, Seller, TEPC/UNS and Entegra shall have finalized the Third Amended and Restated Ownership Agreement.

7.7 **Other FERC Approvals.** The Parties shall have received FERC acceptance of all agreements related to transfer of the Transmission Rights Interest (as filed by APS) and FERC acceptance of all agreements related to the amendment of the Interconnection and Operating Agreement.

7.8 **Replacement of Support Obligations.** The release of all Support Obligations shall have been effected in accordance with Section 5.7.

7.9 **Sale Order.** The Bankruptcy Court shall have entered the Sale Order and the Sale Order shall not have been reversed, stayed, modified, amended, enjoined, set aside, annulled or suspended.

ARTICLE 8 **CLOSING**⁶

8.1 **Closing.** The Closing shall take place at the offices of Vinson & Elkins LLP, 1001 Fannin St., Houston, Texas 77002 at 10:00 A.M. local time, on the third Business Day after the conditions to Closing set forth in Article 6 and Article 7 (other than actions to be taken or

⁶ NTD: Closing deliverables are subject to additional review/diligence.

items to be delivered at Closing, but subject to satisfaction of such conditions at the Closing) have been satisfied or waived, or on such other date and at such other time and place as Buyer and Seller mutually agree in writing (the “**Closing Date**”). All actions that occur on the Closing Date shall be deemed to occur simultaneously at the Closing, unless otherwise specified herein.

8.2 **Jointly Executed Closing Agreements.** Subject to the terms and conditions hereof, and, if applicable, in accordance with Section 17.14 of the Second Amended and Restated Ownership Agreement, at the Closing, Buyer and Seller shall deliver, or cause to be delivered, the following to the other Party:

(a) a Bill of Sale and Assignment (the “**Bill of Sale and Assignment**”) executed by Buyer and Seller transferring all of the Transferred Power Related Assets substantially in the form attached as Exhibit C;

(b) the Second Amended and Restated Reciprocal Easement Agreement executed and acknowledged by Buyer, Seller, TEPC/UNS and Entegra substantially in the form to be attached as Exhibit B;

(c) the Third Amended and Restated Ownership Agreement and the Memorandum of the Third Amended and Restated Ownership Agreement executed by Buyer, Seller, TEPC/UNS and Entegra substantially in the form attached as Exhibit F hereto;

(d) the Seller O&M Agreement Amendment executed by Seller and GBOC in the form attached as Exhibit D hereto;

(e) the GBOC LLC Agreement Joinder executed by Buyer, Seller, TEPC/UNS and Entegra substantially in the form attached as Exhibit G hereto;

(f) the Buyer O&M Agreement executed by Buyer, GBOC and Ethos substantially in the form attached as Exhibit A hereto;

(g) the amendment to the Interconnection and Operating Agreement executed by APS, Seller and Buyer;

(h) the instrument executed by Seller and Buyer assigning the Transmission Rights Interest to Buyer; and

(i) if a Letter of Credit is posted on the date hereof pursuant to Section 2.8(a)(2), the Escrow Agreement executed by Buyer, Seller and the Escrow Agent.

8.3 **Buyer’s Executed Closing Agreements.** Subject to the terms and conditions hereof, at the Closing, Buyer shall deliver, or cause to be delivered, the following to the Seller:

(a) an amount in immediately available funds, by way of wire transfer to an account or accounts designated by Seller, equal to the Estimated Purchase Price, less the Holdback Funds;

(b) if a Letter of Credit is posted on the date hereof pursuant to Section 2.8(a), an amount in immediately available funds equal to the Holdback Funds to the Escrow Account established pursuant to the Escrow Agreement delivered pursuant to Section 8.2(i); and

(c) All such other agreements, documents, instruments and writings required to be delivered by Buyer at or prior to the Closing Date pursuant to this Agreement.

8.4 **Seller's Executed Closing Agreements**. Subject to the terms and conditions hereof, at the Closing, Seller shall deliver, or cause to be delivered, the following to the Buyer:

(a) A copy of the Sale Order and copies of all affidavits of service of the Sale Motion or notice of the Sale Motion filed with the Bankruptcy Court by or on behalf of the Seller.

(b) the Deed for the Transferred Real Property Assets executed by Seller;

(c) the Affidavit of Property Value executed by Seller;

(d) a certificate of non-foreign status of Seller (or if Seller is disregarded as an entity separate from another Person for such purposes, of such other Person) meeting the requirements of Treasury Regulation Section 1.1445-2(b)(2); and

(e) all such other agreements, documents, instruments and writings required to be delivered by the Seller at or prior to the Closing Date pursuant to this Agreement.

