



**Kaua'i Island Utility Cooperative (KIUC)  
Request for Proposals (RFP)**

**Community-Based Renewable Energy (CBRE)  
Project Solicitation**

**July 27, 2018**

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## NOTICE TO BIDDERS

This RFP is being issued in accordance with Section E of KIUC's CBRE Program Tariff, as approved by the Hawaii Public Utilities Commission (HPUC) in its Order No. 35395 issued in Docket No. 2015-0389.

Each individual bidder must submit their intent to respond to this RFP via email to [brockwel@kiuc.coop](mailto:brockwel@kiuc.coop) no later than 5:00 P.M. Hawaii Standard Time (HST), Friday August 31, 2018. The size limit that can be received by KIUC for non-KIUC email accounts is 20 MB. When submitting the intent to respond, please request a reply email which will act as confirmation of submittal receipt by KIUC. If a reply email is not received, please call 808-246-8289.

A pre-bid question and answer (Q&A) and informational meeting will be scheduled following the August 31, 2018 intent to respond deadline, to be held on Kauai no later than October 1, 2018.

Bids should be sent via email to [brockwel@kiuc.coop](mailto:brockwel@kiuc.coop) no later than 5:00 P.M. HST, Thursday November 1, 2018. As noted above, the size limit that can be received by KIUC for non-KIUC email accounts is 20 MB. When submitting the bid, please request a reply email which will act as confirmation of submittal receipt by KIUC. If a reply email is not received, please call 808-246-8289.

The bid selection is expected to occur no later than December 3, 2018, with notification to winning bidders to occur shortly thereafter.

General information about KIUC can be found at [www.kiuc.coop](http://www.kiuc.coop).

## INTRODUCTION AND ADMINISTRATIVE OVERVIEW

### INTRODUCTION

KIUC is issuing this CBRE Project Solicitation in accordance with Section E of KIUC's CBRE Program Tariff, as approved by the HPUC in its Order No. 35395 issued in Docket No. 2015-0389.

The purpose of KIUC's CBRE program is to provide KIUC's customers with the opportunity to participate in a CBRE project in accordance with Act 100, Session Laws of Hawaii 2015, Community-Based Renewable Energy Tariff (Act 100). The CBRE program, in accordance with Act 100, is designed to:

- (1) allow an eligible customer to participate in an eligible renewable energy project that is providing electricity and electric grid services to KIUC;
- (2) allow KIUC to implement a billing arrangement to compensate those customers for the electricity and electric grid services provided to KIUC;
- (3) provide fair compensation for electricity, electric grid services, and other benefits provided to or by KIUC, participating ratepayers, and non-participating ratepayers; and
- (4) to the extent possible, standardize and streamline the related interconnection processes for CBRE projects.

Many of KIUC's residents and businesses are currently unable to directly participate in renewable energy generation because of their location, building type, access to the electric utility grid, or other impediments. The CBRE program attempts to rectify this by expanding the market to participate in renewable energy resources to include residential and business renters, occupants of residential and commercial buildings with shaded or improperly oriented roofs, and other groups who are unable to access the benefits of onsite clean energy generation.

The CBRE program is available only to an "Eligible Renewable Energy Project," as defined in the CBRE Tariff.

### SCHEDULE OF KEY DATES

The below dates are to be followed for this opportunity. Please note the deadline for submittals, indicated in bold.

<b>Submission of Intent to Respond:</b>	<b>No later than 5:00 p.m. HST on August 31, 2018</b>
Pre-Bid Q&A / Informational Meeting:	No later than October 1, 2018
<b>Deadline to Submit Bids:</b>	<b>No later than 5:00 p.m. HST on November 1, 2018</b>
Expected Bid Selection:	No later than December 3, 2018

### RFP AMENDMENTS

KIUC reserves the right to amend this RFP at any time before the deadline. If amended, a red-lined RFP will be sent to all bidders.

**AWARD; RIGHT NOT TO AWARD**

KIUC reserves the right not to award a contract as a result of this RFP. KIUC will evaluate all responses to this RFP and may select one or more bidders to enter into final negotiations for a PPA.

**RFP RESPONSES BECOME PROPERTY OF KIUC**

All responses submitted under this RFP shall become property of KIUC and may be returned only at KIUC's discretion.

**RFP RESPONSES SUBJECT TO PUBLIC REVIEW**

Should KIUC enter into a PPA with any RFP bidder, US Department of Agriculture Rural Utility Service (USDA RUS) review of the arrangement will be required. Review by the HPUC will also be required, and salient terms and conditions of the arrangement may become public record. KIUC will work with the bidder to request that any sensitive information be redacted from the public version of any documents submitted with the HPUC. Successful receipt of USDA RUS and HPUC approvals on terms acceptable to KIUC will be Conditions Precedent of the PPA.

**PRESS RELEASE**

All public notifications, and specifically any Press Releases, related to this RFP must be reviewed and approved by KIUC prior to being released to the public.

# CBRE Tariff

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Issued: April 17, 2018  
By: David J. Bissell, President  
and Chief Executive Officer

Effective: April 17, 2018  
Decision and Order Nos. 19658, 20005, 20960, 21567, 21900,  
22253, 23237, 23317, 23495, 23986, Decision and Order  
(January 30, 2009), Decision and Order (February 2, 2010),  
Decision and Order (January 26, 2011), Decision and Order  
Nos. 30227, 31900, 32657, 33514, 34361, Order No. 35395



SCHEDULE "CBRE"

COMMUNITY-BASED RENEWABLE ENERGY PROGRAM

A. PURPOSE

The purpose of this program is to provide the Company's customers with the opportunity to participate in a community-based renewable energy ("CBRE") program in accordance with Act 100, Session Laws of Hawaii 2015, Community-Based Renewable Energy Tariff ("Act 100"). The CBRE, in accordance with Act 100, is designed to:

- (1) allow an eligible customer to participate in an eligible renewable energy project that is providing electricity and electric grid services to the Company;
- (2) allow the Company to implement a billing arrangement to compensate those customers for the electricity and electric grid services provided to the Company;
- (3) provide fair compensation for electricity, electric grid services, and other benefits provided to or by the Company, participating ratepayers, and non-participating ratepayers; and
- (4) to the extent possible, standardize and streamline the related interconnection processes for community-based renewable energy projects.

As noted in Act 100, many residents and businesses are currently unable to directly participate in renewable energy generation because of their location, building type, access to the electric utility grid, and other impediments. In accordance with Act 100, the CBRE program attempts to rectify this by expanding the market to participate in renewable energy resources to include residential and business renters, occupants of residential and commercial buildings with shaded or improperly oriented roofs, and other groups who are unable to access the benefits of onsite clean energy generation.

B. ELIGIBLE RENEWABLE ENERGY PROJECTS

This CBRE program shall be available only to an "Eligible Renewable Energy Project" (as defined below) that meets and complies with the provisions of this Schedule "CBRE." Acceptance into and participation in this CBRE program shall at all times be in accordance with, and subject to, the provisions of this Schedule "CBRE."

An "Eligible Renewable Energy Project" for purposes of this CBRE program is a generating facility that produces 100% renewable energy and that meets each of the following requirements:

1. The generating facility shall be no less than 250 kilowatts (kW) in size. In the event there is more than one generating facility located on a single parcel of land (i.e., Tax Map Key) that are being considered for participation in this Schedule "CBRE," they shall be considered as a single generating facility for the purpose of determining whether the cumulative size of the facilities fall within the size limitations set forth in this Schedule "CBRE;"
2. The generating facility shall have been submitted in accordance with the solicitation process set forth in Section E (Solicitation Process for Eligible Renewable Energy Projects) below and selected for participation in this program by the Company;

3. A purchase power agreement (“PPA”), setting forth the terms governing the purchase of the energy produced by the generating facility and provided to the Company shall have been entered into with the Company and approved by the Commission. The PPA shall contain all of the terms and conditions set forth in the Company’s standard form PPA for this CBRE program, together with the purchase power rate structure for the generating facility as determined in accordance with Section C (Purchase Power Rates) below;
4. An Interconnection Agreement, setting forth the terms governing the interconnection of the generating facility and its operation in parallel with the Company’s transmission and/or distribution facilities, shall have been entered into with the Company in accordance with the Company’s Tariff No. 2;
5. The owner/developer of the generating facility must agree to allow (a) the installation of curtailment devices, and (b) the Company to curtail the delivery of energy from the generating facility without payment for energy curtailed during a “curtailment condition.” A “curtailment condition” exists when the cumulative output from the Company’s existing supply of zero dispatch cost resources, take-or-pay power purchase agreements, and required spinning reserves exceed load. The Company’s curtailment rights, including the Company’s policies for determining the priority and level of curtailment that each Eligible Renewable Energy Project in this program will be subject to, are set forth in the standard form PPA;
6. The ownership, installation, and operation of the generating facility shall at all times be in compliance with all applicable statutes, rules, tariffs, and regulations (including without limitation, this Schedule “CBRE”) governing the ownership and interconnection of such facility; and
7. The addition of the generating facility to the CBRE program shall not result in the total aggregate of all Eligible Renewable Energy Projects exceeding 3 megawatts (MW).

In addition, in order to have the generating facility qualify as an Eligible Renewable Energy Project under this Schedule “CBRE,” the developer/owner/operator of the facility shall also be subject to additional program participation conditions and requirements that the Company may impose from time to time upon all Eligible Renewable Energy Projects in this CBRE program.

For purposes of the CBRE program, an Eligible Renewable Energy Project shall fall into one of two classes, as follows:

Class I: An Eligible Renewable Energy Project that generates at least 85% of its total output each calendar month between the hours of 4:00 p.m. and 9:00 a.m. (i.e., outside of the peak irradiance period).\*

Class II: Any Eligible Renewable Energy Project that is not a Class I project.

\* When, in any given month, a Class I Eligible Renewable Energy Project generates more than 15% of its total output between the hours of 9:00 a.m. and 4:00 p.m. (i.e., during the peak irradiance period), the portion of such total output during the peak irradiance period that is above 15% shall be “Excess Class I Peak Irradiance Output.” Class I Eligible Renewable Energy Projects will not receive any payment for Excess Class I Peak Irradiance Output.

C. PURCHASE POWER RATES

The purchase power rate that will be paid to an Eligible Renewable Energy Project will vary depending on the amount of capacity purchased (i.e., subscribed to) by customer participants in the CBRE program as further detailed below (Section D.3 below addresses the purchase/subscription of capacity by customer participants). This will be accomplished by utilizing two different rates for each Eligible Renewable Energy Project: (i) the CBRE Subscription Rate (as defined below), which will apply to the portion of the capacity purchased or subscribed to by customer participants in the CBRE program, and (ii) the CBRE Unsubscribed Rate (as defined below), which will apply to the remainder of the capacity (i.e., the capacity that has not been purchased or subscribed to by customer participants).

1. CBRE Unsubscribed Rate. As noted above, the CBRE Unsubscribed Rate will apply to the portion of the capacity of an Eligible Renewable Energy Project that has not been purchased or subscribed to by customer participants in accordance with Section D.3 below.

The CBRE Unsubscribed Rate for each class of Eligible Renewable Energy Projects is as follows:

Class I: \$0.1108/kilowatt-hour (kWh) received by the Company

Class II: \$0.08322/kWh received by the Company

The purpose of the CBRE Unsubscribed Rate is to provide each Eligible Renewable Energy Project a guaranteed minimum rate, regardless of the amount of program capacity purchased/subscribed to by customer participants.

