

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10235 (LSS)  
(Joint Administration Requested)

**DEBTORS' MOTION FOR INTERIM AND FINAL ORDERS (I) AUTHORIZING THE  
DEBTORS TO CONTINUE PERFORMING UNDER CERTAIN SHARED SERVICES  
AGREEMENTS AND HONOR OBLIGATIONS RELATED THERETO; AND  
(II) GRANTING RELATED RELIEF**

Burgess BioPower, LLC ("Burgess") and Berlin Station, LLC ("Berlin"), the debtors and debtors in possession in the above captioned case (collectively, the "Debtors"), hereby submit this *Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Continue Performing Under Certain Shared Services Agreements and Honor Obligations Related Thereto; and (II) Granting Related Relief* (the "Motion"). In support of the Motion, the Debtors respectfully state as follows:

**JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider and determine the Motion pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This is a core proceeding within the meaning of 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

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<sup>1</sup> The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors' corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

2. The statutory predicates for the relief sought herein are Sections 105 and 363 of Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq. (the “Bankruptcy Code”), and Rules 6003 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

3. Pursuant to Rule 9013-1(f) of Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), the Debtors consent to the entry of a final order or judgment with respect to the Motion if it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

### **BACKGROUND**

4. On the date hereof (the “Petition Date”), the Debtors commenced the above-captioned chapter 11 cases (the “Chapter 11 Cases”) by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Court.

5. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession, pursuant to Bankruptcy Code Sections 1107(a) and 1108. As of the date of the Motion, no trustee, examiner or statutory committee has been appointed in the Chapter 11 Cases.

6. Additional information regarding the circumstances leading to the commencement of the Chapter 11 Cases and information regarding the Debtors’ business and capital structure is set forth in detail in the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* (the “First Day Declaration”), filed contemporaneously with the Motion and incorporated herein by reference.<sup>2</sup>

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<sup>2</sup> The First Day Declaration and other relevant case information are available on the following website maintained by the Debtors’ proposed claims and noticing agent, Epiq: <https://dm.epiq11.com/Burgess>

### **RELIEF REQUESTED**

7. By the Motion, the Debtors request entry of interim and final orders, substantially in the form attached hereto as **Exhibit A** (the “Proposed Interim Order”) and **Exhibit B** (the “Proposed Final Order,” and together with the Proposed Interim Order, the “Proposed Orders”): (i) authorizing, but not directing, the Debtors to, in their sole discretion, continue to perform under certain Shared Services Agreements (as defined below) with certain nondebtor affiliates and pay all current amounts due and owing under the Shared Services Agreements in the ordinary course of business, regardless of whether they arose prepetition or postpetition, comprising (collectively, the “Current Shared Services Obligations”): (x) the Current Operator Reimbursable Costs; (y) the Current O&M Service Fees, and (z) the February Manager Compensation (in each case (x)-(z), as such terms are defined herein); and (ii) granting related relief.

### **THE SHARED SERVICES AGREEMENTS**

8. As described more fully in the First Day Declaration, the Debtors do not have any employees and do not directly operate or manage the 75-megawatt biomass plant (the “Facility”) located in Berlin, New Hampshire on a day-to-day-basis. Instead, pursuant to two separate agreements—the O&M Agreement and the PMA (each as defined herein, and together, the “Shared Services Agreements”), copies of which are attached hereto as **Exhibits C & D**, respectively—the Debtors contract with nondebtor affiliated companies for the supply of services (collectively, the “Shared Services”) needed to conduct the Debtors’ business. The Debtors have operated their business under the Shared Services Agreements since beginning business operations over a decade ago.

9. The Debtors’ operations completely rely upon the Shared Services and would be severely disrupted, potentially permanently, if the Debtors were forced to prematurely discontinue

the Shared Services as a result of being unable to continue (i) performing under the Shared Services Agreements and (ii) satisfying the Current Shared Services Obligations (as defined herein). As described in more detail below, given that the Debtors have no employees, the Debtors rely upon the counterparties under the Shared Services Agreements to, among other things: provide all of the Debtors' administrative, back-office, executive management, plant management and operations, financial accounting, cash management, human resources, permit compliance and legal services; ensure regulatory compliance; negotiate transportation and storage agreements; perform inspections; maintain equipment; and manage inventory. In short, absent the Shared Services Agreements, the Debtors would be incapable of operating and maintaining the Facility—the sole revenue source for the Debtors. Moreover, an inability to continue operating under the Shared Services Agreements would not only prevent the Debtors from generating meaningful revenue and diminish the value of the Debtors' assets, it would also introduce a number of safety concerns for the nearby community that could expose the Debtors to liability for failure to comply with stringent safety and reliability requirements associated with operating a power plant.

10. Continued access to the Shared Services is, therefore, essential to the Debtors' continued operations, will enable the Debtors to maintain the stability of their business following the commencement of these Chapter 11 Cases, and will avoid the sudden need to shift their focus at this critical juncture to locate alternative service providers. Accordingly, the Debtors respectfully request through this Motion authorization to continue performing under the Shared Services Agreements and satisfy all Current Shared Services Obligations (as defined herein) in the ordinary course of business, regardless of whether they arose prepetition or postpetition.

## **I. The Operation and Maintenance Agreement**

11. Berlin is party to that certain Operation and Maintenance Agreement dated January 19, 2018 (as amended January 19, 2022, further amended December 1, 2023, and as maybe further amended, the “O&M Agreement”), with CS Berlin Ops, Inc., a Delaware corporation and a nondebtor affiliate of the Debtors (“CS Berlin”).

12. **Services.** Pursuant to the O&M Agreement, CS Berlin provides the operation, maintenance, and technical support services (“O&M Services”) necessary to operate the Facility and employs expert and trained individuals to work onsite at the Facility (“Site Personnel”).<sup>3</sup>

O&M Services provided by CS Berlin include (but are not limited to) the following services:

- Operating the Facility seven (7) days a week, twenty-four (24) hours per day, performing purchasing, operations and maintenance activities;
- Maintaining a health and safety program compliant with the Occupational Safety and Health Administration (“OSHA”);
- Conducting internal assessments of programs and compliance for deficiencies and opportunities for safety improvements;
- Preparing emergency response plans and maintaining an emergency preparedness program;
- Training site personnel;
- Preparing and submitting generation and fuel consumption reports;
- Maintaining computer infrastructure, computer data, and access security program; and
- Providing support to Berlin as reasonably requested.

Exhibit A to the O&M Agreement.

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<sup>3</sup> The descriptions of the O&M Agreement and PMA contained in this Motion are for summary purposes only. To the extent a provision of the agreement is inconsistent with the description herein, the provision in the actual agreement shall govern.

13. ***Fees.*** In exchange for the O&M Services, Burgess pays CS Berlin on behalf of Berlin four general categories of fees or reimbursements: (i) costs incurred by CS Berlin in the ordinary course of business in the performance of services under the O&M Agreement (the “Operator Reimbursable Costs”), (ii) wages, salaries and payroll additives, including insurance, workers compensation, retirement payments owed to Site Personnel (the “Payroll Costs”), (iii) a monthly fee of \$24,000.00 (the “Operating Fee”),<sup>4</sup> and (iv) certain Site Personnel and Operator Incentive Bonuses (the “Incentive Payments,” and together with the Operator Reimbursable Costs, the Payroll Costs, the Operating Fee, and the Incentive Payments, the “O&M Service Fees”). O&M Agreement § 4.1.

14. ***Payroll Costs and Incentive Payments.*** In the days leading up to the Petition Date, Burgess remitted approximately \$650,000 to CS Berlin for Payroll Costs and Incentive Payments for the months of January and February (collectively, the “Pre-funded Employee Expenses”)<sup>5</sup>. For the avoidance of doubt, this Motion is not seeking authorization for any further expenditure of funds by any Debtor to CS Berlin for the Pre-funded Employee Expenses.

15. ***Operating Fee.*** The Operating Fees due and owing in the months of January and February are defined herein as the “Current O&M Operating Fees.” The Debtors do seek authority to pay the Current O&M Operating Fees.

16. ***Operator Reimbursable Costs.*** The Debtors cannot estimate how much is owed to CS Berlin on account of the Operator Reimbursable Costs because some may have not yet been calculated or settled, and CS Berlin may be entitled to calculate and settle such obligations in the ordinary course, which may give rise to prepetition amounts owing from the Debtors to CS Berlin.

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<sup>4</sup> This amount is adjusted annually by an escalation rate based on the Consumer Price Index, as published by the U.S. Department of Labor.

<sup>5</sup> A portion of the Pre-funded Employee Expenses have already been paid to employees for the month of January.

The Operator Reimbursable Costs that the Debtors seek permission by this Motion to pay: (a) *exclude* (i) costs incurred by CS Berlin which would be payable to or for the benefit of an affiliate (as that term is defined in the Bankruptcy Code) of a Debtor or an affiliate of CS Berlin, or any individual in control of any such entity; and (ii) amounts to research, develop, construct, repair or operate any business or project that is not directly related to the biomass-fueled power plant ((i) through (iii) collectively, the “Excluded O&M Expenses”); and (b) each require the consent of the Senior Secured Lenders and the DIP Lenders, which consent shall not be unreasonably withheld; provided that for any Operator Reimbursable Costs payable to CS Operations (as defined below) or an affiliate or individual in control thereof, such Operator Reimbursable Costs shall require the consent of the Senior Secured Lenders and the DIP Lenders in their sole discretion (the Operator Reimbursable Costs with respect which the Debtors seek authority to pay collectively, the “Current Operator Reimbursable Costs”).

17. Apart from the Current Operator Reimbursable Costs, the Pre-Funded Employee Expenses and the Operator Reimbursable Costs, the outstanding prepetition amounts due and owing to CS Berlin (the “Past Due O&M Obligations”) approximate \$200,000. Prior to the Petition Date, on February 8, 2024, Berlin Station and Burgess, the Senior Secured Noteholders (as defined in the First Day Declaration), CS Berlin, CS Operations (defined herein) and certain other parties entered into that certain Restructuring Support Agreement (the “RSA”). As part of the RSA, subject to the terms and conditions therein, CS Berlin agreed to waive and release any claim to the Past Due O&M Obligations.

18. *Mechanics.* Typically, on or prior to the tenth (10<sup>th</sup>) day of each month, CS Berlin submits an invoice to Burgess for any O&M Service Fees incurred during the previous month, and each monthly invoice is paid within thirty (30) days or later of receipt of the invoice or the last

business day of the then current month; provided that Incentive Payments related to performance bonuses earned and payable for each calendar year shall be invoiced on or prior to the tenth (10<sup>th</sup>) day of April of the following calendar year. O&M Agreement § 4.2. Accounting for the payment made by Burgess for the benefit of Berlin is captured through intercompany transactions.

19. CS Berlin has the right to terminate the O&M Agreement if Berlin does not timely pay any O&M Service Fees within thirty (30) days of receiving a notice of default. O&M Agreement § 5.2. The current term of the O&M Agreement is set to expire on January 19, 2025, at which point, the O&M Agreement shall automatically renew for an additional one-year period unless terminated upon at least ninety (90) days' notice. *Id.* § 5.1.

## **II. The Project Management Agreement**

20. Berlin is party to that certain Project Management Agreement dated June 29, 2011 with CS Operations, Inc. ("CS Operations"), a nondebtor affiliate of the Debtors, by assignment from Cate Street Capital, Inc. ("CSC") to CS Operations pursuant to an Assignment Agreement dated March 1, 2018 and amended as of February 8, 2024, (as assigned and amended, the "PMA"). Pursuant to the PMA, CS Operations provides certain management services (the "Management Services"). Management Services provided by CS Operations include (but are not limited to) the following:

- Providing executive management services;
- Preparing and distributing all financial statements, other financial reports, budgets, estimates, tax returns, and other information required;
- Accounting, billing, and other similar cash management services;
- Reviewing, analyzing, and recommending action to Berlin regarding the obtaining, maintenance and renewal of all insurance required;
- Reviewing and analyzing Facility data regarding compliance of regulatory permits;

- Advising with respect to proposed modification, repair or replacement of the Facility;
- Assisting with the procurement and management of fuel for use at the Facility;
- Coordinating and overseeing payroll services; and
- Providing and coordinating public relations and regulatory affairs services.

PMA § 2.

21. As compensation for the Management Services, Berlin is obligated to pay CS Operations \$150,000 per month for December 2023 through April 2024, \$125,000 per month for May 2024 through the earlier of consummation of a sale or a chapter 11 plan, and \$92,000 per month thereafter, subject to adjustment as set forth in the PMA (collectively, the “Manager Compensation”). PMA § 3.1. The Manager Compensation is paid monthly on the last day of the month for which payment is due. PMA § 3.2. The Manager Compensation due and owing for the month of February 2024 (the “February Manager Compensation”), and all other fees, expenses, charges, claims, or other amounts that have been incurred since February 5, 2024 which will be payable by Owner under the PMA are and remain, in each case, payable when due are collectively herein defined as the “Current PMA Obligations.”

22. The past due amount owed to Manager pursuant to the PMA in the amount of \$857,803.32 and, without duplication, any other fees, expenses, charges, claims, or other amounts that have been incurred as of February 5, 2024, any accrued interest in respect of any past due amounts under the PMA, that, in each case, have not been paid by Owner as of February 5, 2024, were forgiven under the PMA (the “Past Due PMA Obligations”). In addition, as part of the RSA, subject to the terms and conditions therein, CS Operations agreed to waive and release any claim to the Past Due PMA Obligations. The aforementioned Current PMA Obligations remain due.

23. Several Current PMA Obligations may have not yet been calculated or settled, and CS Operations may be entitled to calculate and settle such obligations in the ordinary course, which may give rise to prepetition amounts owing from the Debtors to CS Operations. CS Operations has the right to terminate the PMA if Berlin does not timely pay the Manager Compensation as they become due. PMA § 6.3

### **BASIS FOR RELIEF REQUESTED**

#### **I. Section 363(c) of the Bankruptcy Code Authorizes the Debtors to Continue to Perform under the Shared Services Agreements and Honor Current Shared Services Obligations**

24. Section 363(c) of the Bankruptcy Code provides, in relevant part, that a debtor in possession “may enter into transactions . . . in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.” 11 U.S.C. § 363(c)(1). The ordinary course of business standard embodied in this provision is intended to allow a debtor in possession the flexibility to run its business during its chapter 11 proceedings. *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 804 (Bankr. D. Del. 2007) (citing *In re Roth American, Inc.*, 975 F.2d 949, 952 (3d Cir. 1992)).

25. The Bankruptcy Code does not define “ordinary course of business.” *In re Commercial Mortg. & Fin. Co.*, 414 B.R. 389, 393 (Bankr. N.D. Ill. 2009). Courts have, however, clarified that the standard is meant “to embrace the reasonable expectations of interested parties of the nature of transactions that the debtor would likely enter in the course of its normal, daily business.” *Med. Malpractice Ins. Assoc. v. Hirsch (In re Lavigne)*, 114 F.3d 379, 384 (2d Cir. 1997) (quoting *In re Watford*, 159 B.R. 597, 599 (M.D. Ga. 1993)); *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992) (stating that Section 363 of the Bankruptcy Code is designed to allow a

debtor in possession “flexibility to engage in ordinary transactions without unnecessary . . . oversight”).

26. The two tests ordinarily applied by the courts to determine whether an action qualifies as the ordinary course of business are the “horizontal test” and the “vertical test.” *In re Roth American, Inc.*, 975 F.2d at 952. The “horizontal test” focuses on the way businesses operate “from an industrywide perspective.” *Id.* at 953. The “vertical test” focuses on the expectations of creditors. *Id.* Continuing the Shared Services Agreements and honoring Current Shared Services Obligations are ordinary course actions that satisfy both the horizontal test and the vertical test.

27. The horizontal test is satisfied because the Shared Services Agreements are typical arrangements that exist among companies in the Debtors’ industry, and the Debtors believe that continuing the Shared Services Agreements and honoring any Current Shared Services Obligations fall within the standard and ordinary course practice of companies in the Debtors’ industry.

28. The vertical test is likewise satisfied. Under the vertical test, creditors’ reasonable expectations of a debtor’s “ordinary course of business” are based on the debtor’s specific prepetition business practices and norms, and the expectation that the debtor will conform to those practices and norms while operating as a debtor in possession. *In re Garofalo’s Finer Foods, Inc.*, 186 B.R. 414, 425 (N.D. Ill. 1995). Thus, a fundamental characteristic of an “ordinary” postpetition business transaction is its similarity to a prepetition business practice. *Marshack v. Orange Commercial Credit (In re Nat’l Lumber & Supply, Inc.)*, 184 B.R. 74, 79 (B.A.P. 9th Cir. 1995). The size, nature and type of business, and the size and nature of the transactions in question, are all relevant to determining whether the transactions at issue are ordinary. *U.S. ex rel. Harrison v. Estate of Deutscher*, 115 B.R. 592, 598 (M.D. Tenn. 1990); *In re Johns-Manville Corp.*, 60 B.R.

612, 617 (Bankr. S.D.N.Y. 1986). “Accordingly, a postpetition transaction undertaken by the debtor that is similar in size and nature to prepetition transactions undertaken by the debtor would be within the ordinary course of business.” *Garofalo’s*, 186 B.R. at 426.

29. Here, the Debtors propose to use estate property and to expend funds to perform under the Shared Services Agreements in the same manner as they used such property and expended such funds prior to the Petition Date. Moreover, given that the Debtors’ business cannot function without the Shared Services, the Debtors’ creditors expect that the Debtors will continue to perform under the Shared Services Agreements and honor Current Shared Services Obligations as they have done in the past. In light of the criticality of such agreements, it is common for debtors to seek, and for courts to grant orders authorizing the relief sought herein. *See, e.g., In re Lincoln Power, L.L.C.*, Case No. 23-10382 (LSS) (Bankr. D. Del. April 27, 2023) [Docket No. 11] (final order authorizing continued performance under shared services agreements); *TECT Aerospace Group Holdings, Inc.*, Case No. 21-10670 (KBO) (Bankr. D. Del. May 5, 2021) [Docket No. 129] (same); *Boy Scouts of America and Delaware BSA, LLC*, Case No. 20-10343 (LSS) (Bankr. D. Del. Apr. 8, 2020) [Docket No. 369] (same); *In re EV Energy Partners, L.P., et al.*, Case No. 18-10814 (CSS) (Bankr. D. Del. Apr. 25, 2018) [Docket No. 129] (same); *In re Sanchez Energy Corp., et al.*, Case No. 19- 34508 (MI) (Bankr. S.D. Tex. Dec. 12, 2019) [Docket No. 733] (same). Thus, the Debtors submit that the authority to continue the Shared Services Agreements and honor the Current Shared Services Obligations is appropriate and in the best interests of the Debtors, their estates, and all parties in interest in these Chapter 11 Cases and should be permitted pursuant to Section 363(c)(1) of the Bankruptcy Code.

**II. Continued Performance Under the Shared Services Agreements and Payment of Current Shared Services Obligations are Sound Exercises of the Debtors' Business Judgment**

30. Even if continued performance under the Shared Services Agreements and payment of Current Shared Services Obligations were not in the ordinary course of business, the Debtors would still be authorized to perform such actions pursuant to Section 363(b) of the Bankruptcy Code because such actions are sound exercises of the Debtors' business judgment.

31. Section 363(b) of the Bankruptcy Code authorizes a bankruptcy court, after notice and a hearing, to authorize a debtor to "use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Under Section 363(b) of the Bankruptcy Code, a debtor must "show that a sound business purpose justifies such actions." *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999) (internal citations omitted); *see also In re Elpida Memory, Inc.*, No. 12-10947 (CSS), 2012 WL 6090194, at \*5 (Bankr. D. Del. Nov. 20, 2012) (noting that it is "well-settled" that a debtor may use its assets outside the ordinary course where such use "represents the sound exercise of business judgment"); *In re Phx. Steel Corp.*, 82 B.R. 334, 335–36 (Bankr. D. Del. 1987) (stating that judicial approval under Section 363 of the Bankruptcy Code requires a showing that the proposed action is fair and equitable, in good faith, and supported by a good business reason). Moreover, "[w]here the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct." *Johns-Manville*, 60 B.R. at 616 (citation omitted); *see also In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) ("Overcoming the presumptions of the business judgment rule on the merits is a near-Herculean task").

32. There is no question that a sound business purpose exists for the Debtors to continue performing under the Shared Services Agreements and honor any Current Shared Services

Obligations, as the Shared Services are critical to the Debtors' ongoing management and operations and are necessary for the Debtors to continue operating their business during the pendency of these Chapter 11 Cases. As discussed above, the Debtors do not have a workforce that can provide the Shared Services. Accordingly, if the Debtors were not permitted to continue performing under the Shared Services Agreements, the Debtors would be forced to expend significant funds by either attempting to hire a tremendous number of personnel or seeking out third parties to replace CS Operations and CS Berlin. In either event, such actions could not be accomplished quickly enough to avoid major disruptions to the Debtors' business. Moreover, replacing CS Operations and CS Berlin would be extremely costly and result in a destruction of value to the Debtors' estates. Indeed, the Debtors doubt that any third parties could provide the Shared Services as efficiently and effectively as CS Operations and CS Berlin and, even if such third parties did exist and could provide the Shared Services on less expensive terms, the Debtors and their advisors would need to spend significant amounts of time and money negotiating new contracts with such third parties and transitioning the Shared Services from CS Operations and CS Berlin to the new providers. This outcome would not only force the Debtors to expend significant estate funds replicating the Shared Services, it would also distract the Debtors from their efforts to stabilize operations and severely complicate the Debtors' restructuring goals. Accordingly, the Debtors' continued performance under the Shared Services Agreements and the honoring of any Current Shared Services Obligations are sound exercises of the Debtors' business judgment.

### **III. Section 105(a) of the Bankruptcy Code Authorizes the Debtors to Continue to Perform under the Shared Services Agreements and Honor Current Shared Services Obligations**

33. The Debtors further submit that continuing to perform under the Shared Services Agreements and honor Current Shared Services Obligations in accordance with prepetition

practices are necessary and appropriate under Section 105(a) of the Bankruptcy Code pursuant to the equitable “doctrine of necessity.” Section 105(a) of the Bankruptcy Code provides that a court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the Bankruptcy Code. The Court, therefore, may use its power under Section 105(a) of the Bankruptcy Code to authorize the Debtors to continue to perform under the Shared Services Agreements and honor Current Shared Services Obligations, including authorizing the payment of prepetition obligations (if any) arising under the Shared Services Agreements.