ARTICLE 9 **TERMINATION**

9.1 **Termination**. This Agreement may be terminated at any time before the Closing only:

(a) By mutual written consent of Buyer and Seller;

(b) By either Party upon written notice to the other Party if any Governmental Authority having competent jurisdiction has issued a final, non-appealable order, decree, ruling or injunction (other than a temporary restraining order) or taken any other action permanently restraining, enjoining or otherwise prohibiting the Transactions;

(c) By either Party upon written notice to the other Party if the Closing has not occurred on or before the Outside Date; *provided, however*, that (i) except as extended in accordance with Section 5.10(a), in no event shall such date be extended past the [____] day following the date of this Agreement (the "**Termination Date**") and (ii) the failure to close is not caused by a breach of this Agreement by the terminating Party or any of its Affiliates;

(d) By Buyer or Seller pursuant to Section 5.10;

(e) By Seller, if Buyer has breached its representations, covenants or agreements hereunder and such breach would or does result in the failure of any condition expressly set forth in Article 7 (other than those that are within the sole control of Seller), and such breach (other

than a breach of Buyer's obligation to make any payment set forth in and in accordance with Section 2.6, which shall have no cure period) has not been cured within thirty (30) days following written notification to Buyer thereof; *provided, however*, that if, at the end of such thirty (30) day period, Buyer is endeavoring in good faith, and proceeding diligently, to cure such breach, Buyer shall have an additional thirty (30) days in which to effect such cure; or

(f) By Buyer, if Seller has breached its representations, covenants or agreements hereunder and such breach would or does result in the failure of any condition expressly set forth in Article 6 (other than those that are within the sole control of Buyer), and such breach has not been cured within thirty (30) days following written notification thereof; *provided, however*, that if, at the end of such thirty (30) day period, Seller is endeavoring in good faith, and proceeding diligently, to cure such breach, Seller shall have an additional thirty (30) days in which to effect such cure.

9.2 **Effect of Termination.** If this Agreement is validly terminated pursuant to Section 9.1, the Parties shall have no further obligations or liabilities hereunder, except as provided in the Confidentiality Agreement, Section 2.8, Section 5.2(b) Section 10.2, and Section 10.3; provided that nothing in this section shall relieve Buyer from liability for any knowing and intentional breach by Buyer prior to termination of this Agreement of any material covenant or agreement of Buyer under this Agreement if such breach was intended to hinder, delay or prevent the Closing.

9.3 **Return of Documentation.** Following termination of this Agreement pursuant to Section 9.1, Buyer shall promptly (but in any event no more than ten Business Days after the termination of this Agreement) return or destroy all agreements, Contracts, instruments, books, records, materials and other information regarding Seller or its Affiliates or the Transferred Assets provided to Buyer or any of its Representatives in connection with the Transactions. Upon completion of such return or destruction, Buyer shall have a duly authorized officer certify the same in writing to Seller.

ARTICLE 10 **SURVIVAL; REMEDIES**

10.1 **No Survival.** The representations and warranties contained herein and in any certificate or other writing delivered pursuant hereto shall terminate upon and not survive the Closing and there shall be no liability thereafter in respect thereof. Each of the covenants of the Parties hereto contained in this Agreement shall terminate upon the Closing except to the extent that performance under such covenant is to take place after Closing, in which case such covenant shall survive the Closing until the earlier of (i) performance of such covenant in accordance with this Agreement or, if time for performance of such covenant is specified in this Agreement, 60 days following the expiration of the time period for such performance and (ii) the expiration of applicable statute of limitations with respect to any claim for any failure to perform such covenant; provided that if a written notice of any claim with respect to any covenant to be performed after Closing is given prior to the expiration of such covenant then such covenant shall survive until, but only for purposes of, the resolution of such claim by final, non-appealable judgment or settlement.

10.2 **Indirect Claims.** From and after the Closing, Buyer hereby releases, indemnifies and holds harmless Seller and its Affiliates and their respective Representatives (acting in their capacity as such) from and against any Losses, and shall not make any claim, for officer, director, partner, manager or controlling (or any other) stockholder or member liability or for breach of any fiduciary or other duty or breach of any employment contract (or similar arrangement) relating to any pre-Closing actions or failures to act (including negligence or gross negligence) in connection with the business, ownership or operation of any of the Transferred Assets prior to the Closing.