The reason for the higher rate for Class I projects is to provide an incentive for the development of renewable generating facilities that can provide renewable energy to the Company outside of the peak irradiance period (i.e., between the hours of 4:00 p.m. and 9:00 a.m.). Without an increase in daytime load, the Company does not currently need additional intermittent generation resources during the peak irradiance period. It would not be in the interest of the Company's overall membership base to pay a premium for new resources that are not required for system needs – in those situations, a developer/owner/operator of an Eligible Renewable Energy Project should be paid no more than what the Company has paid for similar resources, or the avoided cost price at which the Company could self-develop a similar resource.

2. CBRE Subscription Rate. As noted above, the CBRE Subscription Rate will apply to the portion of the capacity of an Eligible Renewable Energy Project that has been purchased or subscribed to by customer participants in accordance with Section D.3 below.

The CBRE Subscription Rate for an Eligible Renewable Energy Project shall be the rate for the Eligible Renewable Energy Project resulting from the CBRE Project Solicitation process in accordance with Section E (Solicitation Process for Eligible Renewable Energy Projects) below and included in the PPA for that Eligible Renewable Energy Project. The CBRE Subscription Rate for an Eligible Renewable Energy Project may not exceed \$0.19143/kWh, which is the amount of the Company's Fuel & Purchase Power Energy Charge that was included in base rates in Docket No. 2009-0050.

3. Purchase Power Rate. The purchase power rate paid to an Eligible Renewable Energy Project shall be the weighted average of the applicable CBRE Subscription Rate and CBRE Unsubscribed Rate, with the weighting factor ( $w$ ) defined as:

*w = the ratio of total program capacity purchased/subscribed to by customer participants to the total capacity of all Eligible Renewable Energy Projects in service and providing energy to the Company pursuant to an executed PPA*

The weighting factor is calculated monthly.

The purchase power rate for an Eligible Renewable Energy Project for a given calendar month shall be calculated by the following formula:

$$\text{Purchase power rate} = (\text{CBRE Subscription Rate} * w) + (\text{CBRE Unsubscribed Rate} * (1 - w))$$

Notwithstanding the above, and as stated in Section B above, Class I Eligible Renewable Energy Projects will not receive any payment for Excess Class I Peak Irradiance Output.

4. The applicable purchase power rate structure developed in accordance with this Section C shall be included in the applicable PPA for the Eligible Renewable Energy Project and shall apply for a period of twenty (20) years, which rate and/or PPA shall be subject to Commission approval.

#### D. CUSTOMER PARTICIPATION IN ELIGIBLE RENEWABLE ENERGY PROJECTS

An eligible customer may participate in the CBRE program by purchasing (also referred to as subscribing to) a portion of capacity of the Eligible Renewable Energy Projects that are then in service and providing energy to the Company. Through such purchase/subscription, the customer participant is not acquiring any actual ownership interest in the Eligible Renewable Energy Projects, and thus is not assuming any maintenance, operation, insurance or other obligations or liabilities under any applicable PPA or Interconnection Agreement. Instead, through the virtual purchase of capacity from the Eligible Renewable Energy Projects, the customer participant will receive credits applied to its electric bill in proportion to its purchase of/subscription to capacity.

Participation in this CBRE program shall at all times be in accordance with, and subject to, the provisions of this Schedule "CBRE."

##### 1. Eligibility Requirements.

In order to be eligible to participate in the CBRE program (an "eligible customer participant"), the customer must (1) have a smart meter (which is necessary to provide the billing credits under this program), and (2) certify (in form and manner acceptable to the Company) that the customer is unable to install its own renewable distributed energy resource facility and access the benefits of onsite renewable energy generation on its owned or leased property, due to its location, building type, access to the electric utility grid, or other impediment such as the customer being a renter or that the customer's residential or commercial building has continuously shaded or improperly oriented roofs.

##### 2. Enrollment Process and Wait List.

Eligible customer participants may enroll on a "first come, first served basis" until there is no remaining program capacity available, at which point a waiting list will be maintained by the Company. Each enrollment period is for twelve (12) months. If any existing customer participants choose not to re-enroll after the end of their respective 12-month periods, or if any additional program capacity becomes available, the available program capacity will be offered to the next customer on the waiting list. Existing customer participants wishing to enroll for

additional capacity will be subject to the same waiting list process for their respective incremental capacity requests.

3. Purchase/Subscription of Capacity.

Once an eligible customer participant is enrolled and the Company confirms that there is capacity available under this program, the eligible customer participant may sign up to purchase/subscribe to (through payment of the Monthly Capacity Purchase Charge, as described in Section D.5, below) an amount of program capacity subject to the limits shown in the following table:

	Individual Minimum	Individual Maximum	Total Program
Residential	250 watts (W)	1 kW	Lesser of 1 MW or 33.3% of developed CBRE capacity
Commercial	1 kW	100 kW	Lesser of 1 MW or 33.3% of developed CBRE capacity
Large Power	100 kW	1 MW	Lesser of 1 MW or 33.3% of developed CBRE capacity

4. Enrollment and Participation Period.

Once an eligible customer participant enrolls and purchases/subscribes to capacity in accordance with the above, the eligible customer participant is enrolled to participate in the CBRE program for a period of twelve (12) months.

At the conclusion of a 12-month enrollment period, an eligible customer participant will be automatically re-enrolled for the successive 12-month period unless the customer participant provides written notice to the Company of its intention to opt out of the program at least fifteen (15) days prior to the commencement of the successive 12-month period. Not less than thirty (30) days before the expiration of an eligible customer participant's 12-month enrollment period, the Company shall send notice of the customer participant's right to opt out of re-enrollment.

5. Monthly Capacity Purchase Charge and Monthly Billing Credit.

While an eligible customer participant is enrolled in the CBRE program, the eligible customer participant will: (i) pay a Monthly Capacity Purchase Charge (i.e., the charge for the customer participant's purchase/subscription of CBRE capacity), as described below, and (ii) be entitled to a Monthly Billing Credit, as described below. The Monthly Capacity Purchase Charge and the Monthly Billing Credit will be posted to the eligible customer participant's electric bill in the month following the applicable calendar month.

The calculation of the Monthly Capacity Purchase Charge and the Monthly Billing Credit depend on the customer participant's Energy Share and the CBRE Average Realized Purchase Rate, both described below.

Energy Share: This represents the pro rata share of energy delivered by all Eligible Renewable Energy Projects proportional to the customer participant's share of total available

program capacity. The calculation for determining a customer participant's Energy Share for a given calendar month is:

$$\frac{\text{Eligible customer participant's enrolled/subscribed capacity} \div \text{total program capacity} * (\text{total CBRE energy production of Eligible Renewable Energy Projects} - \text{Excess Class I Peak Irradiance Output})}{\text{CBRE Average Realized Purchase Rate}}$$

CBRE Average Realized Purchase Rate: This is the weighted average CBRE Subscription Rate realized by all Eligible Renewable Energy Projects that are in service and providing energy to the Company for a given calendar month, subject to the provisions set forth in Section C above. The calculation for determining the CBRE Average Realized Purchase Rate in a given calendar month is:

$$\frac{\sum(\text{Project } i \text{ CBRE Subscription Rate} * (\text{Project } i \text{ delivered kWh} - \text{Project } i \text{ Excess Class I Peak Irradiance Output}))}{\sum(\text{Project } i \text{ delivered kWh} - \text{Project } i \text{ Excess Class I Peak Irradiance Output})}$$

The CBRE Average Realized Purchase Rate will vary from month to month based on the mix of delivered kWh from the Eligible Renewable Energy Projects. In no circumstances will the CBRE Average Realized Purchase Rate be greater than the maximum CBRE Subscription Rate of \$0.19143/kWh, nor will it be less than the Class II CBRE Unsubscribed Rate of \$0.08322/kWh.

Monthly Capacity Purchase Charge: This monthly charge is the customer participant's payment for its purchase/subscription of CBRE capacity. The calculation for determining the Monthly Capacity Purchase Charge for any given calendar month is:

$$\text{Energy Share} * \text{CBRE Average Realized Purchase Rate}$$

Monthly Billing Credit: This is the customer participant's credit for its Energy Share at the current Fuel and Purchased Power (F&PP) Energy Charge, as adjusted by the Energy Rate Adjustment Clause (ERAC). The F&PP Energy Charge, as adjusted by ERAC, represents the variable cost to the Company of providing system mix generation. Because a customer participant is effectively switching supply for its kWh from a Company system mix to a particular portfolio of renewable resources (i.e., the Eligible Renewable Energy Projects in the CBRE program), it is appropriate for the CBRE Average Realized Purchase Rate to replace the ERAC-adjusted F&PP rate. This will allow customer participants to use the CBRE program as a hedge against fossil fuel costs.

The calculation for determining the Monthly Billing Credit for any given calendar month is:

$$\text{MINIMUM} [\text{Energy Share, Customer Usage}] * (\text{F\&PP Energy Charge} + \text{ERAC})$$

In any given month, a customer participant's Monthly Billing Credit may be lower or equal to, but may never exceed, the customer's actual F&PP energy charge plus ERAC. No excess bill credits may be accrued, and thus no bill credits may be carried over to any subsequent calendar month.

#### E. SOLICITATION PROCESS FOR ELIGIBLE RENEWABLE ENERGY PROJECTS

1. Within thirty (30) days of the effective date of this Schedule "CBRE," the Company will give public notice of its intent to issue a CBRE Project Solicitation to accept offers for Eligible Renewable Energy Projects to participate in the CBRE program.
2. The CBRE Project Solicitation shall be a one-time event. Offerors of proposed Eligible Renewable Energy Projects shall submit bids on a designated date (to be determined by

the Company and set forth in the CBRE Project Solicitation) containing, at a minimum, projected Class I or Class II designation (per criteria in Section B above), renewable technology type, projected in-service date, size, and CBRE Subscription Rate (as defined in Section C.2 above).

3. The Company shall determine whether any offeror is qualified to participate in the CBRE program. The Company may require a performance bond or other form of security or guarantee from proposed and in-development projects to assure completion.
4. In the event that the aggregate capacity of qualified projects offered into the program exceeds the program maximum set forth above (i.e., a total aggregate of 3 MW), the Company shall remove projects following a consideration of each projects' renewable technology type and operating characteristics, projected class designation, offered CBRE Subscription Rate, projected in-service date, benefits to the Company's system, and other factors that are reasonably in furtherance of the provision of electric services, until the 3 MW maximum is no longer exceeded.