34. The United States Court of Appeals for the Third Circuit recognized the “doctrine of necessity” in *In re Lehigh & New England Railway, Co.*, 657 F.2d 570, 581 (3d Cir. 1981). The Third Circuit held that a court could authorize the payment of prepetition claims if such payment were essential to the continued operation of the debtor. *Id.* (stating a court may authorize payment of prepetition claims when there “is the possibility that the creditor will employ an immediate economic sanction, failing such payment”); *see also In re Just for Feet, Inc.*, 242 B.R. 821, 824–25 (D. Del. 1999) (holding that Section 105(a) of the Bankruptcy Code “provides a statutory basis for payment of pre-petition claims” under the doctrine of necessity); *In re Columbia Gas Sys., Inc.*, 171 B.R. 189, 191–92 (Bankr. D. Del 1994) (explaining that the “doctrine of necessity” is the standard in the Third Circuit for enabling a court to authorize the payment of prepetition claims prior to confirmation of a reorganization plan).

35. As discussed above, if the Shared Services were to be discontinued, the Debtors’ operations would be unnecessarily disrupted to the immediate and irreparable harm of the Debtors, their creditors, and other stakeholders. Indeed, an inability to perform under the Shared Services Agreements would: (i) have a devastating impact on the Debtors’ ability to continue as a going concern; (ii) prevent the Debtors from stabilizing their business operations; (iii) force the Debtors

to expend significant amounts of time and estate funds to replicate the services currently provided by CS Operations and CS Berlin; (iv) severely impede the Debtors' restructuring goals; and (v) lead to a substantial loss of value to the Debtors' estates.

36. Thus, the Debtors' continued performance under the Shared Services Agreements is imperative to preserve the value of the Debtors' estates and is in the best interest of the Debtors, their creditors, and other stakeholders. Based on the calamity that would arise if the Debtors were unable to continue to perform under the Shared Services Agreements, the Debtors respectfully submit that the relief requested herein is justified under Section 105(a) of the Bankruptcy Code.

**BANKRUPTCY RULE 6003 HAS BEEN SATISFIED  
AND BANKRUPTCY RULE 6004 SHOULD BE WAIVED**

37. Bankruptcy Rule 6003(b) provides that, to the extent relief is necessary to avoid immediate and irreparable harm, the Court may issue an order granting "a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition" before 21 days after the Petition Date. Certain aspects of the relief requested herein may, if granted, be subject to Rule 6003(b) of the Bankruptcy Rules.

38. For the reasons described above and in the First Day Declaration, the relief requested herein is necessary for the Debtors to operate their business in the ordinary course and maximize the value of their estate for the benefit of all stakeholders. Accordingly, the Debtors believe that the relief requested herein is necessary to avoid immediate and irreparable harm and Rule 6003(b) of the Bankruptcy Rules is therefore satisfied.

39. Additionally, to the extent that any aspect of the relief sought herein constitutes a use of property under Section 363(b) of the Bankruptcy Code, the Debtors seek a waiver of the notice requirements under Rule 6004(a) of the Bankruptcy Rules, to the extent not satisfied, and

of the 14-day stay under Rule 6004(h) of the Bankruptcy Rules. As described above, the relief that the Debtors seek in the Motion is immediately necessary in order for the Debtors to be able to continue to operate their business and preserve the value of their estates. Accordingly, the Debtors submit that the requested waiver of the notice requirements of Rule 6004(a) of the Bankruptcy Rules and the 14-day stay imposed by Rule 6004(h) of the Bankruptcy Rules is appropriate.

### **RESERVATION OF RIGHTS**

40. Nothing contained herein is or should be construed as: (a) an admission as to the validity of any claim against the Debtors or the existence of any lien against the Debtors' property; (b) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (c) a promise to pay any claim; (d) an implication or admission that any particular claim would constitute an allowed claim; (e) an assumption or rejection of any executory contract or unexpired lease pursuant to Section 363 of the Bankruptcy Code; or (f) a limitation on the Debtors' rights under Section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to the Proposed Orders once entered. Nothing contained in the Proposed Orders will be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

### **NOTICE AND NO PRIOR REQUEST**

41. Notice of the Motion has been or will be provided to (a) the U.S. Trustee (Attn: Jane M. Leamy); (b) the holders of the twenty (20) largest unsecured claims against each Debtor; (c) counsel to Deutsche Bank Trust Company Americas in its capacity as Collateral Agent, Hogan Lovells LLP; (d) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP; (e) Berlin Biopower Investment Fund, LLC, with a copy to Murray Plumb & Murray; (f) Greenline CDF Subfund XVIII LLC, with a copy to Kutak Rock LLP, U.S. Bancorp

Community Development Corporation and Leverage Law Group, LLC; (g) Public Service of New Hampshire d/b/a Eversource Energy, with a copy to Hunton Andrews Kurth LLP; (h) the United States Attorney's Office for the District of Delaware; (i) the United States Attorney's Office for the District of New Hampshire; (j) the United States Environmental Protection Agency; (k) the Nuclear Regulatory Commission; (l) the United States Department of Energy; (m) the Federal Energy Regulatory Commission; (n) New Hampshire Department of Environmental Services; (o) New Hampshire Public Utilities Commission; (p) New Hampshire Site Evaluation Committee; (q) New Hampshire Department of Energy; (r) City of Berlin; (s) ISO New England, Inc.; (t) the United States Securities and Exchange Commission; (u) the Internal Revenue Service; (v) CS Operations; (w) CS Berlin; and (y) any party that has requested notice pursuant to Bankruptcy Rule 2002. As this Motion is seeking "first day" relief, the Debtors will serve copies of this Motion and any order entered in response of this Motion as required by Rule 9013-1(m) of the Local Rules. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

42. No prior request for the relief sought in this Motion has been made to this or any other court.

*[remainder of page intentionally left blank]*

**WHEREFORE**, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: February 9, 2024

/s/ Chantelle D. McClamb

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*Proposed Co-Counsel for Debtors Burgess*

*BioPower, LLC and Berlin Station, LLC*

**EXHIBIT A**

**Interim Order**

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10235 (LSS)  
(Joint Administration Requested)

**Re: D.I.**

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO CONTINUE  
PERFORMING UNDER CERTAIN SHARED SERVICES AGREEMENTS AND  
HONOR OBLIGATIONS RELATED THERETO; AND  
(II) GRANTING RELATED RELIEF**

Upon the *Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Continue Performing Under Certain Shared Services Agreements and Honor Obligations Related Thereto; and (II) Granting Related Relief* (the "Motion");<sup>2</sup> and upon the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings*; and the Court finding that: (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012; (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (d) the Court may enter a final order consistent with Article III of the United States Constitution; and upon the record herein; and after due deliberation thereon; and it appearing that sufficient notice of the Motion has been given and that no other further notice is necessary, except as set

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<sup>1</sup> The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors' corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

forth in the Motion with respect to entry of this Interim Order and notice of the Final Hearing (as defined below); and good cause appearing therefor; it is hereby

ORDERED THAT:

1. The Motion is GRANTED on an interim basis, as set forth herein.
2. All objections to entry of this Interim Order, to the extent not withdrawn or settled, are overruled.
3. The Debtors are authorized, but not directed to, in their sole discretion and in the ordinary course of business, continue performing under the Shared Services Agreements and honor, pay, or otherwise satisfy the Current Shared Services Obligations; *provided* that on an interim basis, the Debtors may only pay Current Operator Reimbursable Costs up to an aggregate amount of \$100,000. For the avoidance of doubt, the Debtors are not authorized to pay any Excluded O&M Expenses, Past Due O&M Obligations or Past Due PMA Obligations.
4. The Debtors' banks and financial institutions shall be, and hereby are, authorized, when requested by the Debtors in their sole discretion, to process, honor, pay, and, if necessary, reissue any and all checks, including prepetition checks that the Debtors reissue postpetition, and electronic fund transfers drawn on the Debtors' bank accounts relating to those Current Shared Services Obligations whose payment is approved by this Interim Order, whether such checks were presented or fund transfer requests were submitted prior to or subsequent to the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments.
5. The Debtors' banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Interim Order, and any such bank or

financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for in this Interim Order.

6. The Debtors are hereby authorized, but not directed, to issue postpetition checks or to effect postpetition fund transfer requests in replacement of any checks or fund transfer requests with respect to the Current Shared Services Obligations authorized to be paid pursuant to this Interim Order that have been dishonored or denied as a consequence of the commencement of these Chapter 11 Cases, and to reimburse any expenses that holders of claims in connection with the Current Shared Services Obligations may incur as a result of any bank's failure to honor a prepetition check.

7. Nothing in the Motion or this Interim Order, nor any actions or payments made by the Debtors pursuant to this Interim Order, shall be construed as: (a) an admission as to the validity of any claim against the Debtors or the existence of any lien against the Debtors' properties; (b) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (c) a promise to pay any claim; (d) an implication or admission that any particular claim would constitute an allowed claim; (e) an assumption or rejection of any executory contract or unexpired lease pursuant to Section 365 of the Bankruptcy Code; or (f) a limitation on the Debtors' rights under Section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Interim Order. Nothing contained in this Interim Order shall be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

8. Nothing contained in the Motion or this Interim Order shall be construed to (i) create, alter, or perfect, in favor of any person or entity, any interest in cash of a Debtor that did not exist as of the Petition Date, or (ii) alter or impair any security interest or perfection thereof, in favor of any person or entity, that existed as of the Petition Date.

9. Notice of the Motion as provided therein shall be deemed good and sufficient and the requirements set forth in Rule 6004(a) of the Bankruptcy Rules are hereby waived.

10. The requirements set forth in Rule 6003(b) of the Bankruptcy Rules are satisfied because the relief set forth in this Interim Order is necessary to avoid immediate and irreparable harm.

11. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion.

12. This Interim Order is effective immediately upon its entry.

13. The hearing to consider entry of an order granting the relief requested in the Motion on a final basis (the “Final Hearing”) shall be held **on \_\_\_\_\_, 2024 at \_\_\_\_\_ (prevailing Eastern Time)**. Any objections or responses to the entry of a final order on the Motion shall be filed on or **before 4:00 p.m. (prevailing Eastern Time) on \_\_\_\_\_, 2024** and shall be served on: (a) the Debtors, c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408, Attn: Dean Vomero; (b) Foley Hoag, 1301 Avenue of the Americas, 25<sup>th</sup> Floor, New York, New York 10019, Attn: Alison Bauer, Esq. (abauer@foleyhoag.com) and Jiun-Wen Bob Teoh, Esq. (jteoh@foleyhoag.com), and 155 Seaport Boulevard, Boston, Massachusetts 02210, Attn: Kenneth S. Leonetti, Esq. (ksl@foleyhoag.com); (c) Gibbons, P.C., 300 Delaware Ave., Suite 1015, Wilmington, Delaware 19801, Attn: Chantelle D. McClamb, Esq. (cmcclamb@gibbonslaw.com), and One Gateway Plaza, Newark, New Jersey, 07102, Attn: Robert K. Malone, Esq. (rmalone@gibbonslaw.com); (d) the Office of the United States Trustee, 844 King Street, Suite 2207, Lockbox 35, Wilmington, Delaware; 19801, Attn: Jane M. Leamy, Esq. (jane.m.leafy@usdoj.gov); (e) counsel to the DIP Lenders and the Senior Secured Noteholders, Greenberg Traurig, LLP, One International Place, Suite 2000, Boston, MA 02110,

Attn: Julia Frost-Davies (julia.frostdavies@gtlaw.com), and 222 Delaware Avenue, Suite 1600, Wilmington, Delaware 19801, Attn: Dennis Meloro (melorod@gtlaw.com); and (f) counsel to any statutory committee appointed in these chapter 11 cases. In the event no objections to entry of the Final Order on the Motion are timely received, this Court may enter such Final Order without need for the Final Hearing.

14. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Interim Order.

**EXHIBIT B**

**Final Order**

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

In re

BURGESS BIOPOWER, LLC, *et al.*<sup>1</sup>

Debtors.

Chapter 11

Case No. 24-10235 (LSS)  
(Joint Administration Requested)

**Re: D.I.**

**FINAL ORDER (I) AUTHORIZING THE DEBTORS TO CONTINUE PERFORMING  
UNDER CERTAIN SHARED SERVICES AGREEMENTS AND HONOR  
OBLIGATIONS RELATED THERETO; AND (II) GRANTING RELATED RELIEF**

Upon the *Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors to Continue Performing Under Certain Shared Services Agreements and Honor Obligations Related Thereto; and (II) Granting Related Relief* (the "Motion");<sup>2</sup> and upon the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings*; and the Court finding that: (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012; (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); (c) the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and (d) the Court may enter a final order consistent with Article III of the United States Constitution; and upon the record herein; and after due deliberation thereon; and it appearing that sufficient notice of the Motion has been given and that no other further notice is necessary; and good cause appearing therefor; it is hereby

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<sup>1</sup> The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number are: Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors' corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408

<sup>2</sup> Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

**ORDERED THAT:**

1. The Motion is GRANTED on a final basis, as set forth herein.
2. The Debtors are authorized, but not directed, to, in their sole discretion and in the ordinary course of business, continue performing under the Shared Services Agreements and honor, pay, or otherwise satisfy any Current Shared Services Obligations, regardless of whether such obligations arose prepetition or postpetition, in the ordinary course of business. For the avoidance of doubt, the Debtors are not authorized to pay any Excluded O&M Expenses, Past Due O&M Obligations and Past Due PMA Obligations.
3. The Debtors' banks and financial institutions shall be, and hereby are, authorized, when requested by the Debtors in their sole discretion, to process, honor, pay, and, if necessary, reissue any and all checks, including prepetition checks that the Debtors reissue postpetition, and electronic fund transfers drawn on the Debtors' bank accounts relating to those Current Shared Services Obligations whose payment is approved by this Final Order, whether such checks were presented or fund transfer requests were submitted prior to or subsequent to the Petition Date, provided that sufficient funds are available in the applicable accounts to make the payments.
4. The Debtors' banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other transfer drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this Final Order, and any such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for in this Final Order.
5. The Debtors are hereby authorized, but not directed, to issue postpetition checks or to effect postpetition fund transfer requests in replacement of any checks or fund transfer requests with respect to the Current Shared Services Obligations authorized to be paid pursuant to this Final

Order that have been dishonored or denied as a consequence of the commencement of these Chapter 11 Cases, and to reimburse any expenses that holders of claims in connection with the Current Shared Services Obligations may incur as a result of any bank's failure to honor a prepetition check.

6. Nothing contained in the Motion, the Interim Order, or this Final Order shall be construed to (i) create, alter, or perfect, in favor of any person or entity, any interest in cash of a Debtor that did not exist as of the Petition Date, or (ii) alter or impair any security interest or perfection thereof, in favor of any person or entity, that existed as of the Petition Date.

7. Nothing in the Motion or this Final Order, nor any actions or payments made by the Debtors pursuant to this Final Order, shall be construed as: (a) an admission as to the validity of any claim against the Debtors or the existence of any lien against the Debtors' properties; (b) a waiver of the Debtors' rights to dispute any claim or lien on any grounds; (c) a promise to pay any claim; (d) an implication or admission that any particular claim would constitute an allowed claim; (e) an assumption or rejection of any executory contract or unexpired lease pursuant to Section 365 of the Bankruptcy Code; or (f) a limitation on the Debtors' rights under Section 365 of the Bankruptcy Code to assume or reject any executory contract with any party subject to this Final Order. Nothing contained in this Final Order shall be deemed to increase, reclassify, elevate to an administrative expense status, or otherwise affect any claim to the extent it is not paid.

8. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Final Order in accordance with the Motion.

9. This Final Order is effective immediately upon its entry.

10. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Final Order.

**EXHIBIT C**

## OPERATION AND MAINTENANCE AGREEMENT

THIS OPERATION AND MAINTENANCE AGREEMENT (this “*Agreement*”) is made and entered into January 19, 2018 (the “*Effective Date*”) by and between Berlin Station, LLC, a Delaware limited liability company (“*Owner*”) and CS Berlin Ops, Inc., a Delaware limited liability company (“*Operator*”). Each of Owner and Operator is sometimes referred to as a “*Party*” and collectively as the “*Parties*.”

### RECITALS

A. Owner owns the Burgess BioPower Plant which generates electricity from biomass fuel and is located in Berlin, New Hampshire (as further defined in **Schedule 1**, the “*Project*”) and

B. Owner desires to retain Operator to provide, and Operator desires to provide, operation and maintenance for the Project, as set forth in this Agreement.

**NOW THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

### ARTICLE 1 DEFINITIONS; INTERPRETATION

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

“*Additional Services*” shall mean any activity or service that is required to operate and maintain the Project pursuant to the Specifications that is not one of the Base Services to be provided by Operator.

“*Affiliate*” of a specified Person shall mean any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by or is under common control with, the Person specified. For purposes of the immediately preceding sentence, “control” shall mean the ability to control or effect the day to day management and control of the Person or a fifty percent (50%) or greater beneficial ownership interest in the partnership interests, member interests or voting stock of the Person. Notwithstanding anything to the contrary in this Agreement (including the foregoing sentences), for the purposes of interpreting the obligations of the Parties in this Agreement, Owner and Operator shall not be considered Affiliates.

“*Agreement*” has the meaning assigned to such term in the Preamble.

“*Annual O&M Plan*” means the plan for the Project prepared by Operator for each calendar year of the Term in accordance with **Section 2.15** and as amended, modified, supplemented or replaced during the Term.

“*Base Services*” means the services set forth in **Exhibit A** and **Article 2** (other than Additional Services as described in **Section 2.2(b)** and those items specifically identified as Additional Services in this Agreement) to be performed by Operator pursuant to the terms of this Agreement.

***“Biomass Fuel Supply Agreement”*** means that certain Biomass Fuel Supply Agreement by and between Owner and Richard Carrier Trucking, Inc. dated as of March 1, 2011, as assigned.

***“Change In Law”*** means the enactment, adoption, promulgation, change, modification (including a change in interpretation by a Governmental Authority), amendment or repeal of any Law or Permit, including any FERC, NERC (including NERC Reliability Requirements), Purchasing Utility or Interconnecting Utility requirements applicable to the Site or the Service Fee, that becomes effective after the Effective Date.

***“Change Order”*** means a written agreement to change the Services which describes the change, identifies the writing as a Change Order, sets out adjustments, if any, in the Services and any other provision of this Agreement which is affected, and is executed by the Parties.

***“Commercially Available”*** means, with respect to a spare part, that such spare part: (a) is made available for purchase in the general commercial marketplace by a third party or (b) can be replaced by an equivalent part or a part that has superseded the original part.

***“Effective Date”*** has the meaning assigned to such term in the Preamble.

***“Emergency”*** means an event occurring at the Site or any adjoining property that poses actual or imminent risk of serious personal injury to any person or material physical damage to the Site or to the interconnection facilities requiring, in the good faith determination of the Operator, immediate preventative or remedial action by the Operator.

***“Escalation Rate”*** means, as of each anniversary of the Effective Date, the amount of change in the Consumer Price Index, as published by the U.S. Department of Labor, as measured by its change in value from the immediately previous anniversary of the Effective Date.

***“Excusable Event”*** means (a) an Owner-Caused Delay; (b) a Change in Law; (c) the occurrence or presence of any Hazardous Material; liens or encumbrances; endangered or threatened species; religious, historical, archaeological or biological resources; or any physical conditions at, above or below the surface of the Site, in each case that were unknown by Operator on the Effective Date; (d) spare parts required for corrective maintenance not being Commercially Available; (e) a failure, outage or curtailment of the Project (or any component or system thereof) that is not as a result of Operator’s failure to operate or maintain the Project in accordance with the Specifications; (f) a failure, outage or curtailment of the Project (or any system thereof) as a result of a directive from the Purchasing Utility or the Interconnecting Utility, counterparties to the Interconnection Agreement, or other applicable authority; (g) a casualty event that entails replacement of the Project or any material part thereof (including an event that is covered by the all-risk property insurance required to be maintained by Owner pursuant to this Agreement); or (h) a modification to the Project so that it is no longer in conformity with **Schedule 1**.

***“Force Majeure Event”*** shall mean any circumstance not within the reasonable control, directly or indirectly, of the Party affected, rendering such Party wholly or in part unable to perform its obligations under this Agreement, but only if and to the extent that (a) such circumstance, despite the exercise of due diligence, cannot be or be caused to be prevented, avoided or removed by such Party, (b) such event is not due to such Party’s negligence or intentional misconduct, (c) such event is not the result of any failure of such Party to perform any of its obligations under this

Agreement, (d) such Party has taken all reasonable precautions, due care, and reasonable alternative measures to avoid the effect of such event and to mitigate the consequences thereof, and (e) such Party has given the other Party prompt notice describing such event, the effect thereof and the actions being taken to comply with this Agreement. Subject to the foregoing conditions, Force Majeure Events may include: strikes or other labor disputes (other than strikes or labor disputes solely by employees of the Party declaring the Force Majeure Event or as a result of such Party's failure to comply with a collective bargaining agreement); adverse weather conditions and other acts of nature; earthquakes; and riot or civil unrest; provided, that Force Majeure Events shall not include any inability to make any payments that are due hereunder or to any third party or to procure insurance required to be procured hereunder.

***"Good Industry Practices"*** shall mean the practices, methods, standards of care, skill, safety procedures and diligence, engaged in or approved, during the relevant time period, for the operation and maintenance of biomass energy generating facilities of a comparable type, regional geographic location and complexity to the Project. Good Industry Practice is not intended to require the optimum practice, method or act to the exclusion of all others, but rather to include the practices, methods, standards of care, skill, safety procedures and diligence generally accepted in the industry.

***"Governmental Authority"*** shall mean any (a) United States national, state, county, municipal or local government or any political subdivision thereof, (b) any United States court or administrative tribunal, (c) any other United States domestic governmental, quasi-governmental, judicial, public or statutory instrumentality; authority, body, agency, bureau or entity of competent jurisdiction.

***"Hazardous Material"*** shall mean (a) any petroleum or petroleum products, flammable explosives, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation and transformers or other equipment that contain dielectric fluid containing levels of polychlorinated biphenyls, (b) any chemicals or other materials or substances which are defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants" or words of similar import under any Law, and (c) any other chemical or other material or substance in such concentrations or quantities that are prohibited or regulated by any Governmental Authority under any Law pertaining to protection of human health, the environment or natural resources.

***"Insolvent"*** means: (i) a Party shall file a voluntary petition in bankruptcy or shall be adjudicated as bankrupt or insolvent, or shall file any petition or answer or consent seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under the present or future applicable federal, state or other statute or law relative to bankruptcy, insolvency or other relief for debtors, or shall seek or consent to or acquiesce in the appointment of any trustee, receiver, conservator or liquidator of such party or of all or any substantial part of its properties (the term "acquiesce", as used in this definition, includes the failure to file a petition or motion to vacate or discharge any order, judgment or decree within one hundred eighty (180) days after entry of such order, judgment or decree); (ii) a court of competent jurisdiction shall enter an order, judgment or decree approving a petition filed against a Party seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution or

similar relief under the present or any future federal bankruptcy act, or any other present or future applicable federal, state or other statute or law relating to bankruptcy, insolvency or other relief for debtors, and such party shall acquiesce and such decree shall remain unvacated and unstayed for an aggregate of one hundred eighty (180) days (whether or not consecutive) from the date of entry thereof, or a trustee, receiver, conservator or liquidator of such party shall be appointed with the consent or acquiescence of such party and such appointment shall remain unvacated and unstayed for an aggregate of one hundred eighty (180) days, whether or not consecutive; (iii) a Party shall admit in writing its inability to pay its debts as they mature; (iv) a Party shall give notice to any Governmental Authority of insolvency or pending insolvency, or suspension or pending suspension of operations; or (v) a Party shall make an assignment for the benefit of creditors or take any other similar action for the protection or benefit of creditors.