10.3 **Assumed Liabilities.** From and after the Closing, Buyer hereby assumes all obligations and liabilities (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due) known and unknown arising from or relating to the pre- and post-Closing business, ownership and operation of the Transferred Assets, including environmental liabilities and the pre- and post-Closing environmental condition of the Transferred Assets. Without limiting the generality of the foregoing, from and after the Closing, Buyer hereby unconditionally waives and releases, indemnifies and holds harmless Seller and its Affiliates and their respective Representatives from any and all claims, demands, causes of action, obligations, liabilities (whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due, whether known or unknown), costs or expenses with respect thereto, whenever arising or occurring, and whether arising under Contract, statute, common law or otherwise.

10.4 **Waiver of Other Representations.**

(a) NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, IT IS THE EXPLICIT INTENT OF EACH PARTY, AND THE PARTIES HEREBY AGREE, THAT NONE OF SELLER NOR ANY OF ITS AFFILIATES OR THEIR RESPECTIVE REPRESENTATIVES HAS MADE OR IS MAKING ANY REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING ANY IMPLIED REPRESENTATION OR WARRANTY AS TO THE CONDITION, MERCHANTABILITY, USAGE, SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE WITH RESPECT TO THE COMMON PROPERTY, THE PIPELINE, THE GILA RIVER POWER STATION OR ANY OF THE TRANSFERRED ASSETS, OR ANY PART THEREOF, EXCEPT THOSE REPRESENTATIONS AND WARRANTIES EXPRESSLY MADE BY SELLER IN ARTICLE 3. IN PARTICULAR, AND WITHOUT IN ANY WAY LIMITING THE FOREGOING, (I) NONE OF SELLER NOR ANY OF ITS AFFILIATES OR THEIR RESPECTIVE REPRESENTATIVES MAKES ANY REPRESENTATION OR WARRANTY REGARDING ANY ENVIRONMENTAL MATTERS EXCEPT AS EXPRESSLY MADE BY SELLER IN SECTION 3.6 AND (II) NONE OF SELLER NOR ANY OF ITS AFFILIATES OR THEIR RESPECTIVE REPRESENTATIVES MAKES ANY REPRESENTATION OR WARRANTY TO BUYER WITH RESPECT TO ANY FINANCIAL PROJECTIONS OR FORECASTS RELATING TO THE COMMON PROPERTY, THE PIPELINE, THE GILA RIVER POWER STATION OR ANY OF THE TRANSFERRED ASSETS.

(b) EXCEPT FOR THOSE REPRESENTATIONS AND WARRANTIES EXPRESSLY CONTAINED IN ARTICLE 3, SELLER'S INTERESTS IN THE TRANSFERRED ASSETS ARE BEING TRANSFERRED "AS IS, WHERE IS, WITH ALL

FAULTS,” AND SELLER AND ITS AFFILIATES AND THEIR RESPECTIVE REPRESENTATIVES EXPRESSLY DISCLAIM, AND BUYER AND ITS AFFILIATES AND THEIR RESPECTIVE REPRESENTATIVES EXPRESSLY DISCLAIM RELIANCE UPON ANY AND ALL OTHER REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, INCLUDING REPRESENTATIONS AND WARRANTIES AS TO THE CONDITION, VALUE OR QUALITY OF THE COMMON PROPERTY, THE PIPELINE, THE GILA RIVER POWER STATION OR ANY OF THE TRANSFERRED ASSETS OR THE PROSPECTS (FINANCIAL, ENVIRONMENTAL OR OTHERWISE), RISKS AND OTHER INCIDENTS OF THE COMMON PROPERTY, THE PIPELINE, THE GILA RIVER POWER STATION OR ANY OF THE TRANSFERRED ASSETS.

(c) BUYER ACKNOWLEDGES THAT THE REPRESENTATIONS AND WARRANTIES SET FORTH IN ARTICLE 3 AND IN ANY CERTIFICATE OF SELLER ARE THOSE ONLY OF SELLER AND NOT OF ANY OTHER PERSON INCLUDING ANY AFFILIATE OR REPRESENTATIVE OF SELLER OR ANY OF ITS AFFILIATES. BUYER FURTHER ACKNOWLEDGES, ON BEHALF OF ITSELF AND ITS AFFILIATES, THAT IT HAS NOT RELIED ON ANY REPRESENTATION NOT EXPRESSLY SET FORTH IN THIS AGREEMENT.