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# Standard Form Purchase Power Agreement for CBRE Program



CBRE PURCHASE POWER AGREEMENT

between

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

&

Kauai Island Utility Cooperative

\_\_\_\_\_ (AC) Photovoltaic System

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CBRE PURCHASE POWER AGREEMENT

THIS CBRE PURCHASE POWER AGREEMENT (this "Agreement") is made this \_\_\_ day of \_\_\_\_\_, 20\_\_ (the "Execution Date"), by and between **Kauai Island Utility Cooperative**, a cooperative association formed pursuant to the provision of Chapter 421C of the Hawaii Revised Statutes, with a place of business at Suite 1, 4463 Pahe'e Street, Lihue, Kauai, Hawaii 96766-2000 ("Cooperative") and [\_\_\_\_\_], a [\_\_\_\_\_ **corporation/limited liability company/partnership**] ("Seller") whose mailing address is [\_\_\_\_\_]; and

WHEREAS, Cooperative is an operating electric public utility on the Island of Kauai, subject to the Hawaii Public Utilities Law (Hawaii Revised Statutes, Chapter 269) and the rules and regulations of the Hawaii Public Utilities Commission (the "PUC"); and

WHEREAS, Cooperative operates its power system as an independent power grid and must maximize system reliability for its customers by ensuring that: (a) sufficient generation is available; and (b) the Cooperative's electric system ("Cooperative's System"), including transmission and distribution components, meets voltage stability, frequency stability, and reliability standards and requirements; and

WHEREAS, Seller desires to build, own, and operate a renewable energy facility ("Seller's Facility") that is classified as an eligible resource under Hawaii's Renewable Portfolio Standards Statute (Hawaii Revised Statutes §§ 269-91 through 269-95) and that qualifies as a CBRE Project (as defined in APPENDIX D).

WHEREAS, Seller's Facility will be located in [\_\_\_\_\_] on the island of Kauai, State of Hawaii, on the parcel of land designated as [\_\_\_\_\_] and which is more fully described in APPENDIX A; and

WHEREAS, Seller agrees to sell to Cooperative electric energy generated by Seller's Facility, and Cooperative agrees to purchase such energy from Seller, upon and subject to the terms and conditions set forth herein and in the CBRE Tariff (defined in APPENDIX D); and

WHEREAS, this Agreement covers the sale to Cooperative of electric energy generated by Seller's Facility and does not cover any sale of energy by Cooperative to Seller, as any sale of energy by Cooperative to Seller shall be governed by Cooperative's applicable PUC-approved tariff(s) and rate schedule(s) and not this Agreement; and

WHEREAS, the interconnection between Cooperative's System and Seller's Facility will be governed by a separate Interconnection Agreement entered into by and between Seller and Cooperative simultaneously with this Agreement.

NOW, THEREFORE, in consideration of the premises and the respective promises herein, Cooperative and Seller, intending to be legally bound, hereby agree as follows:

## 1. Purchase and Sale of Energy and Environmental Attributes

a) Purchase Obligation and Rate. Cooperative agrees to purchase all of the energy generated by Seller's Facility and delivered by Seller to Cooperative at the Point of Interconnection pursuant and subject to the terms and conditions of this Agreement, the CBRE Tariff, and at the Purchase Power Rate set forth in APPENDIX B; provided, however, that notwithstanding anything in this Agreement to the contrary, Cooperative shall not be obligated to purchase any energy from Seller prior to when Seller's Facility achieves Commercial Operation (with the exception of test energy set forth in APPENDIX B). The Purchase Power Rate provided in APPENDIX B includes compensation for both energy and Environmental Attributes (defined in APPENDIX D).

b) Environmental Attributes. All Environmental Attributes shall be the property of Cooperative. Seller shall use all reasonable efforts to ensure the Environmental Attributes are vested in Cooperative, and shall execute all documents, including, but not limited to, documents transferring the Environmental Attributes to Cooperative, without further compensation.

c) Tax Credits and Benefits. Seller shall retain any and all tax credits and tax benefits arising out of the ownership and operation of Seller's Facility and the generation of energy, including any production tax credits, any investment tax credits or any grants in lieu of such tax credits and including any renewable tax credit. Changes to any laws and regulations that provide for tax credits and benefits will not result in changes to this Agreement, including, without limitation, any amount payable by Cooperative under this Agreement.

d) Allocation of Taxes. Seller shall pay or cause to be paid when due, (a) all taxes and charges (however characterized) now existing or hereinafter imposed, that are imposed or levied by any Governmental Authority up to the Point of Interconnection, on the generation or sale of energy and Environmental Attributes from Seller to Cooperative hereunder, and (b) all taxes and charges (however characterized) now existing or hereinafter imposed on or with respect to the construction and operation of Seller's Facility. Cooperative shall pay or cause to be paid when due all existing and any new taxes imposed or levied at and after the Point of Interconnection upon a purchaser of energy or Environmental Attributes. If taxes are imposed or levied by a Governmental Authority on a Party in error or incorrectly, or on the wrong Party, the Parties shall work in good faith to cause such Governmental Authority to correct such error and levy or impose such taxes correctly. The rates provided in APPENDIX B (which includes compensation for both energy and Environmental Attributes as set forth in Section 1(a)) shall not be adjusted on the basis of any action of any Governmental Authority with respect to changes to or revocations of sales and use tax benefits, rebates, exception or give back.

## 2. Billing and Payment

a) Billing. By the tenth (10<sup>th</sup>) Working Day of each calendar month, Cooperative shall provide Seller or its designated agent with an invoice and computations for the charges due for the electric energy delivered to Cooperative in the preceding calendar month as determined in accordance with this Agreement. The invoice and computations will separately state the following for the preceding month: (1) the energy delivered to Cooperative from Seller's Facility during the preceding month in accordance with this Agreement; and (2) the amount due

by Cooperative under this Agreement for the delivered energy, calculated in accordance with the Purchase Power Rate set forth in APPENDIX B of this Agreement. If Cooperative fails to prepare and deliver an invoice by the tenth (10<sup>th</sup>) Working Day of any calendar month, Seller shall be entitled to prepare and present an invoice based on the information available to it regarding sales of energy during the previous month and Cooperative shall make payments in accordance therewith, except in the case of an error as determined in accordance with Section 2(d).

b) Payment. By the twentieth (20<sup>th</sup>) Working Day of each calendar month (but, no later than the last Working Day of that month if there are less than twenty (20) Working Days in that month), Cooperative shall make payment on such invoice. Should Seller so elect, Cooperative will make such payment by direct deposit into an account designated by Seller to Cooperative in writing.

c) Late Payments. Any payment not made to Seller by the twentieth (20<sup>th</sup>) Working Day of each calendar month (or the last Working Day of that month if there are less than twenty (20) Working Days in that month), shall accrue interest from such date at the Prime Rate as then most recently quoted in the "Money and Investing, Money Rates" section of *The Wall Street Journal* plus two percent (2%) ("Interest Rate") for the period until the outstanding interest and invoiced amounts (or amounts due to Seller if determined to be less than the invoiced amounts) are paid in full. Partial payments shall be applied first to outstanding interest and then to outstanding invoice amounts.

d) Adjustments. In the event adjustments are required to correct inaccuracies in an invoice after payment, the Party requesting adjustment shall recompute and include in the Party's request the amounts due during the period of the inaccuracy. The difference between the amount paid and that recomputed for the invoice shall either be (i) paid to Seller, or set-off by Cooperative against the next invoice payment to Seller, as appropriate, together with interest accrued on the difference at the Interest Rate from the date that such invoice was payable until the date that the difference is paid, or (ii) objected to by the Party responsible for such payment within thirty (30) days following its receipt of such request. In the case of an objection, the objecting Party, after giving reasonable advance written notice to the other Party, shall have the right to review all records pertaining to metering and billing with respect to Seller's Facility in the other Party's possession during normal working hours on Working Days. If the Parties are still unable to agree on the amount of any adjustment, then the dispute may be referred to dispute resolution in accordance with the procedures set forth in APPENDIX E. Notwithstanding the above, all claims for adjustments shall be waived for any deliveries of electric energy made more than thirty-six (36) months preceding the date of any such request.

e) Set Off. Cooperative may offset any payment due hereunder against amounts owing from Seller to Cooperative pursuant to this Agreement or any other agreement between the Parties. Cooperative's exercise of recoupment and set off rights shall not limit any other remedies available to Cooperative under this Agreement or such other agreement, or otherwise.

### 3. Delivery and Metering

a) Delivery at Point of Interconnection. Seller shall deliver energy sold hereunder to Cooperative at the Point of Interconnection, as defined in the Interconnection Agreement. Seller shall convey, and Cooperative shall accept, title to and risk of loss of all energy at the Point of Interconnection.

b) Metering and Annual Testing. Metering equipment at the Point of Interconnection for the measurement of electrical energy will be maintained by Cooperative. Cooperative will, at least once each year during the Term or any Extension thereof, test and calibrate the metering equipment for accuracy in the presence of Seller's representative, if Seller elects to have a representative present. Cooperative will provide Seller with a written statement containing the results of such meter readings and testing within ten (10) days following such testing. If said metering equipment is found to be inaccurate by more than two percent (2%), then an adjustment for the full amount of such inaccuracy in past billings will be made within thirty (30) days by one Party to the other on the basis that an inaccuracy so discovered shall be conclusively presumed to have existed for the second half of the period between the last meter test and the meter test in which the inaccuracy was discovered. Any payment owed as a result of such an adjustment shall be paid within ten (10) days of the adjustment. Cooperative shall bear its own costs for regular meter checks and reasonable maintenance of the metering equipment.

c) Seller's Requests for Testing. Seller shall have the right to request a meter check in writing if it reasonably believes there is an issue with the accuracy of such equipment and Cooperative will conduct such test within seven (7) days of the receipt of Seller's request. If said metering equipment is found to be inaccurate by more than two percent (2%), then Cooperative shall bear the cost of such meter check and the billing adjustments contemplated above shall be made. If said metering equipment is not found to be inaccurate by more than two percent (2%), then Seller shall bear the cost of such meter check. Seller may install its own metering equipment as a check against the information provided by Cooperative and in order to produce invoices in accordance with Section 2(a) of this Agreement. If the Parties are unable to agree on an adjustment, then the dispute may be referred to dispute resolution in accordance with the procedures set forth in APPENDIX E attached hereto and made a part hereof.

### 4. Credit Support

a) Letter of Credit and Secured Obligations. Seller shall deposit with Cooperative within five (5) Working Days of the execution of this Agreement an irrevocable standby letter of credit in the amount of \_\_\_\_\_ in a form and substance acceptable to Cooperative, from an issuer with an unsecured debt rating (not enhanced by third-party support) equivalent to A- or better as determined by both Standard & Poor's and Moody's ("Letter of Credit"). In addition, if such unsecured debt rating of the issuer is exactly equivalent to A-, the issuer must not be on credit watch or similar classification, or have a negative outlook by a rating agency. Such Letter of Credit must be consistent with this Agreement and shall include a provision for at least thirty (30) days advance notice to Cooperative of any expiration or earlier termination of the Letter of Credit should Seller fail to extend or replace the same. The form of the Letter of Credit must meet Cooperative's requirements to ensure that claims or draw-downs can be made unilaterally by Cooperative in accordance with the terms of this Agreement. Such Letter of

Credit must be issued for a minimum term of three hundred sixty (360) days. Seller shall cause the renewal, extension or replacement of the Letter of Credit such that a Letter of Credit satisfying the requirements of this Section 4(a) is in effect at all times prior to the date Seller's Facility achieves Commercial Operation, no later than thirty (30) days prior to each expiration date of the Letter of Credit. If the Letter of Credit is not renewed, extended or replaced as required herein, Cooperative shall have the right to draw immediately upon the Letter of Credit in full. The Letter of Credit shall be governed by the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Brochure No. 500 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, in which case the terms of the Letter of Credit shall govern.

b) Return of Letter of Credit. If there is an early termination of this Agreement that is not due to default by Seller and Cooperative agrees that no amounts remain outstanding and unpaid by Seller under this Agreement, Cooperative shall return the Letter of Credit to Seller.

c) Drawing on the Letter of Credit. Cooperative may make draws on the Letter of Credit in amounts equal to any (1) Liquidated Damages, (2) amounts owed pursuant to an indemnity claim under this Agreement, or (3) all damages provided for in APPENDIX C, in each case that are due and payable to Cooperative. Seller shall have no obligation to replenish such funds once drawn. Upon Commercial Operation, Cooperative may first draw from the Letter of Credit an amount equal to the amount of Liquidated Damages, if any, due to Cooperative, and Cooperative shall then surrender the Letter of Credit to Seller.