***“Intellectual Property Rights”*** means trade secrets, patents, copyrights, trademarks, proprietary rights and information, licenses and other intellectual property rights that can be held by a Party.

***“Interconnection Agreement”*** means the interconnection agreement for the Project, as described on **Schedule 2**.

***“Interconnecting Utility”*** means the Purchasing Utility.

***“Law”*** means any applicable law, statute, regulation, rule, ordinance, decision, writ, order, decree, judgment, injunctions, codes, acts, treaties, or ordinances, or any interpretation thereof, promulgated or issued by any Governmental Authority.

***“Lender”*** means any Person or entity, directly or indirectly, (a) providing senior or subordinated construction, interim or long-term debt or equity financing or refinancing to Owner (and for the avoidance of doubt, any permitted assignee of all or any portion of this Agreement or any Affiliates of Owner) for or in connection with the development, construction, purchase, installation or operation of the Project, whether that financing or refinancing takes the form of private debt, public debt or any other form (including debt financing or refinancing), including any equity and tax investor directly or indirectly providing financing or refinancing for the Project or purchasing equity ownership interests of Owner (and for the avoidance of doubt, any permitted assignee of all or any portion of this Agreement or any Affiliates of Owner), and any trustee or agent acting on their behalf, (b) providing interest rate protection agreements to hedge any of the foregoing obligations and/or (c) participating in a sale leaseback or leveraged leasing structure with respect to the Project.

***“Limitation of Liability”*** has the meaning given to it in **Section 5.5(a)**.

***“Manufacturer Warranties”*** means all warranties and guarantees provided by the manufacturers of equipment included in the Project.

***“Monthly Reports”*** has the meaning given in **Section 2.4**.

***“Operations and Maintenance Manuals”*** means the operation and maintenance manuals and procedures in respect of the Project to be delivered to Operator by Owner on or prior to the

Effective Date and updated from time to time by Operator with the approval of Owner, such approval not to be unreasonably withheld, conditioned or delayed.

**“Operating Fee”** means an amount equal to twenty thousand dollars (\$20,000) per month, adjusted annually on the Effective Date by the Escalation Rate.

**“Operating Year”** means (a) for the first Operating Year, the period of time beginning on the Effective Date and ending on December 31 of the first Operating Year, and (b) for each Operating Year thereafter, the calendar year, with the last Operating Year ending on the last day of the Term.

**“Operator”** has the meaning assigned to such term in the Preamble.

**“Operator Additional Services”** means any Additional Services to be provided upon the agreement of Owner and Operator pursuant to **Section 2.2(b)** and **Exhibit B**.

**“Operator Incentive Bonus”** means a payment from Owner to Operator pursuant to **Exhibit D**.

**“Operator Indemnified Party”** has the meaning given in **Section 5.4(b)**.

**“Operator Permits”** has the meaning given in **Section 2.12**.

**“Operator Reimbursable Costs”** means the costs, other than Payroll Costs, that are actually, properly, demonstrably and reasonably incurred by the Operator in the ordinary course of business in the performance of the Services under this Agreement, and including the following:

- (a) Operators cost for employer general liability insurance and all umbrella insurances if not otherwise provided for as Payroll Costs;
- (b) Site Personnel training, including tuition, travel, meals, lodging if not otherwise provided for as Payroll Costs;
- (c) All maintenance costs and expenses for the Project, including scheduled, routine, preventative, and unscheduled maintenance;
- (d) The cost of consumables, new and replacement spare parts and tools;
- (e) Project Office Expenses, to the extent not directly paid by Owner;
- (f) Capital expenditures or replacement of Facility equipment and Rolling Stock approved in writing in advance by Owner;
- (g) Rolling Stock Expenses;
- (h) Cost of utility services for the Project;
- (i) Costs of third party legal, accounting, and consulting services;

- (j) Cost of compliance with the permits and Laws;
- (k) All taxes on the Project (including the equipment incorporated therein), the Site, and the electricity and steam sold from the Project (but excluding any such taxes payable by Operator as independent contractor);
- (l) Lease payments for property or easements related to the Project;
- (m) The actual delivered cost of all other items or services Operator is required to provide under this Agreement that are supplied by Operator for the Project in accordance with the terms of this Agreement;
- (n) Recruitment and relocation of Site Personnel if not otherwise provided for as Payroll Costs; and

Any other necessary and proper expenses reasonably required for the performance of the Services and Operator's other duties pursuant to the terms of this Agreement not otherwise accounted for herein; provided, however, that no costs incurred or paid by Operator to any Affiliate of Operator shall be treated as a Reimbursable Cost unless incurred in accordance with **Section 2.15** of the Agreement.

***"Operator's Representative"*** has the meaning given in **Section 2.16**.

***"Owner"*** has the meaning assigned to such term in the Preamble.

***"Owner-Caused Delay"*** means (a) any failure by Owner or any Owner Party to perform or cause the performance of any of its obligations under this Agreement, (b) subject to any ongoing dispute with respect thereto, any failure by Owner or any Owner Party to perform or cause the performance of any Additional Services that have been recommended to Owner by Operator pursuant to **Section 2.10** within a commercially reasonable period of time after receipt of such recommendation by Owner in accordance with **Section 2.10**; (c) any material disruption or interference by Owner or any Owner Party with the performance of the Services or any Operator Additional Services (including a directive by Owner to Operator ordering Operator to shut down or otherwise cease (whether temporarily or otherwise) the operations of all or any portion of the Project); or (d) the Release of any Hazardous Material at the Site by Owner or any Owner Party.

***"Owner Indemnified Party"*** has the meaning given in **Section 5.4(a)**.

***"Owner's Inventory"*** has the meaning given in **Section 3.4(a)**.

***"Owner Party"*** means Owner and its Affiliates and its and their respective successors, assigns, officers, directors, shareholders, managers, members, partners, employees, agents and representatives.

***"Owner Permits"*** has the meaning given in **Section 2.12**.

***"Owner's Representative"*** means the individual designated by Owner to act as Operator's primary point of contact.

**“Party”** has the meaning assigned to such term in the Preamble.

**“Payroll Cost”** means the following fees, costs and expenses in (a) and (b) below; provided, however, the term “Payroll Costs” shall only include any such costs which are demonstrably and reasonably paid by Operator to Site Personnel who are engaged in providing the Services and, for the avoidance of doubt, “Payroll Costs” shall not include any Reimbursable Costs:

(a) Site Personnel wages and salaries (including payments for holidays, vacations, sick time, personal time and overtime), Site Personnel Incentive Payments, customary or required severance payments (except for severance payments for Site Personnel removed for poor performance that are not required by Law), and other wages which Owner has expressly agreed will be payable directly to the Site Personnel (collectively, the **“Wages”**); and

(b) Operator’s payroll additives relating to the Wages (including fringe benefits (medical, dental, vision, AD&D, employee life, unemployment, workers compensation, disability, occupational hazard insurance, and auto allowance), payroll taxes, employee taxes, workers compensation, 401k payments, and any other items related to the same which Owner has expressly agreed will be payable to the Site Personnel.

**“Permit”** means all approvals, permits, permissions, licenses, authorizations, consents, certifications, actions, orders, waivers, exemptions, variances, franchises, filings, declarations, rulings, registrations, applications and notices to, from or issued by any Governmental Authority, or any similar agreements required to be executed with any Governmental Authority, having jurisdiction over the Project and its ownership, operation and maintenance.

**“Person”** shall mean any natural person, corporation, limited liability company, partnership, firm, association, Governmental Authority or any other entity whether acting in an individual, fiduciary or other capacity.

**“Prime Rate”** means the interest rate published in *The Wall Street Journal* as the “Prime Rate” from time to time (or, if more than one rate is published, the arithmetic mean of such rates), determined as of the date the obligation to pay interest arises.

**“Project”** has the meaning assigned to such term in the Recitals.

**“Project Agreements”** means all of the agreements set forth on **Schedule 2**.

**“Project Office Expenses”** means the reasonable and documented costs and expenses associated directly with, and incurred at the administrative offices of, the Project, including, but not necessarily limited to, telephone and telecopy services, heat, electricity, postage and overnight mail services, paper, envelopes, file folders, computer paper, computer software, copy paper, copier and computer supplies, maintenance and replacement of office equipment, supplies, office cleaning and maintenance, including light bulbs and florescent tubes, miscellaneous office supplies, and any other expenses related to Operator’s use of the Project office, Project office equipment, and Project office operation.

**“Project Waste”** has the meaning given to it in **Section 2.8**.

***“Purchasing Utility”*** means the Public Service Company of New Hampshire, d/b/a Eversource Energy.

***“Release”*** means, except as may be expressly authorized by Law, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment including the soils or other surface feature, subsoils or any subsurface feature or strata, surface water, groundwater, or ambient air (including the abandonment or discarding of barrels, containers, and other receptacles containing any Hazardous Materials).

***“Rolling Stock”*** means front-end loaders, forklifts, mobile cranes, person lifts, pickup trucks, tractors, trailers, and automated sweeping equipment necessary or desirable for the operation of the Project.

***“Rolling Stock Expenses”*** means fuels, maintenance and materials, lease payments, insurance, and backup equipment for the Rolling Stock.

***“Service Fees”*** has the meaning given in **Section 4.1**.

***“Services”*** means, collectively, the Base Services and any Operator Additional Services.

***“Site”*** means the location of the Project as more particularly described on **Schedule 1**.

***“Site Personnel”*** means all individuals employed by Operator in the performance of the Services who are employed at the Project site.

***“Site Personnel Incentive Payment”*** means a bonus payment from Operator to Site Personnel calculated pursuant to **Exhibit E**.

***“Subcontractor”*** means any Person with whom Operator enters into an arrangement for the performance of the Services or for the performance of any of Operator's other obligations under this Agreement, including Persons at any tier with whom any Subcontractor has further subcontracted any part of the Project, and the legal or personal representatives, successors, and assigns of such Person.

***“Term”*** has the meaning given in **Section 5.1**.

***“Termination Notice”*** has the meaning given in **Section 5.2(c)**.

***“Termination Payment”*** means, with respect to any date on which a Termination Payment needs to be calculated, the lesser of (a) twenty percent (20%) of the aggregate Operating Fees that would have been payable by Owner over the remainder of the Term, and (b) the Operating Fees that would have been payable for a one (1) year period immediately succeeding the date of termination.

**1.2 Interpretation.** As used in this Agreement (including the Exhibits), the terms “herein,” “herewith” and “hereof” are references to this Agreement, taken as a whole, the terms “includes” or “including” shall mean “including, without limitation,” and references to a

“Section,” “Article” or “Exhibit” shall mean a Section, Article or Exhibit of this Agreement, as the case may be, unless in any such case the context requires otherwise. All references to a given agreement, instrument or other document shall be a reference to that agreement, instrument or other document as modified, amended, supplemented and restated through the date as of which such reference is made. A reference to a Person includes its permitted successors and permitted assigns. The singular shall include the plural and the masculine shall include the feminine and neuter, and vice versa. The term “shall” is understood to be mandatory, meaning will or must, and the term “may” is understood to be permissive in nature.

## **ARTICLE 2 SERVICES**

### **2.1 Engagement of Operator.**

(a) Engagement by Owner. On the terms and conditions set forth in this Agreement, Owner hereby engages Operator to perform the Services.

(b) Acceptance by Operator. On the terms and conditions set forth in this Agreement, Operator hereby accepts the engagement referred to in subsection (a) and agrees to perform the Services.

### **2.2 Services.**

(a) In General. Throughout the Term, Operator shall provide the Services to Owner.

(b) Operator Additional Services. If Owner desires that Operator provide any Additional Services, then Owner shall submit to Operator a written request for such services. If Operator is reasonably capable of providing and is licensed to provide such Additional Services, Operator shall provide the same to Owner in accordance with the provisions of this Agreement. Operator shall perform any Additional Services in accordance with the terms set forth on **Exhibit B**.

(c) Title. Title to all items, parts, materials and equipment supplied under or pursuant to this Agreement to Owner shall at all times remain with Owner.

(d) Status of Operator. Operator has no right or authority to assume, create or incur any liability or obligation, express or implied, against, in the name of, or on behalf of Owner except (i) as expressly authorized in writing by Owner or (ii) as contemplated by the express provisions hereof. Operator shall be solely responsible for all matters relating to the payment of its employees, including compliance with social security, withholding and all other similar regulations governing such matters, and Operator shall be solely responsible for the Services. Operator shall in no event be deemed to have a fiduciary relationship with Owner. Without limiting the generality of the foregoing, Owner retains the ultimate authority and obligation to determine whether and to what extent the Project operates, and Operator shall never cause the Project to generate power except as expressly directed to do so by Owner or any dispatching authority specified by Owner. Operator has no obligation to upgrade or replace Project systems except in

accordance with this Agreement or as expressly directed by Owner, nor shall it be obligated to spend funds or otherwise employ its own credit to support the Project.

**2.3 Standards of Performance.** The Services, and the Operator Additional Services, if any, shall be performed (a) in compliance with all Laws and Permits; (b) in accordance with Good Industry Practices and this Agreement; (c) in a safe, expeditious, good, diligent and workmanlike manner; (d) in accordance with the terms of the Project Agreements; (e) in compliance with the safety regulations and standards adopted under the Occupational Safety and Health Act of 1970, as amended from time to time; (f) in accordance with the 2008 NEC code; (g) in accordance with the Manufacturers Warranties; and (h) in accordance with the Operations and Maintenance Manuals (collectively (a) – (h), the “*Specifications*”).

**2.4 Monthly Reports.** Throughout the Term, Operator shall furnish to Owner, in in substantially the form attached hereto as **Exhibit F**, monthly performance, maintenance and inspection reports for the Project (the “*Monthly Reports*”) on or before the tenth (10<sup>th</sup>) day of the following month. Each Monthly Report shall include a summary of (i) operations; (ii) Project performance (including a discussion of any unscheduled downtime or Excusable Events); (iii) reports of any environmental or Site disturbances; (iv) safety/accident reports; (v) Operator Additional Services; (vi) maintenance and inspection reporting, including any outstanding recommended Additional Services; and (vii) any proposal of recommended maintenance for the upcoming month.

## **2.5 Procurement.**

(a) Procurement Services. Operator shall procure goods, services, consumables, and parts and equipment as needed from time to time for the Services and the general operation and maintenance of the Project in accordance with the Specifications; provided, that such procurement obligations shall be performed in accordance with the provisions of this **Section 2.5**.

(b) Subject to Annual O&M Plan. During each Operating Year, any procurement Services shall be performed in accordance with the approved Annual O&M Plan for such Operating Year.

(c) Procurement Negotiation. In negotiating any agreements with vendors with respect to the procurement Services, Operator shall include in such vendor agreements standard terms and conditions that are set forth in the administrative procedures manual for the Project, if available, including any warranties required with respect to the procurement of the applicable item.

(d) Approved Contracts. In performing procurement and contracting Services, Operator shall be authorized, subject to the express limitations and other provisions of this Agreement, to enter into contracts and purchase orders in the normal course of business in Owner’s name as agent for Owner if such contracts or purchase orders are (i) included in, and consistent with, the then applicable Annual O&M Plan, and (ii) on terms substantially similar to contracts or purchase orders previously entered into between Owner and such contractor (each, an “*Approved Contract*”). Operator shall not be obligated to contract with contractors in its own name. Operator

shall ensure that all contracts and purchase orders are made in writing and are in no way inconsistent with this Agreement.

(e) Approved Contract Limitations. Notwithstanding the general authority granted to Operator pursuant to **Section 2.5(d)** with respect to the procurement Services, without the prior written consent of Owner, Operator shall not enter into any contract or purchase order that (i) involves the payment of more than twenty-five thousand dollars (\$25,000) in the aggregate during any Operating Year, (ii) has a term longer than one year, or (iii) is not an Approved Contract. Operator shall ensure that all contracts and purchase orders are made in writing and are in no way inconsistent with this Agreement.

(f) Assignment of Contracts. All contracts entered into by Operator on behalf of Owner shall provide that the rights and obligations of Operator thereunder shall be, at the election of Owner (or any of its successors, assigns or designees), assigned to Owner (or any of its successors, assigns or designees, as the case may be) without further consent of the applicable contractor.

## **2.6 Warranty Advocacy.**

(a) Warranty Claims. To the extent that equipment warranties cover replacement and/or repair of equipment comprising the Project during the Term, it shall be Operator's responsibility to take such actions as are required to comply with Manufacturer Specifications to maintain all associated Manufacturer Warranties in the performance of the Services and to promptly submit, process and pursue, claims under such warranty coverage; provided that, because warranty claims may need to be submitted in the name of Owner, Owner shall provide such full and complete cooperation as Operator may reasonably require in connection with the submission, processing and pursuit of warranty coverage.

(b) Limitations. Operator agrees to act as agent on behalf of Owner for purposes of this **Section 2.6**. Notwithstanding the foregoing, Operator shall not be responsible for (i) the performance or failure to perform by any provider of any warranty after the Operator has satisfied its obligations in **Section 2.6(a)**; (ii) any act or omission of any provider of any warranty; or (iii) pursuing any litigation or dispute resolution between Owner and any provider of any warranty.

(c) NO IMPLIED WARRANTIES. EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, OPERATOR MAKES NO WARRANTIES OR GUARANTEES, EXPRESS OR IMPLIED, AND OPERATOR SPECIFICALLY DISCLAIMS ANY GUARANTEE IMPLIED BY LAW, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND IMPLIED WARRANTIES OF CUSTOM OR USAGE.

**2.7 Record-keeping; Documentation.** Operator shall keep and maintain all relevant information with respect to the Services and the Project in accordance with the provisions of **Exhibit A**.

## **2.8 Waste Disposal; Hazardous Materials.**

(a) In accordance with all applicable Laws, Operator shall manage all wastes (including wastes containing or consisting of Hazardous Materials) generated by or used in the operation and maintenance of the Project (the "**Project Waste**") and coordinate the off-site transportation, disposal and treatment of such Project Waste. Operator shall assist and consult with Owner concerning the selection of (i) off-Site transporters of Project Waste, and (ii) locations of disposal or treatment of Project Waste; provided, however, that Owner will be responsible, as "generator" of Project Waste for selecting and contracting with counterparties concerning such transportation, disposal or treatment services. All Project Waste will be disposed of in the name of the Owner as the "generator" and "arranger" of such waste. Operator hereby agrees to act as Owner's agent for the purposes of such disposal and will sign or otherwise authorize all such disposal on Owner's behalf.

(b) Operator shall fully indemnify, save harmless and defend the Owner from and against any and all costs and expenses incurred by Owner with respect to the handling, storage, treatment, disposal, sampling, investigation, response, removal, remediation and transportation of all waste products, including without limitation Hazardous Materials, generated or used at, or brought to, the Project or the Site by any other third party for whom Operator does not bear any responsibility to the extent Operator, Subcontractor or any other third party acting at Operator's direction or under Operator's control causes, contributes to, or exacerbates a Release or disturbance of such waste.

**2.9 Insurance.** Operator shall procure and maintain in full force and effect all insurance coverage specified in **Exhibit C**.

**2.10 Recommendation of Additional Services.** If during the Term Operator reasonably believes, in accordance with Good Industry Practices, that any Additional Services need to be performed with respect to the Project, Operator shall notify Owner of the need to perform such Additional Services as soon as reasonably practicable, but in no event later than thirty (30) days after the discovery of the need to perform such Additional Services. Any dispute with respect to the necessity of performing such Additional Services will be resolved in accordance with the dispute resolution mechanism in **Section 6.8**.

**2.11 Costs and Expenses.** Except as specifically provided to the contrary in this Agreement, during the Term, Operator shall bear all costs and expenses related to the performance of the Services.

**2.12 Permits.** Operator shall obtain and maintain any and all Permits required to be obtained in its name under applicable Law for Operator to perform the Services ("**Operator Permits**"). Owner shall obtain and maintain all Permits other than the Operator Permits required to be obtained in the name of Owner under applicable Law for Operator to perform the Services ("**Owner Permits**"). Operator shall provide Owner reasonable cooperation and assistance in obtaining the Owner Permits. Notwithstanding anything in this Agreement to the contrary, Operator shall be required to comply with Laws as in effect on the Effective Date at no additional charge to Owner.

**2.13 Emergency Services.** Operator shall develop Emergency response procedures to respond to all Emergencies and Force Majeure Events. Operator shall provide all necessary

services including staff, equipment, tools and consumables to repair, replace or maintain the affected parts of the Project leading to the Emergency situation. If the Emergency situation arises out of or otherwise is in connection with the acts or omissions of Operator, Operator shall be responsible for all such costs; otherwise, Owner shall be responsible for the costs arising from Emergencies, including any such fees set forth on **Exhibit B** which may be applicable.

## **2.14 Notifications.**

(a) Operator shall report the following matters to Owner by telephone, or e-mail promptly, but in any event no later than two (2) hours after Operator obtains knowledge thereof and shall receive Owner's input on how to remediate or otherwise alleviate such matters:

- (i) the occurrence of any Emergency;
- (ii) the release of any Hazardous Materials or any similar spillage or accident (this does not apply to minor amounts of Hazardous Materials routinely found in cleaning supplies); and
- (iii) environmental excursions that would potentially violate Law.

(b) Operator shall report the following matters to Owner by telephone, e-mail, telefax, next day courier, or hand delivery promptly, but in any event no later than twenty- four (24) hours after Operator obtains knowledge thereof (or, if circumstances do not permit the delivery of such a written notice within twenty-four (24) hours, to the extent possible notification shall be made verbally by telephone and confirmed as soon as is possible in writing):

- (i) any lapse, modification, termination or expiration of any license, permit, approval, authorization or consent issued or obtained for the Project or the Services, which in any case has or may reasonably be anticipated to have a material adverse effect on the operation of the Project or the performance of the Services;
- (ii) material health or safety incidents;
- (iii) any material labor unrest or material suspected unrest (routine complaints about working are specifically excluded here from);
- (iv) knowledge of the publication or release of any material negative news item regarding the Project;
- (v) complaints from local residents or officials;
- (vi) contact by members of the press or regulators, other than contacts of a routine nature such as scheduling of appointments;
- (vii) any dispute with any Governmental Authority or with any party to a Project Agreement which may reasonably be anticipated to have a material adverse effect on the operation of the Project or the performance of the Services;

(viii) any event or circumstance which may reasonably be anticipated to over the short term have a material adverse effect on the Project, including forced outages; and

(ix) serious personal injury.