10.5 Waiver of Remedies.

(a) The Parties hereby agree that neither Party shall have any liability, and neither Party nor any of their respective Affiliates shall make any claim, for any Loss or any other matter, under, relating to or arising out of this Agreement (including breach of representation, warranty, covenant or agreement) or any other document, agreement, certificate or other instrument delivered pursuant hereto, whether based on contract, tort, strict liability, other Laws or otherwise, except as expressly provided in Sections 2.8, 2.10, 2.11, 5.2(b), 9.2, 10.2, 10.3, and 11.14. Notwithstanding anything to the contrary in this Agreement, the Parties further acknowledge and agree that from and after the Closing, (i) the indemnification provisions in Section 10.2, Section 10.3 and Section 5.2(b) shall be the sole and exclusive remedy of the Parties with respect to any breach of this Agreement or any other document, agreement, certificate or other matter delivered pursuant hereto, whether based on contract, tort, strict liability, other Laws, in equity or otherwise and (ii) Seller shall have no liability under this Agreement or any Closing Agreement except as provided in Section 2.7, and in no event shall Buyer or its Affiliates seek to recover any amounts pursuant to Section 2.7 in excess of the Holdback Funds.

(b) NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY, NONE OF SELLER NOR ANY OF ITS AFFILIATES SHALL BE LIABLE TO BUYER OR ITS AFFILIATES FOR SPECIAL, PUNITIVE, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES, OR LOST PROFITS (OTHER THAN DAMAGES THAT ARE THE NATURAL AND PROBABLE CONSEQUENCE OF ANY BREACH AND FLOW DIRECTLY FROM SUCH BREACH), WHETHER BASED ON CONTRACT, TORT, STRICT LIABILITY, OTHER LAW OR OTHERWISE AND WHETHER OR NOT ARISING FROM SELLER’S OR ANY OF ITS AFFILIATES’ SOLE, JOINT OR CONCURRENT NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT

(“**NON-REIMBURSABLE DAMAGES**”); PROVIDED, HOWEVER, IN NO EVENT SHALL THIS SECTION 10.5(b) BE A LIMITATION ON ANY OBLIGATION OF SELLER HEREUNDER WITH RESPECT TO A THIRD PARTY CLAIM RELATING TO SUCH OBLIGATION.

(c) Notwithstanding anything in this Agreement to the contrary, (1) no Person other than Seller (including no Affiliate of Seller, no Representative of Seller or any of its Affiliates, and no Person directly or indirectly owning any interest in Seller) shall have any liability to Buyer or any other Person as a result of the breach of any representation, warranty, covenant, or agreement of Seller in this Agreement or in any certificate delivered pursuant to this Agreement, and (2) no Representative or Affiliate of Buyer (nor any Representative of any such Affiliate or any Person directly or indirectly owning any interest in Buyer) shall have any liability to Seller or any other Person as a result of the breach of any representation, warranty, covenant, or agreement of Buyer in this Agreement or in any certificate delivered pursuant to this Agreement.

(d) Buyer hereby waives any and all rights it has to the equitable remedy of rescission.

ARTICLE 11
GENERAL PROVISIONS

11.1 **Notices.**

(a) Unless this Agreement specifically requires otherwise, any notice, demand or request provided for in this Agreement, or served, given or made in connection with it, shall be in writing and shall be deemed properly served, given or made if delivered in person or sent by facsimile or electronic mail or sent by registered or certified mail, postage prepaid, or by a nationally recognized overnight courier service that provides a receipt of delivery, in each case, to the Parties at the addresses specified below:

If to Seller, addressed to:

Sundevil Power Holdings, LLC
701 Lake Street E, Suite 300
Wayzata, Minnesota 55391
Attn: Ray Wallander
Email: rwallander@wayzpartners.com

with a copy to counsel for Seller:

Vinson & Elkins, LLP
1001 Fannin St, Suite 2500
Houston, TX 77002
Attn: Trina Chandler
Facsimile No.: (713) 615-5188
Email: tchandler@velaw.com

And

Vinson & Elkins, LLP
2001 Ross Avenue, Suite 3700
Dallas, TX 75201
Attn: Paul Heath
Facsimile No.: (214) 999-7976
Email: pheath@velaw.com