## **5. Term**

The term of this Agreement shall commence on the Execution Date and shall remain in effect for a term of twenty (20) years from the date Commercial Operation is achieved (the "Term").

## **6. Conditions Precedent**

a) Effectiveness Prior to Satisfaction of Conditions Precedent. On and after the Execution Date, the Parties shall endeavor in good faith, and shall use commercially reasonable efforts, to satisfy the conditions precedent set forth in this Section 6 without undue delay and by the deadline applicable to each condition precedent. Except where obligations of the Parties are explicitly stated as being effective before the conditions precedent are satisfied, only Section 5 (Term and Termination), Section 6 (Conditions Precedent), Section 9 (Indemnification), Section 11 (Assignment; Change of Control), Section 13 (Force Majeure), Section 14 (Warranties and Representations) and Section 18 (Miscellaneous) of this Agreement shall become effective on the Execution Date.

b) Conditions Precedent. Except as specifically provided in Section 6(a), the Parties' obligations under this Agreement are subject to the timely satisfaction of the following conditions precedent by the dates listed below (each a "Deadline"):

- (1) Receipt by Seller of the Necessary Permits within nine (9) months of the Execution Date (see Section 6(c)(1) below);

(2) Receipt by Cooperative of a Non-Appealable PUC Approval Order within nine (9) months after the Execution Date (see Section 6(c)(2) below); and

(3) Receipt by Cooperative of RUS Approval within forty five (45) days after satisfaction of the condition precedent in clause (3) (see Section 6(c)(3) below).

c) Efforts Towards Conditions Precedent.

(1) Necessary Permits. Promptly following the Execution Date, Seller, at its sole cost and expense, shall use commercially reasonable efforts to apply for and obtain any and all necessary zoning, licenses, permits, and other governmental authorizations for construction of Seller's Facility (collectively, the "Necessary Permits").

(2) PUC Approval Order. No later than sixty (60) days after the Execution Date, Cooperative shall submit an application requesting a decision and order from the PUC that (a) approves this Agreement, (b) finds and/or determines that the purchased energy charges to be paid by Cooperative under this Agreement are just and reasonable, (c) determines that the purchased power arrangements (e.g., terms and conditions) under this Agreement are prudent and in the public interest, and (d) authorizes all of the purchased energy charges to be paid by Cooperative to Seller under this Agreement (including related revenue taxes) to be included in Cooperative's Energy Rate Adjustment Clause (or equivalent) for the Term of this Agreement, to the extent such charges are not otherwise recovered through Cooperative's rates. For purposes of this Agreement, a "Non-Appealable PUC Approval Order" is a decision and order issued by the PUC that (1) grants or issues each of the approvals, findings, determinations and authorizations set forth above, in form and substance acceptable to Cooperative and without the imposition of any conditions unacceptable to Cooperative; and (2) is not subject to appeal to any circuit or appellate court of the State of Hawaii and/or the Supreme Court of the State of Hawaii, or, if appealed, is subsequently affirmed on appeal to any circuit or appellate court of the State of Hawaii or the Supreme Court of the State of Hawaii and is not subject to further appeal. Seller shall cooperate reasonably with Cooperative's efforts to obtain a Non-Appealable PUC Approval Order. Cooperative shall bear the cost of obtaining such approval.

(3) RUS Approval or Notice. No later than sixty (60) days after the Execution Date, Cooperative shall request approval from, or give notice to, the Rural Utilities Service, an agency of the United States Department of Agriculture ("RUS"), regarding this Agreement, as required by Cooperative's loan contract, mortgage, or indenture with RUS ("RUS Approval or Notice"). Seller shall cooperate reasonably with Cooperative's efforts in connection with the RUS Approval or Notice. Cooperative shall bear the cost of the RUS Approval or Notice.

d) Failure to Meet a Condition Precedent. If a condition precedent is not timely satisfied in accordance with Section 6(b), then the Party responsible for the timely satisfaction of such condition precedent (the "Obligated Party") shall give the other Party notice no later than three (3) days prior to the Deadline for such condition precedent explaining the circumstances pertaining to its failure and providing a date by when the Obligated Party reasonably believes it



can satisfy the condition precedent, if at all. If an extension of time or a waiver of the condition is requested as part of said notice, the other Party then has seven (7) days to agree to such request. Any such extension or waiver shall be in writing and signed by both parties. In any event and whether or not the Obligated Party has submitted a notice to the other party, either party may terminate this Agreement after ten (10) days have passed since the Obligated Party missed the Deadline for any condition precedent. Any termination under this Section 6 shall be without further liability whatsoever to either Party.

**7. Construction Milestones**

a) Schedule. Seller will follow the following schedule with respect to construction of Seller’s Facility (“Construction Milestone Schedule”):

	<i>Construction Milestones</i> (collectively, the "Construction Milestones")	<i>Milestone Date</i>
1.	Seller shall provide to Cooperative copies of executed documents providing Seller a leasehold, right of way, easement, or other interest in the site of Seller’s Facility sufficient to allow Seller to construct and operate Seller’s Facility to be interconnected with Cooperative’s System in accordance with the terms of this Agreement	
2.	Seller shall provide Cooperative a copy of the executed Engineering, Procurement and Construction (“EPC”) Contract	
3.	Seller shall have obtained all Necessary Permits	
4.	Seller shall have achieved closing on financing for Seller’s Facility or otherwise provided Cooperative with evidence reasonably satisfactory to Cooperative of Seller’s financial capability to construct and operate Seller’s Facility in accordance with the terms of this Agreement	
5.	Seller or its EPC contractor shall have broken ground and begun construction at the site for Seller’s Facility	
6.	Seller or its EPC contractor shall have commenced initial testing of Seller’s Facility	
7.	Seller’s Facility shall have achieved Commercial Operation	Projected In-Service Date

b) Changes to Seller's Facility. After Seller's Facility achieves Commercial Operation, Seller agrees that no changes or additions to Seller's Facility shall be made without prior written approval by Cooperative and amendment to this Agreement, unless such changes or additions to Seller's Facility could not reasonably be expected to have a material effect on the operations and output of energy produced at Seller's Facility.

c) Liquidated Damages for Delay. With the exception of the Commercial Operation date milestone, if Seller fails to achieve any other Construction Milestone, then Seller shall pay to Cooperative [ \$\_\_\_\_ ] per month in Liquidated Damages until Seller is current with respect to the Construction Milestone Schedule. If Seller fails to achieve Commercial Operation by the Projected In-Service Date, then Seller shall pay to Cooperative [ \$\_\_\_\_\_ ] for the first month and [ \$\_\_\_\_\_ ] for each additional month thereafter as Liquidated Damages, until such date that Commercial Operation is achieved. In no event shall Liquidated Damages under this section exceed [ \$\_\_\_\_\_ ]. Liquidated Damages shall be due and payable upon invoice from Cooperative and shall be prorated to the extent the delays were remedied before the end of a month. For the purpose of this Section, a month shall begin on the first day on which Seller is late in achieving a Construction Milestone and shall be measured by the subsequent anniversaries of such date.

d) Return of Liquidated Damages. To the extent Liquidated Damages were incurred and paid based on Seller's failure to achieve any Construction Milestone other than the Commercial Operation date milestone, Cooperative will return such amounts if Seller achieves Commercial Operation by the Projected In-Service Date; provided, further, that in such cases Cooperative will also waive its right to such Liquidated Damages that were incurred but unpaid.

e) Retention of Liquidated Damages. If Seller does not achieve Commercial Operation by the Projected In-Service Date, Cooperative will be entitled to all Liquidated Damages incurred under this Section 7 and will have such further rights as described in APPENDIX C.

f) Liquidated Damages as a Reasonable Estimate of Damages. Seller acknowledges that the timely completion of Seller's Facility has an urgent time value to Cooperative, and that Seller's failure to timely achieve Commercial Operation and the other Construction Milestones shall cause Cooperative to incur substantial damages that are difficult or impractical to exactly ascertain or compute. Seller has reviewed the Liquidated Damages amounts as stated herein, and has had a full and fair opportunity to inquire into and be informed as to the method of the calculation of the stated amount of Liquidated Damages. Seller agrees that the Liquidated Damages amount is in fact a reasonable pre-estimate of the amount of actual damages that Cooperative is likely to incur upon Seller's delayed progress and late completion of Seller's Facility, and Seller hereby waives all right and ability to challenge or dispute the amount of such Liquidated Damages, which Seller agrees are fully enforceable upon Seller for any failure to comply with the Construction Milestone Schedule.

g) Right of Cooperative to Witness Testing and Receive Reports. Seller shall provide Cooperative the opportunity to witness all testing of Seller's Facility for purposes of demonstrating that it has achieved Commercial Operation, and all reports of such testing, as required by the Interconnection Agreement.

## 8. Labor Requirements

a) Preference for Kauai Residents. Seller and any of its contractors/subcontractors shall use reasonable efforts to give preference in hiring to qualified Kauai residents.

b) Equal Employment Opportunity. Seller is aware of and is fully informed of Seller's responsibilities under Executive Order 11246 (reference to which include amendments and orders superseding in whole or in part) and shall be bound by and agrees to all applicable provisions as contained in Section 202 of said Executive Order and the Equal Opportunity Clause as set forth in 41 CFR 60-1.4 and 41 CFR 60-741.5(a), which clauses are hereby incorporated by reference. (Applicable to all contracts of \$10,000 or more in the whole or aggregate. 41 CFR 60-1.4 and 41 CFR 60-741.5.)

c) Equal Opportunity for Disabled Veterans, Recently Separated Veterans, Other Protected Veterans, and Armed Forces Service Medal Veterans. If applicable to Seller under this Agreement, Seller agrees that it is and will remain in compliance with all applicable rules and regulations promulgated under The Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, including the requirements of 41 CFR 60-250.5(a) (for orders/contracts entered into before December 31, 2003) and 41 CFR 60-300.5(a) (for order/contracts entered into or modified on or after December 31, 2003), which are incorporated into this Agreement by reference. (Applicable to: (i) all contracts of \$25,000 or more entered into before December 31, 2003 (41 CFR 60-250.4) and (ii) each federal government contract of \$100,000 or more, entered into or modified on or after December 31, 2003 (41 CFR 60-300.4) for the purchase, sale, or use of personal property or nonpersonal services (including construction).)