#### **2.15 Personnel; Subcontractors.**

(a) Operator will ensure that all Site Personnel, labor and supervision provided by its employees and the Site Personnel are properly licensed and qualified to perform the work that they are engaged to perform. Operator agrees that it shall be fully responsible to Owner for the acts and omissions of Persons directly employed by Operator, including the Site Personnel.

(b) Except as provided for pursuant to the Annual O&M Plan and the requirements of **Section 2.5**, Operator may not engage a Subcontractor to perform or provide any of the Services without the consent of the Owner; provided that the subcontracting of all or substantially all of the Services shall require Lender approval.

#### **2.16 Annual O&M Plans.**

(a) Operator shall prepare for Owner an Annual O&M Plan for each calendar year during the Term, and such plan will be submitted to Owner for approval prior to October 1 of each calendar year; provided, however, Operator and Owner shall agree to an Annual O&M Plan for the first partial calendar year of the Term prior to the Effective Date.

(b) The Annual O&M Plan shall set out the operating plan and scheduled maintenance for the Project, including detailed information for the applicable calendar year and a forecast in respect of the next five (5) years regarding budgeted production, proposed maintenance, repairs and refurbishments, status of Owner's inventory of spares, and occupational health and safety matters and information as to the maintenance cycle and any major maintenance required. The Annual O&M Plan shall also include projections for the applicable calendar year and a forecast in respect to the next five (5) years, including operation and maintenance expense, capital expenditures (e.g., for maintenance equipment) and other expenses, and that is consistent with the narrative portion and any graphics contained in the Annual O&M Plan as described in the foregoing sentence.

(c) In the event that Owner shall not approve of any Annual O&M Plan or shall propose any modification thereto which is not agreeable to Operator due to Operator's reasonable concerns regarding compliance with the Specifications, Operator agrees to negotiate with Owner, in good faith, acting reasonably, to resolve any disagreement concerning the Annual O&M Plan. In no other circumstances shall Operator not agree to modify as proposed by Owner, provided that Owner bears additional costs that may occur as a result of Owner's proposal. Any dispute in the approval of an Annual O&M Plan will be dealt with under the dispute resolution mechanism in **Section 6.8**.

(d) If, prior to the commencement of any calendar year, Owner does not approve an Annual O&M Plan for such calendar year, Operator will be authorized to operate the Project in accordance with the Specifications, and to take such action and incur such expenditures

as required or appropriate thereunder consistent with the plan submitted until such time as an approved plan is provided.

(e) Operator shall use Good Industry Practices at all times not to incur any category of costs in excess of the amounts set forth in the applicable Annual O&M Plan for such Operating Year. If at any time during the performance of the Services, Operator becomes aware that any budget category defined in an Annual O&M Plan, or the sum total of all expenses associated with the Services, exceeds or will exceed by five percent (5%) the amount provided therefore in the applicable Annual O&M Plan (an "**Excess Expense**"), then Operator shall promptly notify the Owner of such Excess Expense and shall prepare a Change Order request for the Owner to consider.

(f) Should either Party become aware of any facts or circumstance that it believes necessitates an increase in the current Annual O&M Plan or other change to the operating plan incorporated therein, including unscheduled maintenance costs, the Party shall promptly notify the other Party, specifying the potential impact to the Annual O&M Plan or other applicable budget and reasons necessitating the change. Operator and Owner will then meet to discuss any appropriate changes to the Annual O&M Plan, to be documented by Change Order as may be agreed to by the Parties pursuant to **Section 5.6**.

**2.17 Limitations on Operator's Authority.** Notwithstanding any provision of this Agreement to the contrary, Operator's power and authority under this Agreement shall in all cases be limited by and subject to: (1) the restrictions and limitations set forth in this Agreement, (2) the Specifications, (3) all Change Orders agreed to between the Parties, and (4) the requirement that neither Operator nor any Subcontractor nor any of their agents or representatives shall take or cause to be taken any of the following actions unless previously expressly authorized in writing by an Owner Representative:

(a) The sale, lease, pledge, mortgage, conveyance, license, exchange or other transfer or disposition of any property or assets of Owner, including any property or assets acquired on behalf of Owner, except for a sale of assets of the Owner associated with the Facility that (1) that are obsolete or worn out, and (2) are replaced on a reasonably prompt basis;

(b) Making, entering into, executing, amending, modifying or supplementing any Project Agreements, or any other contract or agreement on behalf of or in the name of Owner;

(c) Making, incurring or committing to any expenditure on behalf of Owner other than in accordance with each applicable Annual O&M Plan; provided, however, Operator shall have the right to make or commit to make unbudgeted expenditures required for the performance of the Services that do not, in any single Operating Year, cause (1) any Major Budget Category to be exceeded by five percent (5%) or more, or (2) the sum total of all expenses to exceed the applicable Annual Operating for such Operating Year by more than five percent (5%); and provided, further, that this Section shall not apply to expenditures in excess of the amounts contained in the Annual O&M Plan for Facility fuel or in response to Emergencies.

(d) Borrowing any money on behalf of or in the name of Owner, utilizing any of Owner's or Burgess BioPower, LLC's property as security for any loans, obligating Owner as

guarantor, endorser, surety or accommodation party, or otherwise pledging the credit of Owner in any way other than the incurring of trade accounts in the ordinary course of performing the Services and in accordance with applicable Annual O&M Plan and the other applicable provisions of this Agreement;

(e) Lending any money, or extending any credit, on behalf of or in the name of Owner, except for extending trade credit in the ordinary course of performing the Services and in accordance with the applicable Annual O&M Plan and the other applicable provisions of this Agreement;

(f) Taking any material discretionary actions under any of the Project Agreements, including: (i) exercising or waiving any remedy of Owner or taking any non-routine action on behalf of Owner in the event of a default or threatened default under any such agreement; (ii) amending, modifying, terminating, renewing, extending or superseding any such agreement on behalf of Owner; (iii) assessing or settling any claim for liquidated damages or other damages on behalf of Owner under such agreements; or (iv) asserting or making any claim for indemnification or insurance coverage on behalf of Owner under any such agreement

(g) Approving any change orders (or other similar documents or requests) under any Project Agreement;

(h) Settling, compromising, assigning, pledging, transferring, releasing or consenting to do the same, of any claim, suit, debt, demand or judgment against, or due from or by Owner, or submitting any such claim, dispute or controversy to arbitration or judicial process, or stipulation thereof to a judgment, or consent to do the same; and

(i) Taking any action or failing to take any action that would constitute a violation, default or breach under or in connection with any Project Agreement or any Law;

provided, however, that the foregoing restrictions shall not limit or reduce Operator's obligations hereunder to advise the Owner to take any actions that may otherwise come within the scope of the Services hereunder and to seek the Owner's approval with respect to the same.

**2.18 Operator's Representative.** Prior to the Effective Date, Operator shall designate by notice to Owner a representative (the "***Operator's Representative***") who shall act as the single point of contact for Owner who may be replaced by Operator from time to time upon notice to Owner. The Operator's Representative shall not have authority to amend, or to waive any provision of this Agreement.

### ARTICLE 3 OWNER RESPONSIBILITIES

**3.1 Information.** Owner shall furnish to Operator, at Owner's expense, the information, services, materials and other items described in this **Article 3** and in **Schedule 2**. All such items shall be made available at such times and in such manner as may be reasonably required for the expeditious and orderly performance of the Services by Operator. Owner shall provide technical, operational and other Project information reasonably available to the Owner necessary

for Operator's performance of the Services, including, but not limited to, all operating and maintenance manuals, vendor and manufacturer instruction manuals, and as-built drawings

### 3.2 Access.

(a) Access to Site. Throughout the Term, Owner shall ensure that Operator, Subcontractors and each of their officers, agents and employees have reasonable access to the Site to provide all Services. Operator shall, and shall ensure that its agents, employees and Subcontractors shall, comply with all reasonable requirements of Owner and the Project Agreements and shall indemnify Owner for any losses arising out of or in connection with a failure by Operator to comply with its obligations under this **Section 3.1**.

(b) Owner Responsibility for Third Parties. If Owner brings any Owner Party, or any Owner Affiliate or third party, onto the Site, Owner shall comply, and shall be responsible for such Person's compliance, with the safety requirements of the Site, including Operator's safety requirements.

**3.3 Environmental Reporting.** Owner shall serve as the "Responsible Official" for purposes of the federal Clean Air Act (42 U.S.C. § 7401 et seq.) permitting and reporting, as "Designated Representative" for purposes of applicable environmental "cap and trade" programs requiring such, including but not limited to the Acid Rain Program, as applicable, and as corporate responsible official for other environmental programs, permitting and reporting.

**3.4 Wood Supply.** Owner shall procure biomass fuel consistent with the specifications set forth in Appendix A of the Biomass Fuel Supply Agreement.

**3.5 Owner's Representative.** Prior to the Effective Date, Owner shall designate by notice to Operator a representative (the "*Owner's Representative*") who shall act as the single point of contact for Operator who may be replaced by Owner from time to time upon notice to Operator. The Owner's Representative shall not have authority to amend, or to waive any provision of this Agreement.

## ARTICLE 4 SERVICE FEES

**4.1 In General.** As full compensation to Operator for the performance of all Services hereunder and for all costs incurred by Operator in connection therewith, Owner agrees to pay to Operator, in the manner and at the times specified in this **Article 4**, the Operator Reimbursable Costs consistent with the Annual O&M Plan, the Payroll Costs, and the Operating Fee, as applicable, plus any Site Personnel Incentive Payment or Operator Incentive Bonus earned hereunder, all as further described herein (all of the above, collectively, the "*Service Fees*").

**4.2 Invoicing.** On or prior to the tenth (10<sup>th</sup>) day of each month, Operator shall submit an invoice to Owner for any Services Fees incurred during the previous month. Subject to **Section 4.4**, each monthly invoice to Owner shall be paid within thirty (30) days of the later of receipt of the invoice or the last business day of the then current month; provided that the Operator Incentive Bonus earned and payable for each calendar year shall be invoiced on or prior to the tenth (10<sup>th</sup>) day of April in the following calendar year.

**4.3 Late Payments.** Overdue payment obligations of Owner hereunder shall bear interest, at the discretion of the Operator, from the date due until the date paid at the rate of the lesser of the Prime Rate plus two percent (2%) or the maximum rate allowed by Laws.

**4.4 Disputed Payments.** In the event that Owner disputes any portion of an invoice submitted by Operator, Owner shall pay the undisputed portion thereof when due and shall pay the disputed portion to the extent that the dispute is resolved in favor of Operator by agreement or as provided herein.

**4.5 Taxes.** Notwithstanding any provision in this Agreement to the contrary, the amount of the Service Fees set forth in this Agreement are exclusive of sales and use taxes applicable to the Services (with the exception of Operator's income tax).

**4.6 Liens.** Operator shall take prompt steps to discharge any lien or claim filed by any Subcontractor or supplier in connection with Operator's spare parts or equipment supply obligations. Operator shall, by appropriate agreement(s), require each of its Subcontractors to make payments to their respective Subcontractors and sub-subcontractors in a similar manner, and shall indemnify and hold harmless Owner against any claim against Owner, or any lien imposed on any portion of the Project or the Site, by any of its Subcontractors, including any expenses and reasonable attorneys' fees incurred in discharging any such liens or similar encumbrances. Each of Operator's Subcontractors shall provide Operator with a lien waiver upon completion of relevant work and, upon request from Owner, Operator shall supply copies of such lien waivers to Owner. In lieu of a lien waiver from a Subcontractor of Operator, Operator may provide a lien bond or other security within five (5) days of a written demand therefor from Owner or within five (5) days of Operator learning of the imposition of any such lien. Owner shall have no obligation to pay or ensure the payment of any monies to any of Operator's Subcontractors. Upon request from Owner, Operator shall also provide Owner with a lien waiver and comply with any requests from Owner to certify that the Project and the Site are not encumbered by mechanics' or other liens as required under **Section 6.5**.

## **ARTICLE 5 TERM; TERMINATION**

**5.1 Term.** The term of this Agreement (the "**Term**") shall commence on the Effective Date, and, unless terminated earlier pursuant to the terms of this Agreement, shall continue to and terminate on the third anniversary of the Effective Date; provided that this Agreement shall renew automatically for an additional one-year period unless either Party has delivered a written notice to the other Party of its election not to renew the Agreement at least ninety (90) days prior to the expiration of the original three-year term.

### **5.2 Termination on Default.**

(a) Termination by Owner. Owner may terminate this Agreement if (i) Operator becomes Insolvent, (ii) Operator fails to pay to Owner any undisputed amounts due under this Agreement within thirty (30) days of receiving written notice of such failure from Owner to Operator, (iii) the aggregate total liability of Operator to Owner during any Operating Year reaches an amount equal to the Limitation of Liability, or (iv) Operator fails to perform any of its

material obligations under this Agreement (other than a failure described in clause (i) above), which failure is not remedied within thirty (30) days of receiving written notice of such failure from Owner to Operator or, if the remedy is of such a nature that it cannot reasonably be completed within thirty (30) days of receiving written notice, if Operator fails to commence to remedy such failure within such thirty (30) day period and to diligently and continuously prosecute such remedy or fails to complete the same within one hundred twenty (120) days of receiving written notice.

(b) Termination by Operator. Operator may terminate this Agreement if (i) Owner fails to pay to Operator any undisputed amounts due under this Agreement within thirty (30) days of receiving written notice of such failure from Operator to Owner, (ii) Owner becomes Insolvent or (iii) Owner fails to perform any of its material obligations under this Agreement (other than a failure described in clause (i) above), which failure is not remedied within thirty (30) days of receiving written notice of such failure from Operator to Owner or, if the remedy is of such a nature that it cannot reasonably be completed within thirty (30) days of receiving written notice, if Owner fails to commence to remedy such failure within such thirty (30) day period and to diligently and continuously prosecute such remedy or fails to complete the same within one hundred twenty (120) days of receiving written notice. If Operator so terminates this Agreement, Owner shall pay to Operator: (i) any Service Fees or fees associated with Operator Additional Services, in each case, owed to Operator as of the date of such termination; and (ii) Operator's reasonable closeout and demobilization costs.

(c) Termination Notice. A notice of termination given pursuant to the foregoing provisions of this **Section 5.2** (the "**Termination Notice**") shall specify in reasonable detail the circumstances giving rise to the Termination Notice.

(d) Pre-Termination Rights. Termination of this Agreement shall not affect any rights or obligations as between the Parties which may have accrued prior to such termination, including Operator's right to receive a proportional amount of the Service Fees that have accrued up to the date of termination, or which expressly or by implication are intended to survive termination, whether resulting from the event giving rise to termination or otherwise.

**5.3 Termination for Convenience.** Owner shall have the right to terminate this Agreement for any reason and at any time during the Term upon sixty (60) days written notice from Owner to Operator of Owner's desire to terminate this Agreement; provided, however, that in the event of such termination under this **Section 5.3** Owner shall pay to Operator: (i) any Service Fees or fees associated with Operator Additional Services, in each case, owed to Operator as of the date of such termination; (ii) Operator's reasonable closeout and demobilization costs; and (iii) the Termination Payment.

#### **5.4 Indemnities.**

(a) Operator's Indemnity. Operator shall defend, indemnify and hold harmless, Owner, its subsidiaries and Affiliates, and the directors, officers, agents, employees, successors and assigns of each of them (each, an "**Owner Indemnified Party**") from and against any and all third party suits, actions, losses, damages, injuries, liabilities, claims, demands, penalties, assessments, interests and causes of action, and expenses (including all expenses of litigation, court costs, and attorney's fees) for (a) bodily injury or death to any person, including employees of

Operator; or (b) damage to any property, and in each of the instances described in the preceding clauses (a) and (b) to the extent caused by fraud, willful misconduct or negligent acts or omissions of Operator, its Subcontractors, agents or employees,; from breach of Operator's representations and warranties contained in **Section 6.6(b)** or from the breach or violation of any Permit.

(b) Owner's Indemnity. Owner shall defend, indemnify, and hold harmless Operator and its Affiliates and each of their respective successors, assigns, officers, directors, shareholders, managers, members, partners, employees, representatives and agents (each a "***Operator Indemnified Party***") from and against any and all third party suits, actions, losses, damages, injuries, liabilities, claims, demands, penalties, assessments, interests and causes of action, and expenses (including all expenses of litigation, court costs, and attorney fees) for (a) bodily injury or death to any person, or (b) damage to any property and in each of the instances described in the preceding clauses (a) and (b) to the extent caused by the willful misconduct or negligent acts or omissions of Owner or any Owner Party; or from breach of Owner's representations and warranties contained in **Section 6.6(a)**.

(c) Notice. Each Party shall promptly notify the other in writing of any claims from any third party that may be covered by the indemnities set forth in this **Section 5.4**.

(d) Procedure. The indemnifying Party shall have sole charge and direction of the defense of any suit or proceeding based on any claim, demand, loss, damage, cause of action, suit on liability for which the indemnifying Party is responsible under any such Section. The indemnified Party shall give the indemnifying Party such assistance as the indemnifying Party may reasonably require in such defense, and shall have the right to be represented in such defense by counsel of its own choice at its own expense. If the indemnifying Party fails to defend diligently such suit or proceeding, the indemnified Party may, in its reasonable discretion, either defend such suit or proceeding or settle the claim which is the basis thereof, without the consent of the indemnifying Party, without relieving the indemnifying Party of its obligations under this **Section 5.4**, as applicable, and in either case the indemnifying Party shall reimburse the indemnified Party for its expenses, court costs and reasonable attorneys' fees.

(e) Extension of Indemnification and Limitations. The waivers and disclaimers of liability, releases from liability, limitations and apportionments of liability and the protections of the indemnity and hold harmless obligations expressed in this Agreement shall extend to each Party and its Affiliates and its and their respective successors, assigns, officers, directors, shareholders, managers, members, partners, employees, agents and representatives.

(f) Net of Insurance Benefits. Any recovery under this **Section 5.4** shall be limited to the amount of actual out-of-pocket damages sustained by the Owner Indemnified Parties or the Operator Indemnified Parties, as applicable, by reason of any breach or nonperformance hereunder, net of insurance recoveries from insurance policies of the Owner Indemnified Parties or the Operator Indemnified Parties, as applicable.

## **5.5 Limitation on Liability**

(a) Limitation on Liability. Notwithstanding anything to the contrary in this Agreement, it is agreed and understood that the total liability of Operator under this Agreement

during any Operating Year shall not in the aggregate exceed one hundred percent (100%) of the Service Fees paid to Operator during the preceding Operating Year (the “*Limitation of Liability*”), whether or not such liability is claimed in contract, tort (including negligence and strict liability), warranty, or any other legal or equitable theory; provided, however, that (i) with respect to the indemnification obligations of the parties pursuant to **Section 5.4**, the total liability of the Operator under this Agreement shall not in the aggregate exceed one hundred percent (100%) of the Service Fees to be paid to Operator during the Term, and (ii) that the foregoing Limitation of Liability shall not apply in respect of (i) any fraud, willful misconduct, or gross negligence on the part of Operator or Operator’s representatives, subcontractors, employees or agents, (ii) claims arising in connection with the environmental indemnity set forth in Section 2.8(b), (iii) liability covered by the proceeds of insurance required of the Operator hereunder, (iv) liability for bodily injury or death set forth in Section 5.4(a) or (v) liability arising from the breach or violation of any Permit..

(b) NO CONSEQUENTIAL DAMAGES. EXCEPT WITH RESPECT TO THE INDEMNIFICATION OBLIGATIONS OF THE PARTIES PURSUANT TO **SECTION 5.4** FOR THIRD PARTIES, NEITHER OWNER NOR OPERATOR NOR ANY OF EITHER OF THEIR SUCCESSORS OR ASSIGNS, OR THEIR RESPECTIVE SHAREHOLDERS, PARTNERS, ASSIGNS, DIRECTORS, OFFICERS, AGENTS, EMPLOYEES, OR REPRESENTATIVES SHALL BE LIABLE, UNDER ANY LEGAL OR EQUITABLE THEORY, TO THE OTHER FOR ANY CONSEQUENTIAL, SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR INCIDENTAL LOSSES OR DAMAGES, INCLUDING FROM LOSS OF GOODWILL AND LOSS OF PROFIT, AND OWNER AND OPERATOR EACH HEREBY RELEASES THE OTHER AND EACH OF SUCH PERSONS FROM ANY SUCH LIABILITY.

#### **5.6 Force Majeure Event; Excusable Event.**

(a) No Liability. Neither Party shall be considered to be in default of its obligations under this Agreement (other than an obligation to make payments when due) when and to the extent that performance of such obligations is prevented by any Force Majeure Event or, in the case of Operator, an Excusable Event which arises after the date of this Agreement; provided, however, that Owner shall not be obligated to pay the Service Fee to Operator for any period in which Operator is unable to perform the Services due to a Force Majeure Event that Operator has claimed.

(b) Obligations during Force Majeure Event or Excusable Event. If either Party shall rely on the occurrence of a Force Majeure Event or, in the case of Operator, an Excusable Event, as a basis for being excused from the performance of its obligations under this Agreement, then the Party relying on the event or condition shall (i) promptly notify the other Party, (ii) exercise commercially reasonable efforts to continue to perform its obligations hereunder and perform all obligations hereunder that are unaffected by such Force Majeure Event or Excusable Event, (iii) subject to the requirements of **Section 5.6(c)**, take action within its reasonable control to correct or cure the Force Majeure Event or, in the case of Operator, the Excusable Event, and (iv) exercise all commercially reasonable efforts to mitigate damages to the other Party to the extent such action will not adversely affect its own interests.

(c) Changes.

(i) Change Orders. If any Force Majeure Event, Excusable Event, or another event or circumstance, despite the use of Good Industry Practice, affects Operator's performance of the Services at the Site, then Operator shall be entitled request a Change Order to amend the Service Fee, the budget established in the approved Annual O&M Plan, and the timing and performance of the affected Services (subject to continued compliance with the Project Agreements) to the extent such Force Majeure Event or Excusable Event actually causes Operator to incur additional direct, out-of-pocket costs or that Operator can demonstrate materially delays Operator's performance of the Services at the Site.

(ii) Contents of Draft Change Order. Any draft Change Order shall include: (1) a technical description of the proposed change in such detail as the Owner may reasonably require, (2) the proposed change in the Service Fee, if any, caused by the proposed change, (3) all potential effect(s), if any, on the dates for performance by the Operator hereunder caused by the proposed change, and (4) all potential effect(s), if any, on the Operator's ability to comply with any of its obligations hereunder. Any proposed change in the Service Fee will be equal to the additional direct, out-of-pocket costs that Operator can reasonably demonstrate it would actually incur if it were to perform the Services in accordance with the draft Change Order.