If to Buyer, addressed to:

Attn: _____

with a copy to counsel for Buyer:

Attn: _____

(b) Notice given by personal delivery, mail or overnight courier pursuant to this Section 11.1 shall be effective upon physical receipt. Notice given by facsimile or electronic mail pursuant to this Section 11.1 shall be effective as of the date of confirmed delivery if delivered before 5:00 p.m. Central Time on any Business Day or the next succeeding Business Day if confirmed delivery is after 5:00 p.m. Central Time on any Business Day or during any non-Business Day. Each Party may change the address by which proper notice shall be given pursuant to this Section 11.1 by providing notice to the other Party in accordance with this Section 11.1.

11.2 **Entire Agreement.** This Agreement supersedes all prior discussions, representations and warranties, and agreements between the Parties and/or their Affiliates with respect to the subject matter hereof and, except as set forth in the Sale Order and the Confidentiality Agreement, contains the sole and entire agreement between the Parties and their Affiliates hereto with respect to the subject matter hereof.

11.3 **Expenses.** Except as otherwise expressly provided in this Agreement, whether or not the transactions contemplated hereby are consummated, each Party will pay its own costs and expenses incurred in anticipation of, relating to and in connection with the negotiation and execution of this Agreement and the transactions contemplated hereby.

11.4 **Disclosure.**

(a) Seller may, at its option, include in the Schedules items that are not material, and any such inclusion, or any references to dollar amounts, shall not be deemed to be an acknowledgment or representation that such items are material, to establish any standard of materiality or to define further the meaning of such terms for purposes of this Agreement. Information disclosed in any Schedule shall constitute a disclosure for all purposes under this Agreement notwithstanding any reference to a specific section, and all such information shall be deemed to qualify the entire Agreement and not just such section.

(b) In no event shall disclosure of any matter, fact, occurrence, information or circumstance in this Agreement be deemed or interpreted to broaden the scope of, or alter or otherwise change, the representations and warranties, obligations, covenants, conditions, indemnities or agreements contained in this Agreement, or to create any representation, warranty, obligation, covenant, condition, indemnity or agreement that is not contained in the Agreement. The inclusion of any matter, fact, information or circumstance in this Agreement shall not be construed as an admission or acknowledgment or otherwise imply that such matter, fact, occurrence, information or circumstance is required to be listed in this Agreement in order for any representation or warranty in the Agreement to be true and correct, or that any such matter, fact, occurrence, information or circumstance arises to a Material Adverse Effect or is material (or not material) to or outside (or in) the ordinary course of business of the Seller (or the Transferred Assets) (or that any such matter, fact, occurrence, information or circumstance is above or below any specified threshold).

(c) Any exception, qualification or other disclosure set forth on this Agreement with respect to a particular representation, warranty or covenant contained in this Agreement shall be deemed to be an exception, qualification or other disclosure with respect to all other representations, warranties and covenants contained in this Agreement to the extent any description of facts regarding the event, item or matter disclosed is adequate so as to make reasonably apparent that such exception, qualification or disclosure is applicable to such other representations, warranties or covenants whether or not such exception, qualification or disclosure is so numbered.

(d) Matters reflected in the Schedules are not necessarily limited to matters required by this Agreement to be reflected in the Schedules. In particular, although the Schedules may contain supplementary information not specifically required under this Agreement to be included in the Schedules, such additional matters are set forth for informational purposes, are not represented or warranted in this Agreement and do not necessarily include other matters of a similar nature.

(e) All references in this Agreement to the enforceability of agreements with third parties, the existence or non-existence of third-party rights, the absence of breaches or defaults by third parties, or similar matters or statements, are intended only to allocate rights and risks between the Parties and are not intended to be admissions against interests, give rise to any inference or proof of accuracy, be admissible against any party to this Agreement, or give rise to any claim or benefit to any Person. In addition, the disclosure of any matter in the Schedules is not to be deemed an admission against any party that such matter actually constitutes noncompliance with or a violation of Contract or Law or other topic to which such disclosure is applicable.

(f) In disclosing any matter, fact, occurrence, information or circumstance in this Agreement, the disclosing party is not waiving any attorney-client privilege associated with any such matter, fact, occurrence, information or circumstance, or any protection afforded by the “work product doctrine” with respect to any of the same.