## 9. Indemnification

a) Indemnity by Seller. Seller shall release, indemnify and hold harmless Cooperative and Cooperative's Related Persons from any and all loss, claims, actions or suits, including costs and attorneys' fees, brought by a Third Party and arising out of or in any way connected with (i) the energy generated and delivered under this Agreement up to the Point of Interconnection, (ii) Seller's construction, operation and/or maintenance of Seller's Facility, (iii) patent infringement arising out of Seller's performance under this Agreement, (iv) a breach by Seller of its covenants, representations, and warranties or obligations under this Agreement, including, without limitation, any loss, claim, action or suit, for or on account of injury, bodily or otherwise, to or death of persons, or for damage to or destruction of property belonging to Cooperative or others; provided, however, that Seller's obligations under this Section 9(a) shall not extend to any loss, claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Cooperative or Cooperative's Related Persons.

b) Indemnity by Cooperative. Cooperative shall release, indemnify and hold harmless Seller and Seller's Related Persons against and from any and all loss, claims, actions, or suits, including costs and attorneys' fees, brought by a Third Party and arising out of or in any way connected with (i) the energy delivered by Seller under this Agreement at or after the Point of Interconnection, (ii) operation and/or maintenance of Cooperative's System, or (iii) a breach by Cooperative of its covenants, representations, and warranties or obligations hereunder,

including, without limitation, any loss, claim, action or suit, for or on account of injury, bodily or otherwise, to or death of persons, or for damage to or destruction of property belonging to Seller or others; provided, however, that Cooperative's obligations under this Section 9(b) shall not extend to any loss, claim, action or suit as may be caused solely by the willful misconduct or gross negligence of Seller or Seller's Related Persons.

c) No Duties; No Dedication of System. Nothing in this Agreement shall be construed to create any duty to, any standard of care with reference to, or any liability to any person not a Party to this Agreement or a Party's Related Persons. No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or the public, nor affect the status of Cooperative as an independent public utility cooperative or Seller as an independent individual or entity.

## **10. Insurance**

a) Evidence of Coverage. Seller shall, at least thirty (30) days prior to the commencement of any work on Seller's Facility, and thereafter, on or before June 1 of each year of the Term or any Extension thereof, provide Cooperative with copies of insurance certificates reasonably acceptable to Cooperative evidencing the insurance coverages required to be maintained by Seller in accordance with APPENDIX F and this Section 10. Such certificates shall (a) provide that Cooperative shall receive no less than thirty (30) days prior written notice of non-renewal, cancellation of, or material modification to any of the above policies (except that such notice shall be ten (10) days for cancellation due to non-payment of premiums); (b) provide a waiver of any rights of subrogation against Cooperative, Cooperative's Related Persons and Cooperative's contractors; and (c) contain such other endorsements and terms as required hereunder.

b) Additional Requirements. All policies shall be written with insurers that Cooperative, in its reasonable discretion, deems acceptable (such acceptance shall not be unreasonably withheld or delayed by Cooperative). The insurance required hereunder shall provide that it is primary with respect to Seller and Cooperative. "Claims made" policies are not acceptable.

c) Seller's Liability. Seller's indemnity and other liabilities arising under or related to its performance of this Agreement shall not be limited by the foregoing insurance requirements. Any deductible shall be the responsibility of Seller.

## **11. Assignment; Change of Control**

a) Restrictions on Assignment. This Agreement may not be assigned by either Cooperative or Seller without the prior written consent of the other Party (such consent not to be unreasonably withheld, conditioned, or delayed); provided, however, that:

(1) Seller shall have the right, without the consent of Cooperative, to assign all or any part of its rights, benefits, or obligations under this Agreement solely and exclusively for the purposes of arranging or rearranging debt and/or an equity or lease financing for Seller's Facility, collaterally assigning its interest in this Agreement in connection with a debt financing or a tax equity financing to any Financing Party; and

(2) Notwithstanding any other provision of this Agreement, Cooperative, without Seller's consent, may assign, transfer, mortgage or pledge its interest in this Agreement to create a security interest for the benefit of any lender of the Cooperative, including the United States of America, acting through the RUS (an "Assignment for Security"). Thereafter, the lender, without the consent of Seller or its lenders, may cause its interest in this Agreement to be sold, assigned transferred or otherwise disposed of to a Third Party pursuant to the terms governing such Assignment for Security; and

(3) Cooperative may assign, without the consent of Seller, all or any part of its rights, benefits, or obligations to a wholly-owned subsidiary or to an affiliated company under common control with Cooperative.

In the case of an assignment under Section 11(a)(1) or (2), the non-assigning Party agrees to enter into a consent or consents to assignment with any permitted assignee containing terms and conditions that are customary for transactions of this kind. The Parties agree to cooperate in good faith in this regard and to provide other customary and reasonable documents and acknowledgments as permitted assignees may reasonably request.

b) Restrictions on Changes of Control of Seller. Seller shall be prohibited from entering into any transaction or series of transactions that result in a Change of Control (as defined below) without the written consent of Cooperative (such consent not to be unreasonably withheld, conditioned, or delayed). For purposes of this Agreement, "Change of Control" means (1) any change of more than twenty percent (20%) in the equity ownership of Seller or in any of Seller's upstream Affiliates, including [Add name of Seller's current parent company], and (2) any change in equity ownership such that [Add name of Seller's current parent company] ceases to own and control, directly or indirectly through a series of Persons, at least fifty one percent (51%) of the voting interests of Seller on a fully diluted basis.

c) Restrictions on Sale of Seller's Assets. Seller shall not sell all or substantially all of its assets without the written consent of Cooperative (such consent not to be unreasonably withheld, conditioned, or delayed).

## **12. Sale of Energy to Third Parties**

Cooperative shall have the right to purchase all energy produced for sale by Seller's Facility at the price and on the terms and conditions stated in this Agreement; provided, however, that Seller may consume energy produced at Seller's Facility for its own use in operating Seller's Facility. Seller shall not sell energy from Seller's Facility to any Third Party or subsidiaries or affiliates of Seller; provided, however, if this Agreement is terminated by either Party in accordance with its terms or if Cooperative refuses to accept and purchase energy such that a Cooperative Event of Default has occurred and is continuing, Seller shall have the right to sell power to a Third Party as allowed within the then-existing regulatory framework to the extent permitted by applicable law.

## **13. Force Majeure**

a) Force Majeure Events. A force majeure event ("Force Majeure") shall occur if a Party shall be wholly or partially prevented from performing any of its obligations under this

Agreement by reasons of or through acts reasonably beyond its control, including labor strikes, lightning, rain, earthquake, wind, riots, fire, flood, invasion, insurrection, lava flow or volcanic activity, tidal wave, civil commotion, accident, war, any act of God or the public enemy, or any other similar cause beyond the Party's reasonable control that was not caused by the negligence or lack of due diligence by the Party claiming Force Majeure or that Party's Related Persons. As a result of Force Majeure, the Party claiming Force Majeure shall be excused from whatever performance is prevented by such event to the extent and during the period so prevented, in which case any applicable time periods (excluding the Term or any Extension) shall be extended on a day for day basis, and the claiming Party shall not be liable for any damage or loss resulting therefrom.

b) Events Not Considered Force Majeure. Notwithstanding anything in this Agreement to the contrary, equipment breakdown or the inability of Seller to use equipment due to its design, construction, operation, maintenance, the inability of Seller to meet regulatory standards, or the failure by Seller to obtain on a timely basis or to maintain a necessary permit or other regulatory approval, shall not be considered Force Majeure unless Seller can conclusively demonstrate, to the reasonable satisfaction of Cooperative, that the event was beyond Seller's reasonable control, and was not caused by the negligence or lack of due diligence by Seller or Seller's Related Persons. Also notwithstanding anything in this Agreement to the contrary, the term Force Majeure does not include (i) the inability of Seller to procure equipment for Seller's Facility or any component parts therefor, for any reason (the risk of which is assumed by Seller), (ii) any acts or omissions of any Third Party, including any vendor, materialman, customer, or supplier of Seller, unless such acts or omissions are themselves excused by reason of Force Majeure; (iii) the failure to abide by Good Engineering and Operating Practices, and (iv) changes in market conditions that affect the cost of supplies, or that affect demand or price for power and/or Environmental Attributes.

c) Claiming Force Majeure. The Party claiming an event of Force Majeure shall use reasonable efforts to give written notice of such event to the other Party as soon as reasonably possible and in no event more than seven (7) days after the Party claiming an event of Force Majeure has knowledge that such event may affect its performance hereunder. In addition, the Party claiming an event of Force Majeure shall use reasonable diligence, to the extent practicable, to limit the impact of such event on the performance of its obligations under this Agreement; provided, however, that the requirement to use reasonable diligence shall not be construed to require the resolution of labor disputes involving employees of parties other than Seller or Cooperative. The Party claiming an event of Force Majeure shall resume performance under this Agreement as soon as it is able, and shall promptly give notice of such resumption to the other Party.

d) Force Majeure and Accrued Payment Obligations. Notwithstanding the foregoing, Force Majeure shall not excuse the failure to satisfy any payment obligation that has accrued under this Agreement prior to the Force Majeure event.

e) Termination for Extended Force Majeure. If a Party is unable to render full performance under this Agreement for a period of more than [\_\_\_\_] consecutive months due to Force Majeure, the other Party may terminate this Agreement. Any termination under this Section 13(e) shall be without further liability whatsoever to either Party.

**14. Warranties and Representations**

a) Cooperative and Seller each separately represent and warrant, respectively, that:

(1) Each respective Party has all necessary right, power and authority to execute, deliver and perform under this Agreement.

(2) The execution, delivery and performance of this Agreement by each respective Party will not result in a violation of any law or regulation of any Governmental Authority, or conflict with, or result in a breach of, or cause a default under, any agreement or instrument to which such Party is also a Party or by which it is bound.

(3) This Agreement constitutes a legally valid and binding obligation enforceable against it in accordance with its terms.

b) Seller's Corporate Structure Representation. Seller represents that the diagram provided in Attachment A-1 to APPENDIX A sets forth a true and correct diagram, as of the Execution Date, of its corporate and equity ownership structure, including all parent companies, Affiliates, subsidiaries, joint-ventures and any other significant equity owner/ownership relationship that Seller has with another Person.

c) Seller's Good Standing. Seller represents and warrants that it is an entity in good standing with the Hawaii Department of Commerce and Consumer Affairs and shall provide Cooperative with a certified copy of a certificate of good standing by the Execution Date.

d) Cooperative's Good Standing. Cooperative represents and warrants that it is an entity in good standing with the Hawaii Department of Commerce and Consumer Affairs and shall provide Seller with a certified copy of a certificate of good standing by the Execution Date.

e) CBRE Tariff. Seller agrees and warrants that it shall at all times comply with and be subject to the terms, provisions and restrictions set forth in the CBRE Tariff.

**15. Access, Information and Coordination**

a) Accounting Information. Each Party shall reasonably cooperate with the other Party and respond to reasonable requests for information if and to the extent either Party's accountants reasonably conclude that such Party needs information from the other Party in order to complete its financial statements or comply with financial reporting requirements.

b) Information Required by a Governmental Authority. Each Party shall, promptly upon written request from the other Party, provide the other Party with all data related to this Agreement required for reports to, and information requests from, any Governmental Authority in connection with a proceeding before any Governmental Authority or otherwise. The Parties shall use reasonable efforts to provide this information to the other Party with sufficient advance notice to enable the other Party to review such information and meet any submission deadlines imposed by the requesting organization or entity.

c) Site Access. Upon reasonable prior notice and subject to the prudent safety requirements of Seller, and requirements of law relating to workplace health and safety, Seller shall provide Cooperative and Cooperative's Related Persons with reasonable access to Seller's Facility. Cooperative shall release Seller against and from any and all liabilities resulting from actions or omissions by Cooperative and Cooperative's Related Persons in connection with their access to Seller's Facility, except to the extent that such damages are caused or exacerbated by the intentional or grossly negligent act or omission of Seller.

d) Confidentiality. Information provided under this Section 15 is subject to the confidentiality requirements in Section 18(h) if the Party producing the information designates such information as confidential.