(iii) Process for Concluding Change Order. The Owner shall in writing either approve or disapprove any draft Change Order, or request additional time, not to exceed 30 days, to consider the draft Change Order, within ten (10) days from the date of receipt of such draft Change Order. If the Owner approves the Change Order, the Owner and the Operator shall then sign the Change Order that shall operate as an amendment to this Agreement. Any dispute between the Parties with respect to any draft Change Order shall be settled in accordance with the terms of **Section 6.8.**

(iv) Agreement Required. All changes shall be subject to mutual agreement and no Change Order will be effective until signed by both Parties.

(d) Termination for Force Majeure Event. In the event that Operator is prevented from providing all or a substantial part of the Services as a result of a Force Majeure Event for a continuous period of one hundred eighty (180) days, either Party may terminate this Agreement.

## **ARTICLE 6 MISCELLANEOUS**

**6.1 Amendments.** This Agreement may only be amended, modified or supplemented by an instrument in writing executed by duly authorized representatives of Owner and Operator; provided, that, for the avoidance of doubt, this Agreement may not be amended by electronic mail communications.

**6.2 Waivers.** No delay or omission by a Party to exercise any right or power it has under this Agreement shall impair or be construed as a waiver of such right or power. A waiver by any Party of any breach or covenant shall not be construed to be a waiver of any succeeding breach or any other covenant. All waivers must be signed by the Party waiving its rights.

### 6.3 Successors and Assigns; Financing Provisions.

(a) Except as set forth in this **Section 6.3**, Operator shall not be entitled to assign this Agreement or any of its rights or obligations under this Agreement, nor shall it enter into any transaction as a result of which it may transfer, assign, charge or dispose by any title of any of those rights and obligations, without the prior written consent of the Owner, which consent may be withheld in its sole and absolute discretion. Any assignment or delegation made in contravention of this clause shall be void and unenforceable. Notwithstanding the foregoing, Operator shall be entitled to assign its rights and interests in this Agreement to any Affiliate of Operator or in connection with a merger or acquisition of Operator.

(b) Owner may, without the approval of Operator, assign its rights and interest in this Agreement to (A) a Lender, as security for any financing; (B) an Affiliate of Owner; (C) any Person succeeding to all or substantially all of the assets of Owner (whether voluntary or by operation of law); or (D) any Person that is financially capable of performing Owner's obligations under this Agreement and agrees in writing to assume Owner's duties and obligations under this Agreement. Operator acknowledges and agrees that, upon receipt of written direction from a Lender, and notwithstanding any instructions to the contrary from Owner, Operator will recognize Lender, or any third party to whom Lender has assigned the rights of Owner under this Agreement, as the proper and lawful customer under this Agreement and such Lender (or assignee of Lender) shall be fully entitled to receive the rights and benefits of Owner hereunder so long as Lender (or its assignee) performs the obligations of Owner hereunder, and Operator shall tender performance of any and all other covenants to be performed by Operator under this Agreement to and for the benefit of Lender (or Lender assignee) and as the Lender (or Lender assignee) may direct in the future. Operator shall be protected and shall incur no liability in acting or proceeding in good faith upon any written notice and direction from Lender or which Operator shall in good faith, and upon commercially reasonable verification efforts, believe to be from a Lender. Operator shall be under no duty to make any investigation or inquiry as to any statements contained or matters referred to in any such notice and direction.

(c) Operator shall provide such reasonable cooperation and further assurances that are consistent with this Agreement in connection with Owner's efforts to obtain debt and/or equity financing or refinancing for the Project, whether that financing or refinancing takes the form of private debt, public debt or any other form; enter into interest rate protection agreements to hedge any of the foregoing obligations and/or participate in a sale leaseback or leveraged leasing structure with respect to the Project; and Operator shall use commercially reasonable efforts to cause Subcontractors to do the same, including executing agreements entitling any Lender, at its option, (i) to take over the Project and be treated as Owner, or to cure any defaults under this Agreement, (ii) to clarify and modify, if necessary, the undertaking on the part of Operator under this Agreement as such Lenders may require as a condition of their agreement to provide financing in connection with the Project, and (iii) to provide for other usual and customary rights regarding the sale of the Project and bankruptcy provisions. In particular, in connection therewith, Operator shall certify to Owner from time to time, upon request, whether or not (i) all conditions to be satisfied by Operator on or before such date have been satisfied, (ii) Operator is in default under this Agreement, (iii) all representations of Operator set forth in this Agreement are true and complete, (iv) all insurance policies and payment and performance bonds are in full force and effect, and (v) the Project and the Site have been encumbered by any mechanics' or other liens.

Operator agrees that no Lender shall be obligated to perform any obligation or be deemed to incur any liability or obligation provided in this Agreement on the part of Owner or shall have any obligation or liability to Operator with respect to this Agreement except to the extent any Lender has assumed the obligations of Owner hereunder; provided that Operator shall nevertheless be entitled to exercise all of its rights hereunder against Owner in the event that Owner or any Lender fails to perform Owner's obligations under this Agreement. Operator agrees to provide any customary legal opinions and consents requested by Owner or any Lender in connection with any financing.

#### **6.4 Representations and Warranties.**

(a) Representations and Warranties of Owner. Owner represents and warrants to Operator that: (i) Owner (A) is a limited liability company duly organized and existing in good standing under the laws of the State of Delaware and is qualified to do business in the State of New Hampshire and (B) possesses all requisite power and authority to enter into and perform this Agreement and to carry out the transactions contemplated herein; (ii) Owner's execution, delivery and performance of this Agreement has been duly authorized and this Agreement has been duly executed and delivered and constitutes Owner's legal, valid and binding obligation, enforceable against Owner in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency and other legal principles pertaining to creditor's rights; (iii) execution, delivery and performance by Owner of this Agreement will not (A) violate any Law applicable to Owner or (B) result in any breach of, or constitute any default under, any contractual obligation of Owner and, except as otherwise contemplated herein, no material consent or approvals are required in connection with the execution, delivery and performance by Owner of this Agreement; (iv) Owner has not received written notice of any litigation, claim, action, suit, proceeding or governmental investigation pending and there is no pending or threatened litigation, claim, action, suit, proceeding or governmental investigation against Owner which seeks the issuance of an order restraining, enjoining or otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

(b) Representations and Warranties of Operator. Operator represents and warrants to Owner that: (i) Operator (A) is a corporation duly organized and existing in good standing under the laws of the State of Delaware and is qualified to do business in the State of New Hampshire and (B) possesses all requisite power and authority to enter into and perform this Agreement and to carry out the transactions contemplated herein, (ii) Operator's execution, delivery and performance of this Agreement has been duly authorized and this Agreement has been duly executed and delivered and constitutes Operator's legal, valid and binding obligation, enforceable against Operator in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency and other legal principles pertaining to creditor's rights; (iii) the execution, delivery and performance by Operator of this Agreement will not (A) violate any Law applicable to Operator or (B) result in any breach of, or constitute any default under, and contractual obligation of Operator and except as otherwise contemplated herein, no material consent or approvals are required in connection with the execution, delivery and performance by Operator of this Agreement and (iv) Operator has not received written notice of any litigation, claim, action, suit, proceeding or governmental investigation pending and there is no pending or threatened litigation, claim, action, suit, proceeding or governmental investigation against Operator or any of its Affiliates which seeks the issuance of an order restraining, enjoining or

otherwise prohibiting or making illegal the consummation of any of the transactions contemplated by this Agreement.

**6.5 Further Assurances.** Upon receipt of a written request from the other Party, each Party shall execute such additional documents, instruments, and assurances and take such additional actions as are reasonably necessary and desirable to carry out the terms and intent hereof. Neither Party shall unreasonably withhold, condition, or delay its compliance with any reasonable request made pursuant to this **Section 6.5**.

**6.6 No Partnership or Joint Venture.** Operator, and the agents and employees of Operator, in the performance of this Agreement, shall act in an independent capacity and not as officers or employees or agents of Owner. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement).

**6.7 Notices.** Any notice required or permitted to be given under this Agreement shall be given in writing and shall be deemed effectively given (a) upon personal delivery, (b) two (2) Business Days after deposit with a nationally recognized overnight delivery service, or (c) when transmittal is confirmed by return facsimile or electronic mail if transmitted by facsimile or electronic mail. All notices shall be delivered to the addresses set forth below or to such other address as a Party may designate by ten (10) Days' prior written notice to the other Party.

If to Operator:

CS Berlin Ops Inc.  
Attention: Robert Desrosiers  
One Cate Street, Suite 100  
Portsmouth, New Hampshire 03801  
Fax: 603-584-1315

with a copy to:

If to Owner:

Berlin Station, LLC  
Attention: Robert Desrosiers  
One Cate Street, Suite 100  
Portsmouth, New Hampshire 03801  
Fax: 603-584-1315

With a copy to:

Burgess BioPower, LLC  
Attention: Plant Manager  
57 Hutchins Street

Berlin, New Hampshire 03570

[Fax: ]

#### 6.8 Dispute Resolution.

(a) Governing Law; Jurisdiction. This Agreement is governed by and shall be interpreted in accordance with the laws of the State of New York, without regard to principles of conflicts of law. Any legal claim, suit, proceeding, or action hereunder shall be brought in a federal court of competent jurisdiction located in New York, New York. By execution and delivery of this Agreement, each of the Parties hereby accepts for itself and in respect of its property, generally and unconditionally, the jurisdiction of the aforesaid courts and appellate courts lying therein. EACH PARTY WAIVES ITS RESPECTIVE RIGHT TO ANY JURY TRIAL WITH RESPECT TO ANY LITIGATION ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT.

(b) Initial Dispute Resolution Procedures. In the event of any dispute arising under this Agreement, within ten (10) Days following the receipt of a written notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively. If the Parties are unable to resolve a dispute arising hereunder within ten (10) Days of initiating such discussions, or within thirty (30) Days after notice of the dispute, then either party may seek any and all remedies available to it at law or in equity.

(c) Attorneys' Fees. If any legal action is brought for the enforcement of this Agreement or because of an alleged dispute, default, misrepresentation, or breach in connection with any of the provisions of this Agreement, each Party shall be responsible for its own attorneys' fees and costs. Notwithstanding the foregoing, in the event any legal action is brought to enforce a final, non-appealable judgment, order or decision by a court of competent jurisdiction secured by one Party against the other Party arising out of a dispute in this Agreement, the prevailing Party in such legal action shall be entitled to seek to recover reasonable attorney's fees and costs in connection with such action.

#### 6.9 Confidentiality; Publicity.

(a) Definition of Confidential Information. The following constitutes "**Confidential Information**," whether oral or written which is delivered by Owner to Operator or by Operator to Owner including: (a) proposals and negotiations concerning this Agreement, (b) the terms of this Agreement, (c) the actual invoices billed, and other supporting material provided, to Owner under this Agreement, and (d) information that either Owner or Operator stamps or otherwise identifies as "confidential" or "proprietary" before disclosing it to the other. Confidential Information does not include (i) information that was publicly available at the time of the disclosure, other than as a result of a disclosure in breach of this Agreement; (ii) information that becomes publicly available through no fault of the recipient after the time of the delivery; (iii) information that was rightfully in the possession of the recipient (without confidential or proprietary restriction) at the time of delivery or that becomes available to the recipient from a source not subject to any restriction against disclosing such information to the recipient; and (iv) information that the recipient independently developed without a violation of this Agreement.

(b) Duty to Maintain Confidentiality. Operator and Owner agree not to disclose Confidential Information received from the other to anyone (other than Operator's and Owner's Affiliates, counsel, consultants, lenders, prospective lenders, purchasers, prospective purchasers, investors, prospective investors, contractors constructing or providing services to the Project (including suppliers), employees, officers and directors who agree to be bound by the provisions of this **Section 6.9**), without the deliverer's prior written consent. Confidential Information will retain its character as Confidential Information but may be disclosed by the recipient: (a) if and to the extent such disclosure is required to Governmental Authorities by any requirements of Law; (b) if and to the extent such disclosure is required pursuant to an order of a court; (c) to the extent such disclosure is required in order to enforce this Agreement; (d) to its attorneys, accountants, financial advisors or other agents, in each case bound by confidentiality obligations; (e) to banks, investors and other financing sources and their advisors, in each case bound by confidentiality obligations; and (f) in connection with an actual or prospective merger or acquisition or similar transaction where the party receiving the Confidential Information is bound by confidentiality obligations. With the exception of the terms of this Agreement and Operator's (and its Subcontractors') invoices and supporting material, the originator or generator of Confidential Information may use such information for its own uses and purposes, including the public disclosure of such information at its own discretion. In the event a recipient is required by Law or by a court or regulatory agency to disclose Confidential Information, the recipient will, to the extent possible, give the disclosing Party prompt notice of such request so that the disclosing Party may seek an appropriate protective order. If, in the absence of a protective order, the receiving Party is nonetheless advised by counsel that disclosure of the Confidential Information is finally required (after, if advance notice to the disclosing Party is permitted by Law, exhausting any appeal requested by the disclosing Party at the disclosing Party's expense), the receiving Party may disclose such Confidential Information.

(c) Irreparable Injury; Remedies. Operator and Owner each agree that disclosing Confidential Information of the other in violation of the terms of this **Section 6.9** may cause irreparable harm, and that the harmed Party may seek any and all remedies available to it at law or in equity, including injunctive relief.

(d) Public Statements. Neither Party may issue or make any public announcement, press release or statement regarding this Agreement unless such public announcement, press release or statement is issued jointly by the Parties; or, prior to the release of the public announcement, press release or statement, any such Party wishing to make any such public statement furnishes the other Party with a copy of such announcement, press release or statement, and obtains the approval of the other Party, such approval not to be unreasonably withheld, conditioned or delayed; provided that, notwithstanding any failure to obtain such approval, no Party shall be prohibited from issuing or making any such public announcement, press release or statement if it is necessary to do so in order to comply with Law, legal proceedings or the rules and regulations of any stock exchange having jurisdiction over such Party.

**6.10 Complete Agreement.** This Agreement, together with any Schedules and Exhibits attached hereto, constitutes the entire agreement and understanding between Owner and Operator with respect to the subject matter hereof and supersedes all other prior agreements relating to the subject matter hereof, which are of no further force or effect. Any Schedules and Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. In the event

of a conflict between the provisions of this Agreement and those of the Schedules and Exhibit, the provisions of this Agreement shall prevail, and such Schedules or Exhibits shall be corrected accordingly.

**6.11 Headings.** The headings for each Article and Section of this Agreement are inserted for convenience of reference purposes only and will not be deemed and are not intended to limit, affect or expand on the meaning of the language contained in the particular Article or Section or to constitute a part hereof, and will be of no force or effect in construing or interpreting any of the provisions in this Agreement.

**6.12 Severability.** In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. The Parties shall, however, use their best endeavors to agree on the replacement of the void, illegal or unenforceable provision(s) with legally acceptable clauses which correspond as closely as possible to the sense and purpose of the affected provision and this Agreement as a whole.

**6.13 Negotiated Terms.** The Parties agree that the terms and conditions of this Agreement are the result of negotiations between the Parties and that this Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or its professional advisors participated in the preparation of this Agreement.

**6.14 Survival of Obligations.** The expiration or earlier termination of this Agreement shall be without prejudice to the obligations which one Party owed to the other Party hereunder as of the time of such expiration or termination. Provisions of this Agreement which expressly provide for survival shall survive the expiration or termination of this Agreement for the periods of time so noted.

**6.15 Counterparts.** This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original.

**6.16 Facsimile or Electronic Delivery.** This Agreement may be duly executed and delivered by a Party by execution and facsimile or electronic format (including portable document format (.pdf)) delivery of the signature page of a counterpart to the other Party, and, if delivery is made by facsimile or other electronic format, the executing Party shall promptly deliver, via overnight delivery, a complete original counterpart that it has executed to the other Party, but this Agreement shall be binding on and enforceable against the executing Party whether or not it delivers such original counterpart.

**[SIGNATURE PAGES FOLLOW]**

IN WITNESS HEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

OPERATOR:

CS BERLIN OPS, INC.

By: 

Name: EVP Operations

Title: ROBERT Desrosiers

SIGNATURE PAGE TO OPERATIONS AND MAINTENANCE AGREEMENT

OWNER:

BERLIN STATION, LLC

By: 

Name: *Robert Desrosiers*

Title: *Director*

## **EXHIBIT A**

### **SERVICES**

Capitalized terms used but not defined herein have the meanings assigned to them in the Agreement.

#### **Transition Services**

Prior to June 11, 2017 (the “**Takeover Date**”), Operator shall perform certain transitional services including, but not be limited to, the following (the “**Transition Services**”):

**Facility Personnel** - Owner and Operator shall jointly determine the compensation package for Site Personnel. To the extent feasible and practicable, Operator plans to offer each such individual compensation and benefits comparable in the aggregate to the compensation provided by the previous operator of the Project (the “**Existing Operator**”). Operator shall deliver written offers of employment to the employees of Existing Operator after review and approval of Owner prior to Takeover Date. Operator shall be responsible for the recruitment and hiring process and for related services such as advertising, interviewing, testing and relocating of any additional/replacement employees, Owner shall reimburse Operator for costs related to relocation of replacement Site Personnel and Specialists provided Owner has approved such costs in advance.

**Program Review** - Operator shall review the status of the operations, maintenance, administrative procedures and programs, and budgets being developed or implemented by the Existing Operator. Such review shall be made for the purpose of assessing the degree of completeness and the degree of conformity to the requirements of the corresponding procedures and programs to be provided by Operator as Transition Services. Operator shall inform Owner of the results of such review. Owner may, at any time, audit any Operator program. Operator shall perform the services per Operations Phase Services of **Exhibit A**.

**Information Technology Support** – With the assistance of Owner, the Existing Operator has implemented a Computerized Maintenance Management System (CMMS – brand name “MVP Plant”) to assist in managing maintenance related tasks, issuing purchasing orders, tracking open orders, managing inventory and other related matters. Technical support shall be provided by the Owner as reasonably needed for Operator to perform O&M Services using the CMMS. Operator shall provide additional IT service for the facility including as needed, but not limited to, e-mail, server and new accounts, new file server, phone system, T1 line, power accounts, workstation maintenance, inventory, NERC GADS software and other business and process software and related servers and/or work stations as required or requested plus network security and IT system protection for those remaining property of Existing Operator. The Operator may subcontract these tasks, but remains responsible for timely installation. Operator shall procure other consumables required for operation of the facility in accordance with Section 2.5 of the Agreement.

**Assistance to Owner** - Operator shall cooperate with and assist the Owner in preparing for the transfer of duties and responsibilities from the Existing Operator to Operator.

## **Operational Phase Services**

The Services shall include all activities reasonably necessary to accomplish the tasks set forth below. The Services shall be performed by individuals assigned to work at the Site (the “**Site Personnel**”) and non-Site Personnel (the “**Specialists**”), as applicable.

Maintain the programs I.A through I.O below (each a “**Program**”). The Programs shall be based on Operator’s methodologies as tailored to the Project and information provided by Owner. These Programs shall incorporate Operator’s O&M experience through a formal process of sharing lessons learned and best practices. Operator will maintain a continuous improvement process for programs that update and keep current all programs described below.

### **I. Program Elements**

#### **A. Health and Safety**

Maintain an OSHA compliant health and safety program that has the following program elements:

##### **1. Management:**

- a) A written goals and safety policy and process for communication of safety goals, and safety policy
- b) A process that ensures that safe work performance is a role and responsibility for management, supervision and employees in the organization, and each level is held accountable.
- c) A process providing employees with the authority, access to relevant information, training, and resources needed to carry out their safety responsibilities.
- d) A process that provides input on annual budgetary requirements for the Safety and Health Program.

##### **2. Employee involvement and participation:**

- a) Process in place to communicate and reinforce safety and safe work instruction to employees on a routine basis.
- b) Procedures or processes where employees can report work-related hazards promptly and ways they can make recommendations about appropriate solutions to control the hazards identified, without fear of reprisal.
- c) Conduct regularly scheduled safety meetings.
- d) Established safety committee.

##### **3. Worksite hazard identification:**

- a) Conduct internal assessments of programs and compliance for deficiencies and opportunities for improvements; track resulting action items to completion.

- b) Analyze planned and/or new facilities, process materials, and equipment utilizing a management of change (“**MOC**”) process.
  - c) Job hazards analyses process that includes training employees on the hazards noted.
  - d) Conduct regular site safety inspections so that the entire worksite is inspected at least quarterly.
  - e) Assess ergonomic risks within employee’s tasks.
  - f) Investigate injuries, "near misses," and loss producing events so that their causes and means of prevention can be identified.
  - g) Conduct root cause analyses (“**RCA**”) on all incidents and near misses that had they occurred would have resulted in a serious incident, unless the Parties otherwise agree an RCA is not necessary.
  - h) Analyze injury trends, including leading indicators, to identify incidents with common causes so that such incidents can be reviewed and prevented.
  - i) A work permit procedure that incorporates and documents the following: pre-job briefing, personal protective equipment, confined space entry, hot-work, and lock-out/tag out (“**LOTO**”).
  - j) Incident reporting and investigation procedures.
4. Hazard Prevention and Control:
- a) An emergency preparedness and response plan, including evaluation of emergency drills and involvement with local fire/EMS departments.
  - b) Fire protection and prevention plans.
  - c) Fitness for duty requirements.
  - d) A site security plan.
  - e) A contractor and visitor safety program, including site-specific contractor and visitor orientation training.
  - f) Proper storage for all safety equipment and personnel protective equipment (“**PPE**”).
  - g) Hazardous material communication, handling & storage procedures.
  - h) Medical and first aid programs.
  - i) Confined space entry procedures.
  - j) LOTO procedures for each piece of equipment utilizing P&IDs, process flow diagrams, electrical one-line drawings, work instructions and/or system walkdowns.
  - k) Fire protection and extinguishment systems and procedures.
  - l) A fire prevention / hot work procedure.
  - m) Machine guarding equipment and procedures.
  - n) Procedures for safe operations of powered platforms, manlifts, and powered industrial trucks, and other Rolling Stock.

- o) An ANSI compliant safety shower and eye wash station program.
- p) Electrical safety procedures.
- q) An arc flash program.
- r) Appropriate industrial hygiene programs to include:
  - i. Hearing conservation program.
  - ii. Heat Stress.
  - iii. Chemical exposure.
  - iv. Respiratory protection.
  - v. Blood borne pathogen.
  - vi. Ergonomics.
- s) A procedure for responding to impairment of fire systems as required by Owner insurance providers.

5. Training and Documentation:

- a) A training program to ensure that all employees understand and are aware of the hazards that they may be exposed to and the proper methods for avoiding such hazards.
- b) A training matrix to track training for all Site Personnel.
- c) A safety compliance calendar that includes training and assessments of programs, in addition to routine inspections, monitoring and reporting tasks as required by applicable procedures and regulations.
- d) A process for retaining necessary safety & health documentation to ensure continued compliance.
- e) An electronic and paper filing system that provides easy retrieval and meets all regulatory requirements.