11.5 **Waiver**. Any term or condition of this Agreement may be waived at any time by the Party that is entitled to the benefit thereof, but no such waiver shall be effective unless set

forth in a written instrument duly executed by or on behalf of the Party waiving such term or condition. No waiver by any Party of any term or condition of this Agreement, in any one or more instances, shall be deemed to be or construed as a waiver of the same or any other term or condition of this Agreement on any future occasion. All remedies, either under this Agreement or by Law, will, subject to Article 11, be cumulative and not alternative.

11.6 **Amendment.** This Agreement may be amended, supplemented or modified only by a written instrument duly executed by Seller and Buyer.

11.7 **No Third Party Beneficiaries.** Except for the provisions of Section 5.2(b) (which are intended to be for the benefit of the Persons identified therein), the terms and provisions of this Agreement are intended solely for the benefit of the Parties and their respective successors or permitted assigns, and it is not the intention of the Parties to confer third-party beneficiary rights upon any other Person.

11.8 **Assignment; Binding Effect.** Any Party may assign its rights and obligations hereunder to an Affiliate but such assignment shall not release such Party from its obligations hereunder. Except as provided in the preceding sentence, neither this Agreement nor any right, interest or obligation hereunder may be assigned by any Party without the prior written consent of the other Party, and any attempt to do so will be void, except for assignments and transfers by operation of Law. Subject to this Section 11.8, this Agreement is binding upon, inures to the benefit of and is enforceable by the Parties and their respective successors and permitted assigns.

11.9 **Headings.** The headings used in this Agreement have been inserted for convenience of reference only and do not modify, define or limit any of the terms or provisions hereof.

11.10 **Invalid Provisions.** If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of Law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic and legal substance of the transactions contemplated hereby is not affected in any adverse manner to either Party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the extent possible.

11.11 **Counterparts; Facsimile.** This Agreement may be executed in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. Any facsimile or pdf copies hereof or signature hereon shall, for all purposes, be deemed originals.

11.12 **Governing Law; Venue; and Jurisdiction.**

(a) This Agreement shall be governed by and construed in accordance with the Laws of the State of New York, without giving effect to any conflict or choice of law provision that would result in the imposition of another state's Law.

(b) Each Party hereby irrevocably submits to the jurisdiction of the Bankruptcy Court in connection with any such action, suit or Proceeding brought in connection with the rights and obligations of the Parties pursuant to this Agreement, and agrees that any such action, suit or Proceeding may be brought in such court; provided, however, that if the Bankruptcy Court is unwilling or unable to hear any such action, suit or Proceeding, the United States District Court for the Southern District of New York and any New York state court, in each case, sitting in New York County, New York, shall have sole jurisdiction over such matters. Each Party hereby irrevocably waives the defense of an inconvenient forum to the maintenance of any such action or Proceeding. Each Party further agrees to accept service of process out of any of the before mentioned courts in any such dispute by registered or certified mail addressed to the Party at the address set forth in Section 11.1.

(c) EACH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TO THE FULLEST EXTENT PERMITTED BY LAW TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS AGREEMENT AND WITH RESPECT TO ANY COUNTERCLAIM THEREIN.

11.13 **Attorneys' Fees.** If either Party shall bring an action to enforce the provisions of this Agreement, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and expenses incurred in such action from the unsuccessful Party.

11.14 **Specific Performance.** Each Party hereby acknowledges and agrees that the rights of each Party to consummate the Transactions (including the satisfaction of any condition to Closing) are special, unique and of extraordinary character and that, if either Party violates or fails or refuses to perform any covenant or agreement made by it herein, the non-breaching Party will be without an adequate remedy at law. If either Party violates or fails or refuses to perform any covenant or agreement made by such Party herein, the non-breaching Party subject to the terms hereof, may (at any time prior to the earlier of valid termination of this Agreement pursuant to Article 9 and Closing) institute and prosecute an action in any court of competent jurisdiction to enforce specific performance of such covenant or agreement or seek any other equitable relief. For purposes of clarification, nothing contained in this Agreement, shall prevent or impair the ability of a Party to seek specific performance prior to the earlier of valid termination of this Agreement in accordance with Article 9 and Closing.

[SIGNATURES ARE ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties have duly executed this Agreement on the date first above written.

BUYER:

[_____]

a [_____]

By: _____

Name: _____

Title: _____

SELLER:

SUNDEVIL POWER HOLDINGS, LLC,
a Delaware limited liability company

By: _____
Name: _____
Title: _____