## **16. Good Engineering and Operating Practices and Securities Acts**

Seller shall construct, operate and maintain Seller's Facility and perform all obligations required to be performed by it under this Agreement in accordance in all material respects with Good Engineering and Operating Practices and applicable laws, rules, orders and tariffs.

Seller acknowledges and agrees that Seller's Facility and/or Seller's participation in the CBRE Program may be subject to Hawaii's Uniform Securities Act, Chapter 485A, Hawaii Revised Statutes, and/or any federal securities laws (collectively, the "Securities Acts"), and in such case, Seller agrees to register under, disclose all information as required by, and otherwise comply with all obligations under, the Securities Acts, at Seller's sole cost and expense.

## **17. Outage Coordination**

### a) Scheduled Outages.

(1) Three (3) months prior to the Projected In-Service Date and, thereafter, by July 1 of each year, Seller shall deliver to Cooperative the proposed schedule of maintenance outages ("Planned Outages") for Seller's Facility for the subsequent calendar year (and in the case of the first Planned Outages schedule, also for the remainder of the then-current calendar year). Seller shall take manufacturers' recommendations and Good Engineering and Operating Practices into account when establishing the schedule for Planned Outages.

(2) Within thirty (30) days of receiving the proposed schedule for Planned Outages from Seller, Cooperative may propose amendments thereto. Seller shall not unreasonably withhold its consent to such proposed amendments, provided that, it shall not be unreasonable for Seller to withhold its consent to any such proposed amendments that would be contrary to Good Engineering and Operating Practices.

(3) Seller shall be entitled to change the schedule of Planned Outages if such a change is required to comply with Good Engineering and Operating Practices, provided that: (A) any change to a Planned Outage that has a planned duration of two (2) days or less shall require at least one (1) month's prior written notice to Cooperative, and (B) any change to a Planned Outage that has a planned duration of greater than two (2) days shall require at least three (3) months' prior written notice to Cooperative.



b) Unplanned Outages. Any outage of all or any portion of Seller's Facility other than a Planned Outage scheduled in accordance with Section 17(a) or an outage caused by Force Majeure shall be an "Unplanned Outage" and may, depending on the circumstances, give rise to an Event of Default under APPENDIX C. Seller shall immediately notify Cooperative by telephone call (with confirmation to follow by written notice in each case) upon discovering that Seller's Facility is going to be unable to deliver energy as a result of an Unplanned Outage and, as soon as reasonably practicable following such discovery, shall notify Cooperative in writing of its best estimate of the expected duration of such Unplanned Outage. Such estimate by Seller shall be based on the best information available to it. Should Seller expect any further changes in the duration of any such Unplanned Outage, it shall promptly notify Cooperative.

c) Curtailement. Notwithstanding anything in this Agreement, the Interconnection Agreement or otherwise to the contrary, Cooperative shall have the right, without payment to Seller, to Curtail electric energy delivery to Cooperative from Seller's Facility during any "curtailment condition" (as that term is defined in the CBRE Tariff). Cooperative shall use reasonable efforts to provide Seller with notice prior to or as soon as practicable following the Curtailment. The priority and level of Curtailment that each "Eligible Renewable Energy Project" (as that term is defined in the CBRE Tariff), including Seller's Facility, will be subject to shall be determined by Cooperative based on each project's applicable Purchase Power Rate, whereby, subject to actual power available from each project at the given time of Curtailment, the project(s) with the highest Purchase Power Rate will be subject to Curtailment first and the project(s) with the lowest Purchase Power Rate will be subject to Curtailment last. To the extent more than one project has the same Purchase Power Rate, then, depending on the actual power available from each such project at the given time of Curtailment, Cooperative shall endeavor to Curtail the project(s) with the same Purchase Power Rate by first Curtailing the project with the most recently achieved Commercial Operation Date first and the earliest calendared Commercial Operation Date last and/or through some other allocation method as Cooperative may deem equitable under the circumstances present at the time of such Curtailment.

## **18. Miscellaneous**

a) Amendments. Any amendment or modification of this Agreement or any part hereof shall not be valid unless in writing and signed by the Parties. Any waiver hereunder shall not be valid unless in writing and signed by the Party against whom waiver is asserted.

b) Binding Effect. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors, legal representatives, and permitted assigns.

c) Notices. Any written notice provided hereunder shall be delivered personally or sent by registered or certified first class mail, with postage prepaid, to the other Party at the following address:

Cooperative:

Kauai Island Utility Cooperative  
4463 Pahe'e Street, Suite 1  
Lihue, HI 96766-2000  
Attn: CEO & President  
Fax: (808) 246-8257

Seller: The mailing address listed in APPENDIX A attached hereto.

Notice sent by mail shall be deemed to have been given on the date of actual delivery. Any Party hereto may change its address for written notice by giving written notice of such change to the other Party hereto. Any notice delivered by facsimile must be followed by personal or mail delivery and the effective date of such notice shall be the date of personal delivery or, if by mail, the actual date of delivery.

d) Effect of Section and Appendix Headings. The headings or titles of the several sections and appendices hereof are for convenience of reference and shall not affect the construction or interpretation of any provision of this Agreement.

e) Non-Waiver. No delay or forbearance of Cooperative or Seller in the exercise of any remedy or right will constitute a waiver thereof, and the exercise or partial exercise of a remedy or right shall not preclude further exercise of the same or any other remedy or right.

f) Relationship of the Parties. Nothing in this Agreement shall be deemed to constitute either Party hereto as partner, agent or representative of the other Party or to create any fiduciary relationship or joint venture between the Parties. Seller does not hereby dedicate any part of Seller's Facility to serve Cooperative, Cooperative's customers or the public.

g) Merger Clause. This Agreement, together with the Interconnection Agreement, constitutes the entire and final agreement between the Parties. This Agreement, together with the Interconnection Agreement, contains the complete and exclusive expression of the Parties' agreement on the matters contained in this Agreement. All prior and contemporaneous negotiations and agreements between the Parties on the matters contained in this Agreement are expressly merged into and superseded by this Agreement. The provisions of this Agreement may not be explained, supplemented or qualified through evidence of trade usage or a prior course of dealings. In entering into this Agreement, neither party has relied upon any statements, representation or agreement of the other Party except for those expressly contained in this Agreement or the Interconnection Agreement. There are no conditions precedent to the effectiveness of, and obligations under, this Agreement other than those expressly stated in this Agreement and the Interconnection Agreement.

h) Confidentiality. All non-public information provided by either Party to the other or which is identified by the disclosing Party in writing as confidential or proprietary information shall be treated in a confidential manner and shall not be disclosed to any Third Party without the prior written consent of the non-disclosing Party, which consent shall not be unreasonably

withheld. Notwithstanding the preceding, this Section and the restrictions herein contained shall not apply to any data or documentation which is: (1) required to be disclosed pursuant to state or federal law, an order or requirements of a regulatory body or a court, after five (5) Working Days notice of such intended disclosure is given by the disclosing Party to the non-disclosing Party or if five (5) Working Days notice is not practical, then such shorter notice as is practical, and after providing the non-disclosing Party a reasonable opportunity to oppose such disclosure before the applicable regulatory body or court; (2) disclosed by a Party to an Affiliate of such Party or in connection with an assignment permitted by Section 11; or (3) is as of the time of disclosure, public knowledge without the fault of the disclosing Party. It is understood by the Parties that the pricing terms of this Agreement will be considered public information as of the date of the earliest of Cooperative's filings with the PUC and RUS, but will be treated as confidential until such date unless otherwise agreed to by the Parties.

i) Publicity. Each Party agrees that it shall not issue any press release or media statement regarding this Agreement or the Seller's Facility without the prior consent of the other, and each Party agrees not to unduly withhold or delay any such consent.

j) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Hawaii. The venue for a civil action related to this Agreement shall be the judicial circuit in which Seller's Facility is located.

k) Limitations. Nothing in this Agreement shall limit Cooperative's ability to exercise its rights as specified in Cooperative's Tariff as filed with the PUC, or as specified in General Order No. 7 of the PUC's Standards for Electric Utility Service in the State of Hawaii, as either may be amended from time to time.

l) Further Assurances. Each of the Parties shall from time to time and at all times do such further acts and deliver all such further documents and assurances as shall be reasonably necessary to fully perform and carry out this Agreement.

m) Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same agreement. An executed counterpart of this Agreement transmitted and received by facsimile or other electronic communication (i.e. PDF) shall be deemed for all purposes to be an original, executed counterpart hereof.

n) Definitions. Terms used in this Agreement not otherwise defined in the context in which they first appear are defined in APPENDIX D.

o) Severability. If any term or provision of this Agreement, or the application thereof to any person, entity or circumstances is to any extent invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

p) Settlement of Disputes. Any dispute or difference arising out of this Agreement or concerning the performance or the non-performance by either Party of its obligations under

this Agreement may be referred by either Party to dispute resolution in accordance with the procedures set forth in APPENDIX E.

q) Recovery of Payments. No change may be made in any of the terms and conditions of this Agreement except by written agreement of the Parties. The Parties to this Agreement believe, and have entered this Agreement relying on the belief, that after a satisfactory, Non-Appealable PUC Approval Order has been obtained: (i) no adjustment in the payments to be paid Seller under the provisions of this Agreement is either appropriate or lawful in the absence of an amended agreement signed by the Parties and approved by the PUC; and (ii) in light of the foregoing and of the requirement that, under PURPA and 18 Code of Federal Regulations (“CFR”) Part 292, Cooperative must offer to purchase energy made available from a Qualifying Facility (as defined under PURPA) at a price equal to or less than Cooperative’s avoided cost, it is neither appropriate nor lawful for the PUC or any successor entity to deny Cooperative the recovery of any or all amounts paid to Seller pursuant to the terms of this Agreement. Cooperative will exercise commercially reasonable efforts, and Seller shall cooperate with Cooperative, to resist and appeal any PUC actions, decisions, or orders denying or having the effect of denying or otherwise preventing Cooperative from recovering any or all amounts paid to Seller pursuant to the terms of this Agreement.

r) PURPA Waiver. Seller acknowledges this Agreement as a source of compensation specifically set forth pursuant to the CBRE Tariff as approved by the PUC, agrees that the price for energy under this Agreement satisfies the requirements of 18 C.F.R. Section 292.304(a), and hereby waives any present or future claim to compensation pursuant to Section 210(b) of PURPA or FERC's regulations at 18 C.F.R. Section 292.304 during the initial Term of this Agreement and any Extensions.

s) Patents. Seller agrees that in fulfilling its responsibilities under this Agreement, it will not use any process, program, design, device or material that infringes on any United States patent.

(signature page to follow)

IN WITNESS WHEREOF, Cooperative and Seller have executed this Agreement as of the Execution Date.