6. Program Evaluation:

- a) A process for conducting internal assessments of programs and compliance for deficiencies and opportunities for improvements; track resulting action items to completion.
  - i. Maintain Operator's assessment program.
  - ii. A process for collecting on a monthly basis safety leading indicators for analysis and review of trends.
  - iii. A process for reviewing, maintaining, and updating site safety procedures on an annual basis.
  - iv. A process for tracking and communicating incidents and safety leading indicators.
  - v. Conduct one annual Operator initiated visit to the Project to perform a safety program assessment, the scope of which is established by Operator.
  - vi. An unsafe condition recognition and correction process.

- vii. Maintain an Issues and Actions (“I&A”) Tracking Process and implement process for ensuring that safety items are closed out promptly, but not to exceed 90 days unless Owner approves longer timeframe. Actions, which are not required for regulatory or permit compliance purposes, (“Best Management Practices”) and process improvement projects are not subject to the 90 day timeframe.

## **B. Environmental**

Maintain an Environmental Compliance Program with the elements below to ensure compliance with all regulatory and Permit requirements.

### **1. Management:**

- a) A written environmental policy and process for communicating the goals and environmental policy.
- b) Ensure that environmentally compliant performance is a role and responsibility for management, supervision and employees in the organization, and each level is held accountable.
- c) A written environmental personnel development program to ensure on-site environmental personnel receive training and development to enable them to complete, directly or through other resources/experts the applicable site environmental requirements such as air, water, waste, hazardous materials and continuous emissions and opacity monitoring systems (“CEMS/COMS”). The development program should include an assessment of the environmental experience of the site Compliance Manager (job title may vary) and preparation and implementation of a training and development plan tailored to the individual’s experience, competencies and job scope.
- d) A process for providing input and assistance in annual budgetary requirements for the environmental compliance program.
- e) In collaboration with Owner, develop, maintain, and refine a division of responsibilities matrix, consistent with the environmental scope obligations set forth in this **Exhibit A** that defines the respective roles of Operator and Owner in greater detail.

### **2. Program Compliance and Assessments:**

- a) Site Personnel
  - i. A process for completing routine reports accurately and on time.
  - ii. A compliance calendar that incorporates recurring environmental regulatory and permit reporting requirements.

- iii. A permit “matrix” that includes a comprehensive list of all Project Permits and licenses.
- iv. A process for providing assistance to Owner in tracking all relevant emissions data as necessary for making Owner decisions for buying and selling of applicable allowances.
- v. A process for implementing and maintaining permit or regulatory required environmental plans, such as spill prevention plans, stormwater pollution prevention plans, CEMS/COMS QA/QC plans, Startup, Shutdown, Malfunction Plan, Pollution Control Equipment Operating Plan or accidental release prevention/risk management plans, as applicable.
- vi. Obtain professional environmental support for environmental plan modification, renewal or implementation as necessary to satisfy permit and regulatory requirements.
- vii. A process for collecting facility environmental data, including required air and water/waste water monitoring data and permit compliance information, and preparation of environmental reports.
- viii. A process for obtaining professional environmental support for environmental reports that are new, complex, non-routine (such as state or federal requests or event-triggered reports), or beyond the capabilities of current employees, as necessary to satisfy permit and regulatory reporting requirements.
- ix. Properly manage wastes, including Hazardous Materials generated at the Project in accordance with this Agreement.
- x. The following environmental operating programs:
  - Air permit program.
  - Continuous emissions and opacity monitoring systems (“CEMS/COMS”) quality assurance and quality control plan (“QA/QC Plan”).
  - Process to support Title V reasonable inquiry and annual compliance certification reports.
  - Waste water management plan.
  - Waste (includes hazardous) management plan.
  - Chemical approval process.
  - Oil / chemical unloading procedure.
  - Oil discharge prevention (spill prevention control and countermeasure plan (“SPCC”).
  - Stormwater management program (stormwater pollution prevention plan “SWPP”).
  - Hazardous chemical reporting and community right to know.

- xi. A MOC process which evaluates environmental considerations and implications using a MOC environmental checklist, and supports the Owner or its consultant with associated permitting assessments, such as “New Source Review” determinations.
  - xii. Maintain an I&A tracking process for ensuring that environmental non-compliance items or potential non-compliance items are closed out promptly, not to exceed 90 days, unless Owner approves longer time frame. Best Management Practices are not subject to this 90 day maximum.
  - xiii. Arrange for the services of environmental professionals and subject matter experts in areas of air, water, waste, and CEMS/COMS as required to achieve compliance and scope of services.
  - xiv. Recordkeeping and documentation:
    - Retain necessary environmental records and documentation required by regulations and Permits.
    - Maintain an electronic and paper filing system that provides easy retrieval and meets all regulatory requirements.
  - xv. Assessments and continuous improvement:
    - Maintain the Operator assessment program
    - A process for collecting on a monthly basis environmental metrics for analyzing and reviewing trends.
    - A process for reviewing, maintaining, and updating Site environmental procedures on an annual basis.
    - A process for tracking and communicating incidents, and other environmental metrics.
- b) Specialists - Operational Period Environmental Services Provided in the Services Fee:
- i. Make available to the Site Personnel standard tools, templates and general O&M guidance materials, such as management checklists for federal programs, training templates for federal programs, and guidance on implementing and maintaining federal programs.
  - ii. Monitor regulatory developments in federal (and state in the case of New Hampshire) environmental law as it pertains to power plant operations and compliance, and provide periodic updates to Site Personnel.
  - iii. Conduct one annual Operator-initiated visit to the Project to perform an environmental program assessment, the scope of which is established by Operator. Provide a written report documenting the assessment. All

findings from the assessment will be tracked and documented through completion utilizing the I&A list. Time to participate in I&A calls is included in the Services Fee. Time to prepare for and support resolution of I&A is reimbursable

- iv. Develop and coordinate environmental webinars, conferences and training opportunities.
- c) Specialists - Operational Period Environmental Services which constitute Additional Services and are to be performed in accordance with **Exhibit B**:
  - i. Provide environmental support as needed for preparing environmental reports and plans; customization and population of Operator standard tools, templates and plans; applicability analysis and implementation guidance regarding new state and Federal regulations which are more detailed than the updates required pursuant to Section 2(b)(ii); detailed review, implementation guidance and direct support on environmental projects and issues related to operations, including resolution of I&A, which are not otherwise addressed as part of the annual environmental assessment described in Section 2(b)(iii).
  - ii. As requested and available, provide additional environmental services in the areas of environmental consulting, permitting, detailed auditing or compliance assessments, developing customized training material or delivering training, environmental plan development or modification (such as SPCC Plans, Stormwater Pollution Prevention Plans or Risk Management Plans), specialized CEM consulting, or Owner business support such as due diligence, asset sale, or strategic regulatory or permitting analysis. Such services will be provided at the standard hourly rates listed in **Exhibit B** or negotiated rates, depending on the scope of the project.

### C. Other Regulatory

1. Maintain the Project's NERC Compliance Program that complies with FERC, NERC, and regional entity requirements and procedures.
2. NERC / Regional Entity: Maintain program for compliance with NERC and NERC regional entity standards.
  - a) Prepare and submit all required NERC-GADS reports as required.
  - b) Maintain Authorized Representatives and Primary Compliance Contacts for the GOP per Regional Entity/OATI Compliance Data Management protocols.
  - c) Maintain procedures for all GO and GOP Standards FERC Orders 693 and 706.

- d) Prepare required NERC reports for GO's or other functions required of Owner and maintain these in the files. Respond to internal audit requirements, etc. as required.
  - e) Prepare required NERC reports for GO's or other functions required of Owner for submission, respond to audit requirements, etc. as required.
  - f) Maintain GO and GOP requirements in a compliance calendar.
  - g) Maintain a NERC Governance Program.
  - h) Conduct a yearly review of the Project's implementation of the NERC Governance program.
  - i) Identify audit support.
  - j) Maintain internal audit procedures.
  - k) Maintain recordkeeping and filing system for both GO and GOP.
  - l) In collaboration with Owner, develop, maintain, and refine a division of responsibilities matrix, consistent with the NERC scope obligations set forth in this **Exhibit A** that defines the respective roles of Operator and Owner in greater detail.
  - m) Maintain required NERC training program.
  - n) Make recommendations to Owner for any issues identified during assessments and for NERC program enhancements.
3. FERC:
- a) Maintain listing of required FERC reports and timing.
  - b) Maintain QF Procedures for Data Collection and Reporting.
  - c) Maintain DOE and EIA Procedures for Data Collection and Reporting
  - d) Maintain Assessment Program and Procedures for Audit Preparation.
  - e) Maintain FERC Requirements into Compliance Calendar.
  - f) In collaboration with Owner, develop, maintain, and refine a division of responsibilities matrix, consistent with the FERC scope obligations set forth in this **Exhibit A** that defines the respective roles of Operator and Owner in greater detail.
  - g) Maintain FERC related training program.

#### **D. Operations**

Operate the Project seven (7) days a week, twenty four (24) hours per day in accordance with the requirements of this Agreement and the programs described here, perform or cause to be performed purchasing, operations and maintenance activities, and perform or cause to be performed all other services required for the Project or appropriate under the Project Agreements. Such services include the following:

1. Coordinate and communicate with Owner's Representative relating to scheduling of fuel supply.

2. Provide daily coordination and communication with the Purchaser Utility and Interconnecting Utility, as applicable, relating to dispatch of the Project and transmission of power from and to the Project.
3. Process for monitoring and reporting fuel quality and quantity and rejection of any non-specification fuel unless otherwise agreed by Owner.
4. Process for monitoring Project security systems and deal with breaches.
5. Train Site Personnel on Emergency response procedures for the Project.
6. Process for reviewing, updating, re-training, and re-qualifying Site Personnel as required.
7. An operations program with the elements below.
  - a) The operations program shall begin with system descriptions as provided by Owner on or before the Takeover Date. Operator shall periodically review the system descriptions and edit as required to ensure they are accurate, understandable and useful. Revisions and development of systems descriptions performed by Specialists would be compensated as provided in **Exhibit B**.
  - b) Operating procedures for each system as provided by Owner on or before the Takeover Date, and a process for maintaining and updating procedures. These procedures should include detailed step by step instructions for operating the system, including precautions and prerequisites, alarms, and protective actions. These procedures should also include an alarm response guide that includes all alarm and trip points to assist Site Personnel in diagnosing and properly responding to all alarms. They should also include start-up, shutdown, layup, cold weather and other specific needed procedures. These procedures should be primarily designed to be utilized in training, requalification activities, and when optimizing and troubleshooting systems.
  - c) Checklists to be utilized during routine operations as provided by Owner on or before the Takeover Date, to ensure that each step is performed as required and a process for maintaining checklists.
  - d) Integrated operating procedures as provided by Owner on or before the Takeover Date, for overall Project startup and shutdown.
  - e) A qualification program for each Operator position including testing protocols for demonstration of competencies.
  - f) A requalification program for each Operator position and establish requalification schedule for each Operator position.
  - g) Log book protocols.
  - h) Shift turnover process.
  - i) Process for monitoring of plant parameters and round logs.

- j) Data historian usage that will collect information required for routine reporting, provide useful information for the continued optimization of the equipment and life preservation, and assist in diagnosing abnormal conditions.
- k) Heat rate and unit capacity program designed to monitor efficiencies and unit generating capability.
- l) Unit life preservation programs that balance the achievement of short term goals against long term equipment maintenance and replacement expenses.
- m) A document and other resource library and filing system to support the operations department.
- n) NERC / GADS reporting protocols.
- o) Infrequent Operating Procedures.
- p) A procedure for planning for equipment obsolescence.
- q) A quality assurance and quality control procedure.

#### **E. Emergency Preparedness**

Maintain an emergency preparedness program with the elements below.

1. Procedures and plans for major plant equipment or system failure.
2. Procedures and plans for black plant response and restoration.
3. Procedures and plans for weather and seismic related emergencies.
4. Procedures and plans associated with terrorist-related activity.
5. Procedures and plans associated with the release / threatened release of hazardous chemicals and substances.
6. Procedures and plans associated with major power plant casualties, explosions, personnel injury, and fire.
7. An up to date contact listing of individuals to be notified in case of an emergency.

#### **F. Maintenance**

A maintenance policy program with the elements below:

1. A manual describing the Maintenance Policy.
2. Work control procedures.
3. Equipment and system configuration control procedures.
4. Test and calibration procedures.
5. DCS tuning log.
6. A detailed schedule to track all outage preparations, work and testing, including corrective maintenance actions, contractor work and scheduled preventative maintenance using Critical Path Management (“CPM”) software.

7. Procedures necessary to maintain compliance with all applicable NERC policies and procedures.
8. Tool lists and inventory system.
9. Maintain warehouse / storage facilities to properly store inventory and provide for ease in retrieving parts as needed.
10. Conduct frequent visual equipment inspections and log significant parameters such as pressures, temperatures, flow rates, and efficiency. Trend and analyze this information as appropriate.
11. Performance Monitoring. Review operating and maintenance schedules for the purpose of reducing operating downtime, maintaining Project reliability and optimizing Owner's economic returns. Analyze operation results daily and report monthly to Owner. Based upon these analyses, develop operating plans and maintenance schedules to maximize Project performance.
12. Plans to accomplish all scheduled predictive and preventive maintenance work, unless otherwise agreed to by the Parties.
13. Process for accomplishing routine maintenance for Project equipment (disassemble, clean, inspect, align, lubricate, adjust, calibrate, make minor repairs), all as required.
14. Accomplish all on-line and off-line scheduled and unscheduled maintenance.
15. Keep all repair, calibration, test, and measuring equipment in good repair.
16. Calibration of sensors, controllers, recorders, meters, transmitters, gauges and protective relays, batteries, as required to permit operation within acceptable parameters.
17. Report all significant known operational, design and equipment deficiencies.
18. Perform periodic maintenance inspections to identify and report status of equipment and system deficiencies, and initiate appropriate maintenance and repair.
19. Required maintenance of buildings and grounds, including electrical systems, plumbing and HVAC, so as to maintain a clean, safe and orderly Site.
20. Purchase order system for operating and maintenance supplies, spare parts, safety apparatus, tools and other items normally required.
21. An equipment tagging and identification system.
22. Arrange for scheduled inspections and overhauls on major equipment so as to minimize interference with the operation of the Project and its revenues from the sale of power, minimize the cost of completing maintenance and repairs.
23. Retain vendors or contractors for unscheduled major repairs as required and manage and oversee all repairs and modifications. Manage all Project outages (planned, unscheduled, forced) to achieve objectives.

24. Preparations to support the planned outage schedules and CPMs developed for them, including ordering and receiving all required spare parts.

#### **G. Computerized Maintenance Management System (“CMMS”)**

The CMMS system shall include:

1. Software license kept current, CMMS properly set up and maintained, and system usage is proper.
2. Configuration to contain the requisitioning and purchasing system
3. Procedures documenting the predictive, preventive and corrective maintenance requirements to be employed.
4. Schedule and assign routine maintenance during operations, planned outages, or forced or unscheduled outages.
5. Organize activities including: work order generation including predictive and preventive, material history, special tooling, equipment history, bill of materials, inventory control including spare parts, backlog control, reporting, productivity analysis, calibration records and cost tracking.
6. Identify and store all maintenance work orders that require a Project outage or equipment to be taken out of service so that these activities can be planned for during scheduled outages and as many as possible to be accomplished during Forced Outages.

Note: Operator’s on-going CMMS assessment activities will include the performance of random sampling of standing preventive and predictive work orders and comparison of the contents to vendor recommendations and Operator’s experience.

#### **H. Water Chemistry**

A water chemistry program with the elements below:

1. A water chemistry program that documents chemistry control, water treatment, sampling, and chemical storage and handling.
2. Written process for ensuring water chemistry compliance with OEM requirements and industry standards (e.g. ASME, EPRI) for:
  - a) Steam Turbines
  - b) Cooling Systems
  - c) Condensers
  - d) Boilers
3. Manage relationships with third party water chemistry vendors and service providers.

## **I. Training and Qualification**

A training/qualification program with the elements below:

1. The Training program shall provide documentation of Site Personnel's knowledge of proper operations, maintenance, safety, and environmental as required by applicable law and Permits.
2. The training program shall include a calendar for new employee orientation and required elements that will be documented in a matrix that includes all Site Personnel and includes dates when training first occurred and dates for annual refreshers.
3. The training program shall identify method of training, i.e. hands on, classroom, web-based.
4. The training program shall identify frequency for training completion; for example, upon initial hire, every year, after incident occurs that requires re-training, upon being absent from plant for greater than 6 months.
5. The training program shall identify a timeframe by which training shall be completed; for example, within 3 weeks of employment, prior to working on task, by end of the Operating Year, or other appropriate period or condition.
6. A process for maintaining the training program content to be consistent with current Operator's programs and plant system changes. Provide Site Personnel integrated operations training.
7. A Training Manual and matrix of all personnel for the Project
8. A process to provide training to personnel in the content and application of Project Programs.
9. A Training Program that includes written curriculum and written processes for demonstration of qualifications.
10. Coordinate its training with the training to be provided by contractors, vendors, and outside specialty schools.
11. Availability of applicable training materials for use in onsite training.
12. Any licensing requirements as set forth by local and state regulations are properly current, documented and displayed.
13. An established periodic requalification program as needed for each non-exempt position.

## **J. Management**

Facility management personnel shall supervise and manage the Project resources as described below:

1. Effectively and efficiently direct Site Personnel.

2. Comply with applicable Laws, if any, which require the licensing of Site Personnel.
3. Cooperate in connection with securing and maintaining any and all certificates, Permits, licenses and inspections necessary for the continuous operation of the Project.
4. Evaluate Project operations and make recommendations on cost-effective ways to improve the Project and its operations.
5. Report Project operating results as required.
6. Prepare and submit generation and fuel consumption reports in accordance with the requirements in applicable Project Agreements and Permits.
7. Provide such reports as are necessary to support submission of reports under the project documents.
8. A process for maintaining cooperative and supportive relations with local civilian, business and labor community to establish the Project and its employees as “good citizens” in the local community. Maintain community relations protocols including criterion by which requests for donations may be evaluated.
9. Provide day-to-day administration of Project Agreements and Permits (excluding any financing agreements).

**K. Capital Modification/Improvements/Management of Change**

A MOC program that provides a detailed sequence for making modifications to the facility with the following elements:

1. Justification routines that will determine the economic impact of the proposed modification(s) as it relates to operation and maintenance of the Project.
2. A process for assessing the implications to the safety and health programs in evaluating project feasibility.
3. A process for evaluating the environmental considerations and implications of the modification, using an MOC environmental checklist; and provide support with associated permitting assessments, such as “New Source Review” determinations.
4. A process to ensure that all Project documentation, including the safety and health program and P&IDs, is brought up to date to reflect the changes if the Project is implemented.
5. A process to ensure that all training programs are amended as needed and retrain Site Personnel on the changes.
6. Provide available information to properly account for capital projects and allow updates to financial models for the Project by Owner.

**L. Document Control and Compliance Calendar**

An established process for maintaining facility documentation and calendar:

1. Technical Document System - A system for maintaining technical documents, including copies of all pertinent Project data (e.g., vendor manuals, equipment specifications, startup and testing records, facility drawings, up to date P&IDs) with proper labeling, indexing, and filing.
2. A consistent filing system, complete with file naming conventions and a file folder format for all relevant Project programs and data files. Information should be easy to locate when needed for operational issues and when audits are conducted, as well as to improve efficiencies in everyday activities. Train Site Personnel on this program.
3. A file retention policy for all programs and other retention requirements as set forth by the Owner, regulatory agencies, or other policies.
4. Electronic Compliance Calendars that capture recurring requirements related to safety, health, environmental, NERC, FERC, EIA, DOE and contractual obligations.
5. A process for keeping technical documents, P&IDs, and data files updated and current.
6. Provide Owner access to all documents for review.

**M. Information Technologies**

1. Maintain computer infrastructure including hardware and software.
2. Maintain computer data and access security program.

**N. Incident Tracking and Communication Plan**

An established process for Incident Reporting and Investigations that includes:

1. Communicate Incidents in a timely manner in accordance with the Agreement.
2. A distribution list for communications of incidents.
3. Incident Reporting procedures that contain the following elements:
  - a) If the incident is a serious injury or forced outage, provide daily updates until the matter is stabilized or in the case of a forced outage the plant has returned to operation.
  - b) Incidents will be investigated and reported in accordance with the incident reporting procedure and other additional procedures that may be applicable.
4. Know, follow, update and train to the procedures on a scheduled basis. Ensure that updates to procedures are scheduled and tracked.
5. Complete incident reporting, investigations and tracking for both Operator employees and Subcontractors. Subcontractor accidents investigations will be provided from the Subcontractor and reviewed by Operator for applicable information and documentation. Accidents investigations should contain

recommendations to prevent future incidents from recurring. Incident reports must include the important attributes of incident investigation and establishment of root causes for the incidents.

6. Perform evaluation of incidents utilizing RCA tool.
7. Track Incidents through completion of investigation and communicate results of investigation by submitting a final incident report which includes, RCA, lessons learned, a summary of financial impact of incident (including, but not limited to loss of revenue, repair costs, and fines incurred, etc.).
8. Incident Tracking and Communications:
  - a) Compile month end and annual reports summarizing incidents, near misses and lessons learned for the Project.
  - b) Collect safety leading indicator data and incorporate in the monthly and annual reports.
9. Other Communications:
  - a) A plan for routine and extraordinary communications including process for interfacing with media sources.
  - b) Routine Reporting formats that will report monthly progress against the Annual Business Plan and other reports as requested by Owner.

**O. Facilities/Buildings and Grounds/Security**

1. Maintain site offices.
2. Make arrangements for janitorial, garbage pickup and landscape services and maintenance of all access roads, office space, and other structures.
3. Maintain security measures.

**II. Administrative Program**

- A. Maintain job descriptions and qualification standards. Include recommended revisions in the Annual Operating Plan or otherwise make recommendations to Owner.
- B. Maintain current organization chart and reporting relationships. Periodically analyze it in relation to the current operations. Make recommendations as to changes in staff size, skill sets, and reporting relationships as conditions change to achieve a more effective organization.
- C. Maintain an administrative program that documents Annual Operating Plan reporting, payroll, accounting, inventory control, and procurement and security standards.

**III. Owner Assistance**

Provide support to the Owner as reasonably requested and within Site Personnel capabilities to support Owner's duties relative to Project O&M.



**EXHIBIT B**

**OPERATOR ADDITIONAL SERVICES**

**Section 1.01 Operator Additional Services Fee.** As consideration for any Operator Additional Services provided by Operator, Owner shall pay Operator the demonstrated, direct costs of Subcontractors, consumables, materials and supplies, permits, travel (in accordance with Operator's then current travel policy), and other out-of-pocket costs and expenses payable by Operator in respect of such services (the "**Operator Additional Services Fee**").

**Section 1.02 Operator Additional Services Estimates.** Within 48 hours after (i) Owner's initial inquiry about the provision of Additional Services or (ii) Operator's notifying Owner of the need for Operator Additional Services, Operator shall prepare and deliver to Owner a written estimate of the total invoice amount for such Operator Additional Service. After receipt of such written estimate, Owner will notify Operator if it authorizes Operator to perform such Operator Additional Services.

**Section 1.03 Operator Additional Services Invoicing.** Operator shall invoice Owner within thirty (30) days of completion of any Operator Additional Services agreed to by Owner pursuant to the terms of this Agreement. Owner shall pay the amount set forth on any invoice that is consistent with the terms of the written estimate for such Operator Additional Services within thirty (30) days after receipt thereof. Any undisputed amount not paid when due will accrue interest, at the Operator's discretion, at the monthly rate equal to the amount set forth in **Section 4.2** of this Agreement.

**EXHIBIT C**

**INSURANCE**

1. **OPERATOR INSURANCE.** Operator shall obtain and maintain on and after the Effective Date, with insurance carriers reasonably acceptable to Owner, the insurance described below under individual or blanket insurance policies. For Operator's defense and indemnity obligations herein, Operator's insurance coverage is primary to the insurance maintained by Owner and Lenders (except that Owner's property policy is primary for all property damage claims as provided further in Section 2 below).
  - A. **Commercial General Liability.** Commercial General Liability insurance shall be in an amount of \$1,000,000 each occurrence and \$2,000,000 general aggregate. Such insurance shall include premises/operations, explosion, collapse and underground hazards, broad form contractual, products/completed operations, broad form property damage and bodily injury coverages.
  - B. **Workers' Compensation & Employers Liability.** Workers' compensation insurance written in accordance with statutory provisions and employers' liability coverage in an amount of \$1,000,000. The employers' liability coverage shall not contain an occupational disease exclusion. Such policy or policies shall contain an all states endorsement or stop gap endorsement.
  - C. **Commercial Automobile Liability.** Commercial Automobile Liability insurance covering all owned, non-owned, leased and hired vehicles. Such coverage shall be written in an amount of \$1,000,000.
  - D. **Excess Liability.** Excess liability insurance providing coverage with a limit of fifteen million dollars (\$15,000,000) in excess of the insurance required in items (A), (B) with respect to employers' liability only.
2. **OWNER INSURANCE.** Owner shall obtain and maintain at its expense with insurance carriers reasonably acceptable to Operator, the insurance described below under individual or blanket policies effective as of the Effective Date. For Owner's defense and indemnity obligations herein, Owner's insurance coverage is primary to the insurance maintained by Operator.
  - A. **Property Insurance.** Property insurance, with a deductible amount no greater than one million (\$1,000,000.00) and 20% of total insured values subject to a min of \$1,000,000 with respect to earthquake or other catastrophic perils. Coverage shall be on an "All Risks" basis covering physical loss or damage to all real and personal

property of Owner for one hundred percent (100%) of the full replacement value of such property per occurrence but shall allow for sub limit for flood and earthquake covering physical loss or damage to all real and personal property of Owner for one hundred percent (100%) of the full replacement value of such property per occurrence. Owner acknowledges that, in order to reduce overall contract costs, Owner will be responsible for insuring against damage to its property, including the facility, caused by the actions or inactions of Operator, and that Operator has no obligation to obtain similar coverage. In the event that Owner cannot obtain the foregoing coverage with respect to potential Operator damage to Owner's property, Owner shall notify Operator, and Operator shall obtain such coverage, if available, subject to recovery of such additional costs by Operator as a reimbursable cost hereunder. All such Owner's Property Insurance shall be primary and non-contributory to any other insurance or self insurance required to be provided by Operator.

- B. Boiler and Machinery Insurance. Boiler and machinery insurance, with a deductible amount no greater than one million dollars (\$1,000,000.00) and 5% of total insured values subject to a min of \$1,000,000 with respect to earthquake or other catastrophic perils. Coverage shall include coverage for the Facility and for all insurable objects, including but not limited to pressure vessels, electrical turbines and equipment, motors, air tanks, boilers, machinery, pressure piping or similar apparatus, on a comprehensive form for one hundred percent (100%) of the full replacement value of such property per occurrence. Such insurance policy shall cover objects at all locations required to be insured by Owner's Property Insurance per subsection (1) above, and provide protection against risks of physical loss or damage from all causes including as a consequence of faulty workmanship and engineering failures. Owner acknowledges that, in order to reduce overall contract costs, Owner will be responsible for insuring against damage to its property, including the facility, caused by the actions or inactions of Operator, and that Operator has no obligation to obtain similar coverage. Such insurance shall be primary and non-contributory as to all claims for property damage.
- C. Commercial General Liability Insurance. Commercial general liability insurance covering personal injury and property damage and covering liability for damage to property in connection with ownership. The coverage referred to herein shall be provided either in a single policy or through a combination of policies. Such policy or combination of policies shall have a limit of one million dollars (\$1,000,000.00) per each occurrence and two million dollars (\$2,000,000.00) in the aggregate.
- D. Excess or Umbrella Liability Insurance. Excess or umbrella liability insurance in excess of the Owner's Commercial General Liability Insurance described in

subsection (C) above, in a per occurrence and an aggregate amount of ten million dollars (\$10,000,000.00).

- E. Other Insurance. Coverage for pollution liability, including first party and third party clean-up from gradual, sudden and accidental coverage's shall be provided on a "claims made basis" with a limit of no less than five million dollars (\$5,000,000.00), commencing not later than immediately prior to execution of contracts and solely regarding claims for which the owner has in this Agreement agreed to provide defense and indemnity.
  - F. Automobile Liability Insurance. Insurance covering all owned, non-owned, leased and hired vehicles. Such coverage shall be written in an amount not less than \$1,000,000 per occurrence for combined bodily injury and property damage and containing appropriate no-fault insurance provisions, covering automobiles used by Operator in connection with the Facility or Owner's operations.
3. FORM AND CONTENT. All policies, binders or interim insurance contracts with respect to insurance maintained by either Operator or Owner pursuant to this **Exhibit C** shall:
- A. Be placed with insurance companies that are reasonably acceptable to Owner and Operator, as the case may be, and have an A.M. Best rating of at least A- Class VIII.
  - B. Except for Worker's Compensation Insurance, the Operator's insurance shall include the Owner, Lender and the officers, directors and employees of each of them and Operator as Additional Insured only to the extent of owners ownership and/or operations and activities and only to the extent of the required insurance limits and solely regarding claims for which the Operator has in this Agreement agreed to provide defense and indemnity. Except for Worker's Compensation Insurance, the Owner's insurance shall include the Operator and their officers, directors and employees of each of them as Additional Insureds to the extent of each such parties' interests in the Project and/or operations and activities.
  - C. State that it is primary, or in excess only with respect to the specific primary policy provided by the same party for such coverage, and not excess or contributing as with respect to any other insurance (or self-insurance) available to the other Party or the additional insureds and that all provisions thereof, except the limits of liability, shall operate in the same manner as if there were a separate policy covering each insured under each such policy but only to the extent of the required insurance limits and solely regarding claims for which the Party has in this Agreement agreed to provide defense and indemnity.

D. Provide that there will be no recourse against any additional insured for the payment of premiums (if such policies provide for the payment thereof), additional premiums or assessments, it being understood that such are obligations of the named insured providing such insurance pursuant to this Agreement;

E. Such policies shall include a separation of insured clause.

4. CERTIFICATES.

A. Prior to the Effective Date, Operator shall furnish Owner with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, setting out compliance with the insurance requirements set forth above.

B. Prior to the Effective Date, Owner shall furnish Operator with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, setting out compliance with the insurance requirements set forth above.

C. Failure of either Party to demand a certificate of insurance or other evidence of full compliance with these insurance requirements or failure of either Party to identify a deficiency from evidence that is provided shall not be construed as a waiver of the obligation to maintain such insurance required by this Agreement.

5. GENERAL INSURANCE PROVISIONS.

A. Operator shall be responsible for any loss of or damage to their own property, including tools, equipment and vehicles or other property which does not form part of the project.

B. Operator shall require evidence of insurance from each Subcontractor prior to allowing such Subcontractor to commence the performance of any work with respects to the project.

C. Neither party represents that coverage and limits will necessarily be adequate to protect the other party, and such coverage and limits shall not be deemed as a limitation on liability under the indemnities provided in this Agreement.

D. The insurance requirements set out in this **Exhibit C** are independent from all other obligations of the Parties under this Agreement and apply whether or not required by any other provision of this Agreement.

E. Operator shall cause each Subcontractor engaged by Operator on its own behalf to purchase and maintain insurance of the type specified in this **Exhibit C**. When requested by Owner, Operator shall furnish to Owner copies of certificates of insurance evidencing coverage for each such Subcontractor.

- F. Operator, as applicable, shall retain for seven (7) years copies of insurance policies provided pursuant to this Agreement.

**EXHIBIT D**

**OPERATOR INCENTIVE BONUS**

1. **Definitions.**

Capitalized terms used but not defined herein have the meanings assigned to them in the Agreement.

***“Annual Operating Fee”*** means an amount equal to the sum of the Operating Fees which are owed to Operator for the given Operating Year; provided, that, in the event that any Operating Year is less than twelve (12) months, the Annual Operating Fee shall be equal to the sum of Operating Fees which are owed to Operator for the number of months in such partial Operating Year.

***“Maximum Operator Incentive Bonus”*** means, as of the measurement date, an amount equal to forty percent (40%) of the Annual Operating Fee for the given Operating Year.

2. **Operator Incentive Bonus.**

Operator may earn an Operator Incentive Bonus in accordance with such criteria and metrics as shall be agreed between the Parties and set forth in the Annual O&M Plan for the given Operating Year. The amount of the Operator Incentive Bonus in respect of any Operating Year shall not be greater than Maximum Operator Incentive Bonus. The Operator Incentive Bonus earned by the Operator in a given year shall be calculated using the following formula:

$$[OIB = [(0.10 * SHF) + (0.10 * EF) + (0.40 * AF) + (0.40 * BCF)] * MOIB]$$

Where:

"OIB" = the Operator Incentive Bonus for the year.

"SHF" = the Safety and Health Factor for the year

"EF" = the Environmental Factor for the year

"BCF" = Budget Compliance Factor for the year

"AF" = the Availability Factor for the year

"MOIB" = Maximum Operator Incentive Bonus.

**(a) Safety and Health Factor**

The Safety and Health Factor (“SHF”) is based upon the Project’s success in maintaining a safe work environment. The Safety and Health Factor is calculated using the following formula:

$$\text{SHF} = (0.30 * \text{TRAIN}) + (0.7 * \text{RIR})$$

Components will be adjusted based on the criteria below.

**TRAIN - Completing Required Safety Training:** 100% is 1.0, 95% and below is 0.0.

**RIR – Recordable Incident Rate:** RIR less than industry average is 1.0. RIR greater than industry average is 0.

**(b) Environmental Factor**

The Environmental Factor (“EF”) will be a number between 0.0 and 1.00. An “NOV” shall be any notice of violation by a Government Authority for a violation of an environmental Law of any kind. EF will be adjusted in accordance with the table below:

Notices of Violation (“NOV”) received during the year	Environmental Factor
0	1.00
1	0.25
2 or More	0.00

The amount of money awarded under the EF component of the OIB will be reduced by the amount of any monetary penalties incurred under any NOV issued.

**(c) Availability Factor**

The Availability Factor (“AF”) is based on the Project’s success at achieving the expected annual availability set forth in the approved O&M Plan. For each one-tenth of one percentage point below the expected AF \$1,000 shall be subtracted from the AF component of OIB.

**[(d) Budget Compliance Factor**

The Budget Compliance Factor (“BCF”) is a measure of the Project’s ability to control costs in a given Operating Year. The monies awarded under the BCF component of the OIB shall be reduced

by \$1,000 for each one-tenth of one percentage point that actual O&M Expenses are above the total established in the annual Approved O&M Plan and any approved Change Orders.

**EXHIBIT E**

**SITE PERSONNEL INCENTIVE PAYMENT**

Site Personnel shall be entitled to a Site Personnel Incentive Payment based on the criteria and metrics as shall be agreed between the Parties and set forth in the Annual O&M Plan for the given Operating Year.

**EXHIBIT F**

**FORM MONTHLY REPORT**



**MONTHLY OPERATING REPORT – OUTLINE**

- I. Executive Summary**
- II. Plant Operations and Performance**
  - a. Availability, Capacity and Net Generation
  - b. Scheduled Downtime Events
  - c. Unscheduled Downtime Events
- III. Maintenance Activities**
  - a. Work Orders and Preventative Maintenance Completed
  - b. Unplanned Maintenance or Repairs
  - c. Issues of Concern
- IV. Environmental, Health & Safety**
  - a. Environmental Monitoring and Reporting
  - b. Safety Metrics and Training
  - c. Unusual Events
- V. Plant, Property and Equipment Status**
- VI. Next Month Look Ahead**

## **SCHEDULE 1**

### **PROJECT DESCRIPTION**

<b>Project Description</b>	67.7 MW net capacity biomass fueled renewable energy project
<b>Address</b>	1 Community Street, Berlin, New Hampshire

## **SCHEDULE 2**

### **PROJECT AGREEMENTS**

#### Fuel Supply Agreements

- Biomass Fuel Supply Agreement dated March 1, 2011 by and between Laidlaw Berlin Biopower, LLC and Richard Carrier Trucking, Inc, as amended, supplemented, or otherwise modified from time to time.

#### Interconnection Agreement

- Large Generator Interconnection Agreement dated 1/30/2011 by and between Owner and Public Service Company of New Hampshire d/b/a Eversource Energy, as amended, supplemented, or otherwise modified from time to time.

#### PPA

- Amended and Restated Power Purchase Agreement dated May 18, 2011 by and between Public Service Company of New Hampshire d/b/a Eversource Energy and Owner and Laidlaw Berlin Biopower, LLC, as amended, supplemented or otherwise modified from time to time.

Execution Copy

**AMENDMENT TO  
OPERATION AND MAINTENANCE AGREEMENT**

This Amendment to Operation and Maintenance Agreement (“Amendment”) is made and entered with an effective date of January 19, 2022 (the “**Effective Date**”) by and between Berlin Station, LLC, a Delaware limited liability company (“**Owner**”) and CS Berlin Ops, Inc., a Delaware corporation (“**Operator**”). Each of Owner and Operator is sometimes referred to as a “**Party**” and collectively as the “**Parties**”.

**RECITALS**

**WHEREAS**, Owner and Operator entered into that certain Operation and Maintenance Agreement dated January 19, 2018 (“Agreement”); and

**WHEREAS**, Owner and Operator intended for the Agreement to automatically extend for one (1) year periods after the initial term of three (3) years until and unless a Party terminates the Agreement as provided therein; and

**WHEREAS**, Owner and Operator desire to amend the Agreement to correct a clerical error in the Agreement with regard to the automatic extensions; and

**WHEREAS**, Owner and Operator also desire to amend the Agreement to clarify Operator’s authority to provide Site Personnel Incentives subject to Owner’s approval.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Section 5.1 (“**Term**”) is hereby Amended and Restated as follows:

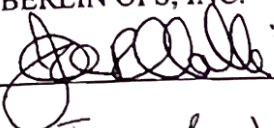
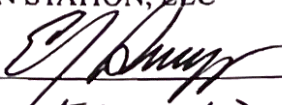
The term of this Agreement (“the Term”) shall commence on the Effective Date, unless terminated earlier pursuant to the terms of this Agreement, shall continue to and terminate on the third anniversary of the Effective Date; provided that this Agreement shall renew automatically for additional one-year periods unless either Party has delivered a written notice at least ninety (90) days prior to the expiration of the original three (3) year Term or any such renewal period.

2. The Parties acknowledge and agree that Site Personnel Incentive Payments shall be broadly interpreted and include, without limitation, attendance bonuses, stay incentives, performance bonuses and other discretionary bonuses. As provided in the Agreement, Site Personnel Incentive Payments shall be included in the Annual O&M Plan, provided that Operator may revise Site Personnel Incentive Payments from time to time as Operator deems necessary or prudent, documented by agreed Change Orders between the Parties pursuant to Sections 2.16(f) and 5.6 of the Agreement.

3. In all other respects, the Agreement remains in full force and effect and is hereby ratified and confirmed by both Parties.

**[Signature page follows.]**

With the intention of being legally bound, the Parties have executed this Agreement as of Effective Date set forth hereinabove.

<b>OPERATOR:</b> CS BERLIN OPS, INC.	<b>OWNER:</b> BERLIN STATION, LLC
By: 	By: 
Name: <u>Jean L. Halli</u>	Name: <u>Edward Dwyer</u>
Title: <u>Director</u>	Title: <u>Manager</u>

**AMENDMENT TO  
OPERATION AND MAINTENANCE AGREEMENT**

This Amendment to Operation and Maintenance Agreement (“Amendment”) is made and entered with an effective date of December 1, 2023 (the “**Effective Date**”) by and between Berlin Station, LLC, a Delaware limited liability company (“**Owner**”) and CS Berlin Ops, Inc., a Delaware corporation (“**Operator**”). Each of Owner and Operator is sometimes referred to as a “**Party**” and collectively as the “**Parties**”.

**RECITALS**

**WHEREAS**, Owner and Operator entered into that certain Operation and Maintenance Agreement dated January 19, 2018 (“**Agreement**”); and

**WHEREAS**, Owner and Operator intended for the Agreement to automatically extend for one (1) year periods after the initial term of three (3) years until and unless a Party terminates the Agreement as provided therein; and

**WHEREAS**, Owner and Operator desire to amend the Agreement to correct a clerical error in the Agreement with regard to the automatic extensions; and

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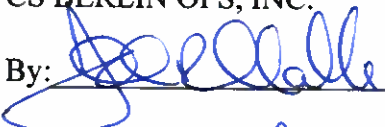
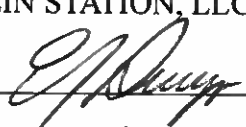
The term of this Agreement (“the Term”) shall commence on the Effective Date, unless terminated earlier pursuant to the terms of this Agreement, shall continue to and terminate on the third anniversary of the Effective Date; provided that this Agreement shall renew automatically for additional one-year periods unless either Party has delivered a written notice at least ninety (90) days prior to the expiration of the original three (3) year Term or any such renewal period.

2. The Parties acknowledge and agree that Site Personnel Incentive Payments shall be broadly interpreted and include, without limitation, attendance bonuses, stay incentives, performance bonuses and other discretionary bonuses. As provided in the Agreement, Site Personnel Incentive Payments shall be included in the Annual O&M Plan, provided that Operator may revise Site Personnel Incentive Payments from time to time as Operator deems necessary or prudent, documented by agreed Change Orders between the Parties pursuant to Sections 2.16(f) and 5.6 of the Agreement.

3. In all other respects, the Agreement remains in full force and effect and is hereby ratified and confirmed by both Parties.

**[Signature page follows.]**

With the intention of being legally bound, the Parties have executed this Agreement as of Effective Date set forth hereinabove.

<b>OPERATOR:</b> CS BERLIN OPS, INC.	<b>OWNER:</b> BERLIN STATION, LLC
By: <u></u>	By: <u></u>
Name: <u>Jean R. Halli</u>	Name: <u>Edward J. Dwyer</u>
Title: <u>MANAGER</u>	Title: <u>Director</u>

**EXHIBIT D**

**PROJECT MANAGEMENT AGREEMENT**

BETWEEN

**CATE STREET CAPITAL, INC.**

AND

**BERLIN STATION, LLC**

DATED AS OF JUNE 29, 2011

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## **PROJECT MANAGEMENT AGREEMENT**

THIS PROJECT MANAGEMENT AGREEMENT (the "Agreement") is dated as of this 29<sup>th</sup> day of June, 2011, by and between Berlin Station, LLC, a Delaware limited liability company ("Owner") and Cate Street Capital, Inc., a Delaware corporation ("Manager").

### **RECITALS**

WHEREAS, Owner was formed to own the land and Project located in Berlin, NH (the "Site") and to develop and own a nominal 75 MW biomass electric generation Project at the Site (together with all related facilities, property, assets, rights and obligations, the "Project"); and

WHEREAS, Owner desires to engage Manager to perform certain management services for the Project on behalf of Owner on the terms and conditions set forth herein, and Manager desires to provide such services to Owner on the terms and conditions set forth herein; and

WHEREAS, the Owner has authorized the issue and sale of Notes, subject to and in accordance with the various loan note purchase agreements, among the Owner and various holders, the "Note Holders" thereto from time to time (as amended, modified or supplemented from time to time, the "Loan Agreements").

WHEREAS, Owner and Manager intend that this Agreement shall set forth all those terms and conditions pertaining to Manager's management and monitoring of the Project from and after the date hereof;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties hereto agree as follows:

## **ARTICLE I - DEFINITIONS AND INTERPRETATIONS**

### **1.1. Definitions and Interpretations.**

Capitalized terms used herein have the meanings ascribed to them in this Agreement.

### **1.2. Miscellaneous Definitions and Conventions.**

Except as otherwise expressly provided in this Agreement or required by the context, for purposes of this Agreement, (i) any capitalized term defined herein by reference to another instrument or document shall continue to have the same meaning ascribed thereto whether or not such other instrument or document remains in effect, (ii) words importing the singular include the plural and vice versa, and words importing a gender include any gender, (iii) any reference to any agreement or contract includes schedules, exhibits, appendices and permitted supplements and amendments thereto, (iv) any reference herein to a

Person includes its successors and permitted assigns hereunder, and (v) any reference herein to an Article, Section, § or Schedule is to an Article, Section or Schedule to this Agreement (and in the case of § to a Section of a Schedule to this Agreement).

## **ARTICLE II - MANAGEMENT SERVICES; DUTIES AND RELATIONSHIPS**

### **2.1. Appointment.**

Owner hereby appoints and engages Manager, and Manager hereby accepts such appointment, as Owner's exclusive representative to perform the following management services relating to Owner's business and the Project upon the terms and conditions set forth herein.

### **2.2. Management Services Generally.**

2.2.(a) During the Term, Manager shall provide the services described in Sections 2.3 through 2.11 (collectively, the "Management Services"). The Manager shall perform all Management Services in a prudent and professional manner in accordance with generally accepted standards of care and performance for services comparable in scope and responsibility to the Management Services, and in accordance with all Applicable Laws and Project Permits and prudent utility practices.

2.2.(b) Each Party shall take such further actions, execute such documents and furnish such information as may be reasonably requested by the other Party, and shall reasonably cooperate with each other in order to carry out the purposes and intent of this Agreement and to enable them to perform their respective obligations hereunder.