KAUAI ISLAND UTILITY COOPERATIVE

By: \_\_\_\_\_  
Name: David J. Bissell  
Title: President & CEO

"Cooperative"

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

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

"Seller"

(Signature page to Purchase Power Agreement)

APPENDIX A:  
DESCRIPTION OF SELLER'S FACILITY

Name of Seller's Facility:  
Location:  
Telephone number (for system emergencies):  
Mailing Address:  
Owner:  
Operator:

Name of person to whom payments are to be made:  
Mailing address for payments:  
Hawaii General Excise Tax License number:  
Equipment:  
Insurance carrier(s):

If Seller is not the operator, Seller shall provide a copy of the agreement between Seller and the operator which requires the operator to operate Seller's Facility and which establishes the scope of operations by the operator and the respective rights of Seller and the operator with respect to the production of electric energy from Seller's Facility no later than Commercial Operation. Such agreement shall be treated as non-public information pursuant to Section 18(h) of this Agreement. Seller shall provide a certificate warranting that the operator is a corporation, partnership or limited liability company in good standing with the Hawaii Department of Commerce and Consumer Affairs.

If Seller is the operator, Seller shall provide a certified copy of a certificate warranting that Seller is a corporation, partnership or limited liability company in good standing with the Hawaii Department of Commerce and Consumer Affairs.

Seller shall provide Cooperative a description of its ownership structure.

Please see attached organizational chart: See Attachment A-1.

A description of Seller's Facility is provided on Attachment A-2.

ATTACHMENT A-1:  
SELLER'S OWNERSHIP STRUCTURE

ATTACHMENT A-2:  
DESCRIPTION OF SELLER'S FACILITY



APPENDIX B:  
ENERGY PURCHASES BY THE COOPERATIVE

Cooperative's Purchase Obligation.

Subject to the provisions of this Agreement, Cooperative shall accept and pay for the entire net energy generated by Seller's Facility and delivered by Seller to Cooperative at the Point of Interconnection.

Purchase Power Rate.

Cooperative and Seller hereby confirm and agree that: (i) the "CBRE Subscription Rate" applicable to this Agreement is \$\_\_\_\_\_ [Insert the rate resulting from the CBRE Project Solicitation process, which rate may not exceed \$0.19143/kWh], and (ii) the "CBRE Unsubscribed Rate" applicable to this Agreement is \$\_\_\_\_\_ [Insert either the Class I or Class II CBRE Unsubscribed Rate set forth in the CBRE Tariff, as applicable\*\*].

Cooperative and Seller also hereby confirm and agree that, except as otherwise provided in this Agreement and/or the CBRE Tariff, Cooperative shall pay for energy delivered at the Point of Interconnection during the term of this Agreement at a Purchase Power Rate equal to the weighted average of the CBRE Subscription Rate and CBRE Unsubscribed Rate set forth above, in accordance with the weighting formula set forth in the CBRE Tariff, at Section C.3 (Purchase Power Rate). As a result, Seller confirms and acknowledges that the Purchase Power Rate under this Agreement will vary depending on the amount of capacity purchased (i.e., subscribed to) by customer participants in accordance with the CBRE Tariff. Seller also confirms and agrees that the Purchase Power Rate includes compensation for both energy and Environmental Attributes.

**[If the facility is a Class I Eligible Renewable Energy Project, include the following:** Cooperative and Seller hereby further agree and confirm that, as stated in the CBRE Tariff, at Section B (Eligible Renewable Energy Projects) and Section C (Purchase Power Rates), Seller will not receive any payment for any "Excess Class I Peak Irradiance Output" produced by Seller's Facility.]

Test Energy.

Cooperative shall use its reasonable efforts to accept test energy that is delivered as part of the normal testing for \_\_\_\_\_ generators prior to Commercial Operation, at the Purchase Power Rate for the Term set forth above; provided Seller must coordinate such normal testing with Cooperative so as to minimize adverse impacts on Cooperative's System and operations.

APPENDIX C:  
DEFAULT AND REMEDIES

1. Events of Default of Seller. The following shall constitute an event of default by Seller if not excused pursuant to Section 13 (Force Majeure) (each a “Seller Event of Default”):
  - a. Seller fails to meet any Construction Milestone, unless such failure is due to action or inaction by Cooperative;
  - b. Seller fails to achieve Commercial Operation within twelve (12) months of the Projected In-Service Date;
  - c. If all or any portion of Seller’s Facility is taken offline due to Unplanned Outages in any one (1) year period for an aggregate amount of time exceeding 1,890 hours or for more than six (6) separate Unplanned Outages lasting more than twenty four (24) hours each;
  - d. Seller, by act or omission, fails to comply with any other material covenant, condition or other provision of this Agreement, the Interconnection Agreement and/or the CBRE Tariff, and fails to cure such non-compliance to Cooperative’s satisfaction within thirty (30) days after written notice of such non-compliance from Cooperative, unless such non-compliance cannot be cured within thirty (30) days and Seller is making diligent efforts to cure such non-compliance; provided, however, that if such non-compliance is not cured to Cooperative’s satisfaction within sixty (60) days of such notice, Cooperative may terminate this Agreement. Notwithstanding the above, in the event such non-compliance is deemed by Cooperative to pose a health and/or safety risk, Cooperative shall have the right to provide for a shorter period for Seller to cure such non-compliance, and to immediately terminate this Agreement if Seller does not cure such non-compliance to Cooperative’s satisfaction within the stated time period;
  - e. Seller fails to maintain in effect and/or comply with any agreements required to deliver energy to the Point of Interconnection, including but not limited to the Interconnection Agreement.
2. Events of Default of Cooperative. The following shall constitute an event of default by Cooperative if not excused pursuant to Section 12 (Force Majeure) (each a “Cooperative Event of Default”):
  - a. Cooperative fails to pay any undisputed amount due and payable under this Agreement and such failure continues for fifteen (15) Working Days after written notice of such failure;
  - b. Cooperative, by act or omission, materially breaches or defaults on any material covenant, condition or other provision of this Agreement, and fails to cure such breach or default within thirty (30) days after written notice of such breach or default from Seller, unless such breach or default cannot be cured within thirty (30) days and Cooperative is making diligent efforts to cure such breach or

default; provided, however, that if such breach or default is not cured within sixty (60) days of such notice, Seller may terminate this Agreement.

3. Termination for Event of Default. Upon the occurrence of a Cooperative Event of Default or a Seller Event of Default (a Cooperative Event of Default and a Seller Event of Default each being referred to as an “Event of Default”) which has not been cured within the applicable cure period, the non-defaulting Party shall have the right to declare a date, which shall be between fifteen (15) and thirty (30) days after the notice thereof, upon which this Agreement shall terminate. Neither Party shall have the right to terminate this Agreement except as provided for upon the occurrence of an Event of Default as described above, or as otherwise may be expressly provided for in this Agreement.
4. Remedies for Termination Under this Appendix C.
  - a. Upon the termination of this Agreement under this Appendix C, the non-defaulting Party shall be entitled to receive from the defaulting Party all of the actual damages incurred by the non-defaulting Party.
  - b. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party’s performance or non-performance of this Agreement.
  - c. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein); provided, that if either Party is held liable to a Third Party for such damages and the Party held liable for such damages is entitled to indemnification therefor from the other Party hereto, the indemnifying Party shall be liable for, and obligated to reimburse the indemnified Party for, such damages.
  - d. Unless otherwise provided, each right or remedy of the Parties provided for in this Agreement shall be cumulative of and shall be in addition to every other right or remedy provided for in this Agreement, and the exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.

APPENDIX D:  
DEFINITIONS

Affiliate: With respect to any entity, each entity that directly or indirectly controls, is controlled by, or is under common control with, such designated entity, with “control” meaning the possession, directly or indirectly, of the power to direct management and policies, whether through the ownership of voting securities (if applicable) or by contract or otherwise.

Agreement: As defined in the first paragraph of this Agreement.

Assignment for Security: As defined in Section 11(a)(2) of this Agreement.

CBRE Project: An “Eligible Renewable Energy Project,” as defined in the CBRE Tariff.

CBRE Tariff: The rules and rates set forth in KIUC’s Tariff No. 1, at Schedule “CBRE,” which Schedule “CBRE” was approved by the PUC pursuant to Decision and Order No. \_\_\_\_\_, issued on \_\_\_\_\_, in Docket No. 2015-0389, as may be amended from time to time.

CFR: As defined in Section 18(q) of this Agreement.

Change of Control: As defined in Section 11(b) of this Agreement.

Chapter 658A: As defined in APPENDIX E of this Agreement.

Commercial Operation: Commercial Operation occurs on the date that Seller’s Facility has successfully met all the requirements of the Interconnection Agreement to establish the Point of Interconnection and begins supplying energy to Cooperative’s System in accordance with this Agreement.

Construction Milestone: As defined in Section 7(a) of this Agreement.

Construction Milestone Schedule: As defined in Section 7(a) of this Agreement.

Cooperative: As defined in the first paragraph of this Agreement.

Cooperative Event of Default: As defined in APPENDIX C of this Agreement.

Cooperative’s System: The electric system owned and operated by Cooperative consisting of generation, storage, transmission and distribution lines, and related equipment for the production, transmission and delivery of electric power to the public.

Curtail or Curtailment: As explained in Section 17(c) of this Agreement.

Deadline: The date by which a condition precedent must be satisfied.

Energy Rate Adjustment Clause: The provision in Cooperative’s rate schedules that allows Cooperative to pass through to its customers Cooperative’s costs of fuel and purchased power.

Environmental Attributes: Any environmental credit, offset, or other benefit allocated, assigned or otherwise awarded by any governmental or international agency under current or future laws, regulations or other applicable rules to Cooperative or Seller based in whole or in part on the fact that Seller's Facility is a non-fossil fuel facility. Such Environmental Attributes shall include, but not be limited to, green tags, renewable energy credits, and emissions credits, including credits triggered because such facility does not produce carbon dioxide when generating electric energy, or any renewable energy credit, but in all cases shall not mean tax benefits or credits of any kind, or grants in lieu of tax benefits or credits.

EPC: As defined in Section 7(a) of this Agreement.

Event of Default: As defined in APPENDIX C of this Agreement.

Execution Date: The date referred to in the first paragraph of this Agreement.

Extension: As defined in Section 5(b) of this Agreement.

Financing Party: One or more entities which provide financing to Seller for the development, construction or operation of Seller's Facility, including any lender, tax equity investor, financing lessor and any agent acting on behalf of such entities in connection with a financing.

Force Majeure: Any event defined in Section 13 of this Agreement.

Good Engineering and Operating Practices: The practices, methods and acts engaged in or approved by a significant portion of the electric utility industry for similarly situated U.S. facilities that at a particular time, in the exercise of reasonable judgment in light of the facts known or that reasonably should be known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with law, regulation, reliability, safety, environmental protection, economy and expedition. Good Engineering and Operating Practices include, but are not limited to, taking reasonable steps to ensure that:

1. Adequate materials, resources and supplies are available to meet the needs of Seller's Facility or Cooperative's System (as applicable) under normal conditions and reasonably anticipated abnormal conditions.
2. Sufficient operating personnel are available and are adequately experienced and trained to operate Seller's Facility or Cooperative's System (as applicable) properly, efficiently and within manufacturer's guidelines and specifications and are capable of responding to emergency conditions.
3. Preventive, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation, and are performed by knowledgeable, trained and experienced personnel utilizing proper equipment, tools, and procedures.
4. Appropriate monitoring and testing is done to ensure equipment is functioning as designed and to provide assurance that equipment will function properly under normal conditions.

5. Equipment is operated in a manner safe to workers, the general public and the environment and in accordance with equipment manufacturer's specifications, including, without limitation, defined limitations such as operating voltage, current, frequency, polarity, synchronization, control system limits, etc.

Good Engineering and Operating Practices are not limited to the optimum practice, method or act to the exclusion of all others, but rather consists of a spectrum of possible practices, methods or acts which can fall within this description.

Governmental Authority: Any supranational, federal or state authority or other political subdivision thereof, having jurisdiction over Seller, Cooperative, Seller's Facility, or this Agreement, including any municipality, township or county, and any entity or body exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including any corporation or other entity owned or controlled by any of the foregoing.

Interconnection Agreement: The Interconnection Agreement executed by Cooperative and Seller, which provides for the construction of the facilities required to interconnect Seller's Facility with Cooperative's System and for the interconnected operation of Seller's Facility with Cooperative's System.

Interest Rate: As defined in Section 2(c) of this Agreement.

Letter of Credit: As defined in Section 4(a) of this Agreement.

Liquidated Damages: Refers to the amounts provided for in the case of delays pursuant to Section 7(b) of this Agreement.

MWh: Megawatt hour.

Necessary Permits: As defined in Section 6(c)(1) of this Agreement.

Non-Appealable PUC Approval Order: As defined in Section 6(c)(2) of this Agreement.

Obligated Party: As defined in Section 6(d) of this Agreement.

Party/Parties: Cooperative and Seller are sometimes herein referred as a Party singularly or the Parties collectively.

Person: Any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association, Governmental Authority or any other entity whatsoever.

Planned Outages: As defined in Section 17(a)(1) of this Agreement.

Point of Interconnection: The point of delivery of energy supplied by Seller to Cooperative where Seller's Facility interconnects with Cooperative's System, pursuant to the Interconnection Agreement.

Projected In-Service Date: [TBD].

PUC: The Public Utilities Commission of the State of Hawaii.

Purchase Power Rate: As defined in APPENDIX B of this Agreement.

Purchase Price: As defined in Section 7(h) of this Agreement.

PURPA: Public Utility Regulatory Policies Act of 1978 (P.L. 95 617) as amended from time to time and as applied in Hawaii by the PUC.

Related Persons: With respect to any Person, such Person's Affiliates, and each of its and their respective directors, officers, employees, agents and representatives.

RUS: As defined in Section 6(c)(3) of this Agreement.

RUS Approval: As defined in Section 6(c)(3) of this Agreement.

Securities Acts: As defined in the Section 16 of this Agreement.

Seller: As defined in the first paragraph of this Agreement.

Seller Event of Default: As defined in APPENDIX C of this Agreement.

Seller's Facility: All equipment, devices, and associated appurtenances owned, controlled, operated and managed by Seller in connection with, or to facilitate, the production, generation, transmission, delivery or furnishing of electric energy by Seller to Cooperative and to interconnect with Cooperative's System.

Unplanned Outage: As defined in Section 17(b) of this Agreement.

Term: The Term of this Agreement as defined in Section 5(a) of this Agreement, and as the same may be extended in Section 5(b) of this Agreement.

Third Party: Any person or entity other than Cooperative or Seller, and excludes any Affiliate of Seller.

Working Day: All days excluding Saturdays, Sundays and legal holidays of either the federal government or the Hawaii state government.

APPENDIX E:  
DISPUTE RESOLUTION

1. Good Faith Negotiations

Before any dispute under this Agreement is subjected to the provisions of Section 2 of this APPENDIX E or any litigation, the presidents, vice presidents, or authorized delegates from both Seller and Cooperative having full authority to settle the dispute, shall personally meet in Hawaii and attempt in good faith to resolve the dispute within thirty (30) days.

2. Dispute Resolution Procedures

If the Parties are unable to resolve any dispute under this Agreement under the procedures of Section 1 of this APPENDIX E, such dispute may be referred by either Party to binding arbitration in Hawaii in accordance with the requirements of this Section 2; provided that, this Agreement to arbitrate shall be specifically enforceable and this APPENDIX E shall not preclude either Party from pursuing its equitable remedies to enforce this Agreement to arbitrate, including without limitation, seeking injunctive relief. Cooperative and Seller agree that the procedures in this Agreement to arbitrate shall be followed to the extent not prohibited by Hawaii Revised Statutes Chapter 658A, as may be amended from time to time (“Chapter 658A”). If any of such procedures conflict with Chapter 658A, then except as otherwise prohibited in Chapter 658A, Cooperative and Seller agree to waive, or vary the effect of, the requirements of Chapter 658A.

a. Initiation of Arbitration

Either Party shall give to the other written notice in sufficient detail of the existence and nature of any dispute proposed to be arbitrated under this Section 2 and the remedy sought as well as a detailed statement of its contentions of law and fact. Such notice shall be made within a reasonable time after the dispute in question arose, and in no event shall such notice be made after the date when institution of legal or equitable proceedings based on such dispute would be barred by the applicable statute of limitations but for this APPENDIX E. Such notice will be signed by the president of the Party issuing the notice and be delivered to the president of the other Party. The other Party shall file an answering statement within twenty (20) days of receipt of the notice. After the answering statement is filed, the Parties shall diligently negotiate in good faith for an additional period of thirty (30) days.

b. Appointment of Arbitrator

If the dispute is not resolved through the negotiations required by Section 2.a of this APPENDIX E, each Party shall within five (5) days, appoint one person to serve as an arbitrator and the two arbitrators thus appointed shall select a third arbitrator to serve as chairman of the panel of arbitrators; and such three arbitrators shall determine all matters by majority vote; provided, however, if the



two arbitrators appointed by the Parties are unable to agree upon the appointment of the third arbitrator within twenty (20) days after their appointment, both shall give written notice of such failure to agree to the Parties and, if the Parties fail to agree upon the selection of such third arbitrator within twenty (20) days thereafter, then either of the Parties upon written notice to the other may require such appointment from and pursuant to the rules for commercial arbitration of the Dispute Prevention and Resolution, Inc.

Each arbitrator appointed pursuant to this Section 2.b shall swear to conduct such arbitration in accordance with the terms of this Section 2, the laws of the State of Hawaii, and the Code of Ethics of the Dispute Prevention and Resolution, Inc. Each arbitrator who would be disqualified for any reason that would disqualify a judge under the Code of Judicial Conduct shall immediately resign or be withdrawn as an arbitrator. Copies of the notice, the statement of contentions of law and fact, the answering statement and this Agreement shall promptly be furnished by the initiating Party to the arbitrator(s) selected.

c. Arbitration Procedures

(1) The Parties shall have 120 days from the date of the formation of the arbitration panel to perform discovery and present evidence and argument to the arbitrators. During this period, the arbitrators shall be available to receive and consider all such evidence as is relevant, within reasonable limits due to the restricted time period, and to hear as much argument as is feasible, giving a fair allocation of time to each Party to the arbitration. This period may be extended for sufficient cause by the arbitration panel or by agreement of the Parties. The arbitration panel shall have the general powers of a court and may proceed in accordance with established rules of evidence and procedure, liberally construed to promote justice and expeditious resolution of the dispute. The arbitration panel shall have complete discretion over the mode and order of discovery, presentment of evidence, and the conduct of the hearing. The arbitrators shall not consider any evidence or argument not presented during such period. To the extent not prohibited by law and to the extent not in conflict with the procedures set forth in this Section 2, such arbitration shall be held in accordance with Chapter 658A, and the prevailing rules of the Dispute Prevention and Resolution, Inc. for commercial arbitration.

(2) The arbitrators shall use all reasonable means to expedite discovery and to sanction non-compliance with reasonable discovery requests or any discovery order. Cooperative and Seller agree that (i) all records of Cooperative and Seller, its partners, members, or affiliates pertaining to the negotiation, administration, and enforcement of this Agreement shall be maintained in the possession of Cooperative and Seller as applicable in the ordinary course of its business, and (ii) they will use their respective best efforts to ensure that each of their officers, employees, general partners, or managing members will submit to the jurisdiction of the

arbitration panel appointed pursuant to this APPENDIX E and shall respond to all reasonable discovery requests of such arbitration panel. All documents and deponents made available in response to reasonable discovery requests shall be made available in Lihue, Hawaii.

- (3) At the conclusion of such 120 day period, the arbitrators shall have 30 days to reach a determination and to give a written decision to the Parties, stating their findings of fact, conclusions of law and final order.

d. Arbitrator Limitations

The arbitrators shall have authority to interpret and apply the terms and conditions of this Agreement and to order any remedy allowed by this Agreement, but may not change any term or condition of this Agreement, deprive either Party of a remedy expressly provided hereunder, or provide any right or remedy that has been excluded hereunder.

e. Decision Binding on the Parties

The decision of the arbitrators shall be binding on the Parties at such time as the decision is confirmed by order of a court of competent jurisdiction pursuant to Chapter 658A.

f. Cost of Arbitration

The arbitrators in rendering their decision shall also state which Party prevailed over the other Party, or that neither Party prevailed over the other. The costs of arbitration (including attorney fees and costs of the Parties and legal counsel appointed pursuant to Section 2.b of this APPENDIX E) will be borne by the Party that is not the prevailing Party. In the event neither Party prevails, the Parties shall each pay fifty percent (50%) of the cost of the arbitration.

APPENDIX F:  
INSURANCE COVERAGE

- A. **Worker's Compensation Insurance** to cover obligations imposed by federal and state statutes pertaining to Seller's employees, and Employer's Liability Insurance with a limit of one million Dollars (\$1,000,000).
- B. **Commercial General Liability Insurance**, or the equivalent, with a limit of two million Dollars (\$2,000,000) per occurrence. This policy shall include coverage for bodily injury liability, broad form property damage liability, blanket contractual, owner's protective, products liability and completed operations.
- C. **Business Automobile Liability Insurance**, or the equivalent, with limit of one million Dollars (\$1,000,000) per accident with respect to Seller's vehicles whether owned, hired, or non-owned.
- D. **Excess Liability**. Excess Liability Insurance covering claims in excess of the underlying insurance described in paragraphs (A) (with respect to only Employer's Liability Insurance), (B) and (C) with a limit per occurrence of twenty-five million Dollars (\$25,000,000).

The amounts of insurance required in the foregoing paragraphs (A), (B), (C) and (D) may be satisfied by purchasing coverage in the amounts specified or by any combination of primary and excess insurance, so long as the total amount of insurance meets the requirements specified above.

- E. **Property Insurance**. During construction and operation of Seller's Facility, Seller shall provide standard form "All Risk" insurance covering 100% of the project cost. The All-Risk Property insurance shall cover physical loss or damage to Seller's Facility including the period during testing and startup. A deductible may be carried, which deductible shall be the absolute responsibility of Seller. All-Risk Property insurance shall include: (i) coverage for fire, flood, wind and storm, tornado and earthquake with respect to facilities similar in construction, location and occupancy to the Facility; and (ii) equipment insurance covering all objects customarily subject to such insurance, including the PV modules, inverters, racking and the balance of Seller's Facility, in an amount equal to the full replacement value.