2.2.(c) Manager shall cause Charles Grecco and Dammon Frecker or Raymond Kusche to oversee the performance of the Management Services and to perform an active and substantial role in the performance thereof during the period from the date hereof through the second anniversary of the Turnover Date. It shall not be a default under this Agreement if Charles Grecco or Dammon Frecker/Raymond Kusche ceases to oversee the performance of the Management Services due to death, Disability or termination for cause during such period, provided the Manager promptly notifies Owner of such event and engages a Qualified Replacement Individual within sixty (60) days. After such second anniversary, Manager shall cause Charles Grecco and Dammon Frecker/Raymond Kusche or a Qualified Replacement Individual for either of them to oversee the performance of the Management Services and to perform an active and substantial role in the performance thereof; and if either Charles Grecco or Dammon Frecker/Raymond Kusche (or his respective Qualified Replacement Individual) ceases to oversee the performance of the Management Services for any reason, the Manager shall promptly notify Owner of such event and engage a Qualified Replacement Individual within sixty (60) days. Notwithstanding the foregoing, the written consent of the Note Holders under the Loan Agreements shall be required prior to the engagement of any Qualified Replacement Individual.

2.2.(d) Each Party shall either perform its obligations hereunder directly by it and its employees or cause such obligations to be performed on its behalf by its subcontractors, provided that any such performance by a subcontractor shall not relieve, excuse or otherwise diminish the Contracting Party's responsibility and liability for performance under this Agreement.

2.2.(e) Manager shall, at its sole cost and expense, procure and maintain its own equipment, employees, telephone, mailing, telecopy and other office services and facilities as described in Section 2.14.

2.2.(f) To the extent necessary to perform the Management Services, Manager shall be entitled to retain the services of qualified professional accountants, attorneys and engineers and other specialty consultants (e.g. lobbyists, fuel consultants, chemists). The fees and expenses of such professionals shall be paid by Owner upon receipt of invoices and adequate supporting documentation, up to the aggregate amount in any calendar year set forth in the operating plan and budget approved in accordance with the Loan Agreements (including approved revisions thereto). Each such approved operating plan and budget shall continue in effect until a subsequent plan and budget has been approved under the Note Purchaser Agreements. Fees and expenses of professionals retained by Manager in excess of budgeted amounts shall be paid by Manager.

2.2.(g) Manager acknowledges that it is familiar with the Loan Agreements and agrees that, notwithstanding anything herein to the contrary, it shall perform the Management Services hereunder in the manner required by, and in compliance with applicable corresponding obligations under, the Loan Agreements.

### **2.3. Management, Financial and Legal Services.**

2.3.(a) Executive Management. Manager shall provide executive management services to the extent required by Owner in the management of the construction and of the Project and in the supervision of Owner's assets and affairs. These services shall include assistance in the implementation of all orders and resolutions of the Board of Managers and officers of Owner.

2.3.(b) Financial Accounting Services; Annual Budget. Manager shall prepare and distribute, on behalf of Owner, all financial statements (which shall be prepared in accordance with GAAP), other financial reports, budgets, estimates, tax returns, and other information required to be prepared and distributed pursuant to any Project Document, financial reporting requirement or as are customarily required to be prepared in accordance with good financial practices. Manager shall prepare such materials in accordance with all applicable requirements of the Project Documents. Manager shall act as primary interface with auditors retained by Owner for purposes of auditing Owner's financial statements. Commencing on the Commencement Date, at least sixty (60) days prior to the end of each Contract Year (or such earlier date as is required in order for Owner to satisfy its obligations under the Loan Agreements), Manager shall prepare, or cause to be prepared, and deliver to Owner a proposed operating plan and budget for the two years commencing on the following January 1 for review and approval by Owner.

2.3(b)(i) Operating Budget. The operating plan and budget shall set forth an itemized statement of the anticipated receipts and disbursements for the Project including the costs for non-capital maintenance of the Project. The operating budget shall include projected financial statements, including appropriate balance sheets, income statements or cash flows. The statements, where appropriate, shall reflect non-operating revenues and expenses, such as dividends and interest, but shall reflect these items separately from all true operating revenues and expenses of the Project. The operating plan and budget shall be prepared such that true operating revenues shall be sufficient revenues to cover true operating expenses of the Project. The operating plan and budget shall be prepared in accordance with all applicable requirements relating thereto set forth in the Loan Agreements.

2.3(b)(ii) Capital Budget. The capital budget shall set forth any recommended renovation and construction costs for the Project, which shall designate expenditure items as either mandatory or desirable. The capital budget shall show the source of funds for the items referenced in the capital budget. The capital budget shall be prepared in accordance with all applicable requirements relating thereto set forth in the Loan Agreements.

2.3.(c) Cash Management. Manager shall provide Owner with accounting, billing and other similar cash management services as required by Owner to carry out Owner's obligations under the Project Documents, including the following:

2.3(c)(i) Accounts Receivable. Manager shall review, analyze and recommend collection actions to Owner with respect to any default in payments to Owner under Project Contracts to which Owner is a party (other than Project Contracts to which Manager is the contract counterparty). Upon direction by Owner, Manager shall undertake collection efforts on behalf of Owner in connection with any such payment defaults. Manager shall cause amounts collected pursuant to this Section 2.3(c)(i) to be deposited directly in the Revenue Account (enter account number and wire instructions). If Manager nonetheless receives payment of any such amounts collected on behalf of Owner, Manager shall immediately remit all such amounts for deposit in the Revenue Account and, prior to such remission will hold such amounts in trust for Owner.

2.3(c)(ii) Accounts Payable. Manager shall process all payments required to be made by Owner pursuant to the Project Contracts and shall timely submit requisitions to Owner in form and substance satisfactory to Owner. Notwithstanding the foregoing, in no event shall the provisions of this Section 2.3(c)(ii) constitute a guarantee by Manager of the payment obligations of Owner or otherwise cause Manager to be liable or responsible for any payment required to be made by Owner or any other Person on behalf of Owner.

2.3.(d) Insurance. Manager shall review, analyze and recommend action to Owner regarding the obtaining, maintenance and renewal of all insurance required to be provided by Owner under the Project Documents ("Required Insurance") and the submission, processing and collection of claims thereunder, all to the extent permitted by, and in accordance with, applicable provisions of the Loan Agreements. Upon the direction of Owner, Manager shall perform all administrative activities required to obtain and maintain the Required Insurance and

shall submit to the appropriate insurer timely notices and claims of all losses insured under any Required Insurance policy and prosecute the resolution and collection of such claims, in each case in to the extent permitted by, and in accordance with, all applicable requirements of the Loan Agreements.

2.3.(e) Permit Compliance; Legal Services. Manager shall review and analyze Project data provided to it by Owner regarding compliance with Project Permits held by the Owner and shall recommend actions to Owner regarding compliance with such Project Permits or with applicable provisions of the Loan Agreements relating to such Project Permits. Where Project Permits must be obtained, modified, transferred or renewed by Owner, Manager shall prepare any application, filing or notice related thereto, shall cause such materials to be submitted to, and shall represent Owner in contacts with, governmental authorities, and shall perform all ministerial or administrative acts necessary for the timely issuance (or, as applicable, transfer) of Project Permits and the continued effectiveness thereof.

#### **2.4. Contract Administration.**

2.4.(a) General: Manager shall perform the services described in this Section 2.4 relating to the Administration of Project Documents ("Contract Administration Services") in each case in accordance with applicable requirements of the Loan Agreements.

2.4.(b) Definition of "Administer" and "Administration": For purposes of this Agreement, the terms "Administer" or "Administration" with respect to any contract, matter or Person shall mean doing all things necessary or appropriate to (i) monitor, supervise performance by other parties, enforce, and perform Owner's obligations (other than payment obligations or obligations that by their nature cannot be performed by Manager on behalf of Owner) under, any such contract or matter, (ii) responding to inquiries and requests and providing information required in a timely manner to the parties to such contracts or other Persons in connection with such contracts, matters or Persons, (iii) reviewing, analyzing, recommending courses of action to Owner and implementing directions of Owner relating to any disputes between Owner and any Person pursuant to any contract, matter or Persons Administered hereunder by Manager, and (iv) taking such other actions as shall be reasonably requested by Owner with respect to such contracts, matters or Persons; provided, however, "Administer" or "Administration" shall not include performance of day-to-day operational matters at the Project, including without limitation scheduling of deliveries of Fuel, scheduling of power deliveries, other comparable routine interface with counterparties to the Project Contracts and other routine operational matters.

2.4.(c) Contract Administration of Project Documents: Manager shall Administer all Project Documents, including without limitation the following agreements:

2.4.(c)(i) the Construction Contract;

2.4.(c)(ii) the Master Service Agreement ("MSA") - Construction Management and Owner's Engineer;

2.4.(c)(iii) the Lease Agreement / Right to Use Agreement;

2.4(c)(iv) the O&M Agreement;

2.4(c)(v) the Amended Power Purchase Agreement;

2.4(c)(vi) the Interconnection Agreement;

2.4(c)(vii) the Fuel Supply Agreement;

2.4(c)(viii) the Ash Recycling Agreement;

2.4(c)(ix) the Water/Sewerage Ordinances;

2.4(c)(x) the Owner's Engineer Agreement;

2.4(c)(xi) the Financing Documents; and

2.4(c)(xii) any other contractual obligation of Owner, as identified by Owner from time to time.

2.4(d) Manager Recordkeeping and Reporting: Manager shall maintain records of its activities in connection with the performance of the Contract Administration Services, including, but not limited to:

2.4.(d)(i) records of all solicitations and negotiations by Manager or on its behalf with third parties in connection with the Contract Administration Services;

2.4.(d)(ii) records of all meetings by Manager or on its behalf with any legislative and/or regulatory bodies, agencies and officials in connection with the Contract Administration Services;

2.4(d)(iii) records of collection efforts by Manager or on its behalf under all agreements Administered by Manager hereunder; and

2.4(d)(iv) records regarding activities by Manager or on its behalf that are required to be maintained or provided pursuant to the Loan Agreements.

Manager shall deliver to Owner, as soon as practicable and in any event within 5 days after any officer or management committee member of Manager obtaining knowledge, notice (a) of any condition or event which, in the opinion of management of Manager, could have a Material Adverse Effect (as defined in the Loan Agreements), (b) that any Person has given any notice under a Material Project Document (as defined in the Loan Agreements) of, or any Person has taken any other action with respect to, a claimed default or event of default under a Material Project Document, (c) of the institution of any material litigation involving claims against Manager or Owner, which could reasonably be expected to materially adversely affect the Project, (d) of any regulatory proceeding which could reasonably be expected to materially adversely affect the Project, (e) any claim of infringement or violation of, or any loss of any license or right to use, patents, copyrights, trademarks or other proprietary information of any Person necessary for the operation of the Project or the performance by Owner of any Project Document to which it is a party or (f) or any other matter for which the Owner is required to give notice under the Loan Agreements. Such notice shall specify the nature and period of existence of any such condition or event, or specify the notice given or action taken by such

person and nature of any such claimed default event or condition, or specify the details of such proceeding, litigation or dispute and what action Manager or Owner has taken, is taking or proposes to take with respect thereto; and with reasonable promptness, such other information and documents as Owner may reasonably request. Manager also covenants that, immediately and in no event later than two Business Days after any officer or management committee member of Manager obtains knowledge of an Event of Default or Default (as such terms are defined in the Loan Agreements), it will deliver to Owner a notice specifying the nature and period of existence thereof and what action Manager has taken, is taking or proposes to take with respect thereto.

2.4.(e) Records Retention. All records referred to in Section 2.4(d) shall be maintained at the Project Site or at Manager's corporate headquarters by Manager for a period of at least five (5) years or any longer period required by Applicable Law or the Project Documents (including without limitation, the Loan Agreements), and shall be made available for inspection on reasonable notice or otherwise as required by the Loan Agreements. In no event shall Manager destroy or dispose of the records maintained by it pursuant to this paragraph, but rather shall deliver all such records to Owner when Manager no longer elects (and is no longer required by this Agreement) to maintain such records.

## **2.5. Construction Oversight.**

Manager shall act as the primary interface with the Independent Engineer, the Construction Manager, and the Owner's Engineer and such other entity as Owner may designate at all times during the Construction Period, and shall monitor all progress under the Construction Agreement and attend the monthly progress meetings required pursuant to the Construction Agreement, as the primary interface with Contractor on behalf of Owner; provided that fees and expenses of Construction Manager, Owner's Engineer, and Independent Engineer shall be paid by Owner. Manager shall promptly review and analyze the results of all tests (including, without limitation, the "Performance Tests") and the progress of work under the Construction Agreement and shall make recommendations to Owner regarding the results of such tests and the progress of the construction of the Project. Manager shall recommend changes to the Project to Owner and shall prepare all written documents and submit materials associated with change orders proposed by Owner under the Construction Agreement, in each case in accordance with all applicable requirements of such agreements and the Loan Agreements. Owner shall review and analyze all requests for change orders and notices of force majeure events received from contractors and shall recommend to Owner a course of action in response thereto, which course of action shall include and comply with all applicable requirements of the Loan Agreements to process and implement actions related thereto.

## **2.6. Central Engineering Support & Environmental Services.**

2.6.(a) Information Support. Manager shall provide information, data, records, results of operations, technical data, O&M manuals, financial results and other information relating to other biomass fueled electric generating facilities owned in whole or in part or leased by Manager or any of its Affiliates to the extent that such information could be useful to Owner in connection with its operation of the facilities and to the extent that such information is not

proprietary. Manager shall promptly respond to all technical inquiries from Owner regarding the maintenance and operation of the Project and shall provide to Owner all technical information regarding the Project in its possession required to be provided by or on behalf of Owner under the Loan Agreements.

#### 2.6(b) Oversight of Operations and Changes and Periodic Plant Maintenance.

2.6.(b)(i) Manager shall review and analyze information provided to it by Owner regarding, and advise Owner of a proposed course of action with respect to, any proposed modification, repair or replacement of all or part of the Project, the Project Site, or the methods of operating and maintaining the Project, including any modifications, repairs or replacement necessitated by the occurrence of an event of force majeure (each, a "Change"). Manager shall analyze and advise Owner with respect to (i) the detailed activities required to be undertaken pursuant to any Change, (ii) the amount of, and/or method of calculating, the cost of labor and materials in connection therewith, (iii) any adjustment to the levels of Fuel that can be accepted at the Project during the implementation of such Change or the level of electricity that can be generated during such period and (iv) all applicable requirements of the Loan Agreements to process and implement such Change. Upon agreement between Manager and Owner with respect to the actions to be taken related to any Change and receipt of all approvals therefor required under the Loan Agreements, Manager shall oversee the implementation of such actions and shall regularly advise Owner on the status of such actions.

2.6.(b)(ii) Manager shall assist Owner in connection with the administrative aspects of Project shutdowns for periodic and/or major maintenance, and shall review and evaluate (i) the detailed operating activities required to be undertaken in connection with such shutdown, (ii) the most cost-effective way to mitigate revenue loss due to the inability to accept Fuel and the reduction or absence of electricity generation during such period, and (iii) all applicable requirements of the Loan Agreements related thereto.

2.6.(b)(iii) Manager shall review and analyze the operation, maintenance and repair/replacement of the Project and advise Owner regarding courses of action with respect to thereto and all applicable requirements of the Loan Agreements related thereto.

2.6.(b)(iv) Manager shall review and assist Owner in connection with the development of a preventative maintenance program for the Project and shall review and assist Owner in connection with changes by Owner to any Project O&M manuals.

2.6.(b)(v) Notwithstanding the foregoing, in no event shall Manager be liable for (i) failing to recommend any Change or for the improper performance of any Change or (ii) the failure to properly perform any Project shutdown or maintenance unless, in each case, caused by the negligence or misconduct of Manager or breach by Manager of its covenants contained herein.

2.6.(c) Development of Capital Improvement Programs. Manager shall assist and advise Owner in connection with ascertaining the necessity for any capital improvement programs at the Project that are permitted or approved by Owner and in accordance with the Project

Documents (including, without limitation, the Loan Agreements) and shall assist Owner in the implementation of any such capital improvements by overseeing all work performed by, and acting as primary interface with, all contractors and third party engineers retained by Owner in connection with such capital improvements.

2.6.(d) **Transmission & Interconnection Support.** Manager shall assist and advise Owner in connection with transmission and interconnection issues to ensure the continuous and reliable interconnection of the Project with the transmission utility and the uninterrupted delivery of electricity produced at the Project to the Power Purchaser.

2.6.(e) **Environmental Monitoring and Compliance.** Manager shall assist and advise Owner in connection with environmental matters relating to the Project and the Project Permits. Without limiting the foregoing, Manager shall monitor and review the emissions performance data prepared by the environmental monitoring firm of the Project and shall provide Owner with, and advise Owner with respect to the implementation of, recommendations for improved performance in the case of a deficiency and the satisfaction by Owner of all related requirements of the Loan Agreements.

## **2.7. Fuel Procurement Services Oversight; Disposal Services.**

2.7.(a) Manager shall assist Owner in connection with the procurement and management of Fuel for use at the Project ("Fuel Procurement Services").

2.7.(b) In furtherance, but not in limitation of, the foregoing, Manager's duties in connection with the Fuel Procurement Services shall include:

2.7.(b)(i) commencing on the Commencement Date, at least 60 days prior to the beginning of each Contract Year, Owner shall submit to Manager a detailed plan for the procurement of Fuel for such Contract Year (the "Fuel Supply Plan"). The Fuel Supply Plan shall include, at a minimum, an analysis of the market, opportunities for purchasing Fuel below Schiller Station, potential sources of Fuel, and the strategy to be pursued with respect to such market shall identify all applicable requirements of the Loan Agreements relating to Fuel supply, including maintaining minimum supply requirements, and other fuel supply arrangements, and shall be designed to comply with all such requirements;

2.7.(b)(ii) review and evaluation of the implementation of the Fuel Supply Plan for such Contract Year and the development of recommended courses of action to enhance the Fuel Supply Plan for consideration by Owner, in each case in accordance with all applicable requirements of the Loan Agreements; and

2.7.(b)(iii) assist Owner in the solicitation and negotiation of alternative Fuel Supply arrangements to be submitted to Fuel Suppliers and reasonably necessary to implement the Fuel Supply Plan.

2.7.(c) Commencing on the Commencement Date, within 10 days following the last day of each calendar quarter during a Contract Year, Manager shall provide Owner with a

written report of the quantity and sources of Fuel procured during such calendar quarter, any other information regarding Fuel activities during such calendar quarter required to be provided pursuant to the Loan Agreements and, if such results are less than anticipated pursuant to the Fuel Supply Plan, Manager shall recommend to Owner actions that may be taken to successfully implement the Fuel Supply Plan and to maximize the Wood Price Adjustment under the Power Purchase Agreement.

2.7.(d) Manager may engage the assistance of a Fuel consultant to the extent necessary in connection with the performance of its obligations under this Section 2.7; provided that the fees and expenses of any Fuel Consultant shall be paid in accordance with Section 2.2(f).

2.7.(e) Notwithstanding the foregoing, in no event shall Manager be liable for any deficiency in the Fuel Supply Plans or the failure to implement or perform the Fuel Supply Plans unless caused by the negligence or misconduct of Manager or breach by Manager of its covenants contained herein.

## **2.8. Human Resources.**

2.8(a) Payroll and Benefit Services. (if applicable) Manager shall coordinate and oversee provision of any payroll services for Owner employees. Manager shall prepare regular reviews of pay statistics and recommend adjustments to payroll for Owner employees.

2.8(b) OSHA Reporting. Manager shall review and assist Owner in connection with all filings and reports with appropriate federal, state and local regulatory agencies related to Occupational Safety & Health Administration ("OSHA") statutes and regulations and correlative state law, and shall recommend actions to Owner in connection with compliance therewith.

2.8(c) Management and Employee Training and Development. Manager shall review and assist and, upon approval by Owner, monitor implementation of classroom and on- the-job training programs developed by Owner and Operator or its contractors for the operations and supervisory staff on all procedures needed to operate and maintain the Project and to perform Owner's obligations under the Project Documents (including, without limitation, all applicable requirements of the Loan Agreements). Manager shall review and assist Owner with, and, upon approval by Owner, monitor implementation of, training programs developed by Owner for senior management in the areas of employee discipline, performance review, dispute resolution, and other areas germane to the operation of the Owner's business.

## **2.9. Public and Investor Relations.**

2.9.(a) Good Neighbor Initiatives. Manager shall develop a program of participation in and outreach to the local community of Berlin, New Hampshire and the areas served by the Project. Manager shall identify, and if requested by Owner, coordinate, organize and attend neighborhood meetings, make contacts with special interest parties such as the agricultural and local communities, and make determinations as to the advisability and level of support for political or charitable donations and local community investment programs. Manager shall not

make any political or charitable contributions on behalf of Owner or sponsor or organize any public meeting or other activity on behalf of Owner without the consent of Owner.

2.9.(b) Local Industry and Trade Liaison. Manager shall appear before and meet with local industry representatives and individuals (including without limitation Androscoggin Valley Economic Recovery Corporation, Coos County Commissioner's Office, Androscoggin Valley Regional Refuse Disposal District, Tri-County Community Action Program, State Building and Construction Trade Council and the New Hampshire Timberwood Owners Association), as may be reasonably requested by Owner.

2.9.(c) New Market Tax Credit ("NMTC") Liaison. Manager shall appear before and meet with NMTC representatives and individuals, assist in the developing and implementing any NMTC programs. The NMTC programs are designed and managed by the NMTC representatives, but the Manager will work within those parameters in order to promote the Project and the purposes of Owner.

2.9.(d) Investor/Lender Relations and Support. Manager shall assist Owner in interaction between Owner Persons extending credit to or on behalf of Owner or the Project.

## **2.10. Public and Regulatory Affairs.**

2.10.(a) Manager shall perform the following public relations and regulatory affairs services on behalf of Owner:

2.10.(a)(i) review, evaluate and recommend courses of action and, upon Owner's direction, implement programs relating to public and media relations, including promotional and public relations programs, designed to promote the beneficial use programs of the State of New Hampshire for the proper disposal of ash residue;

2.10.(a)(ii) review correspondence from and prepare submittals to be made by Owner to, and attend meetings with or related to administration of all matters in connection with the New Hampshire Attorney General, the New Hampshire Department of Environmental Services, the New Hampshire Site Evaluation Board, and the New Hampshire Public Utilities Commission; and

2.10.(a)(iii) review correspondence from and prepare submittals to be made by Owner to and attend meetings with or related to administration of all local, county, state and federal regulatory and legislative affairs relating to the Project other than those relating to the Project Permits.

2.10.(b) In furtherance, but not in limitation, of the foregoing activities described in Section 2.10(a), Manager shall:

2.10.(b)(i) keep reasonably current on legislative and regulatory developments and report to Owner any significant new development that could reasonably be expected to have a material effect on the Project;

2.10.(b)(ii) recommend courses of action related to, and upon the direction of Owner, recommend and engage lobbying firms to undertake, lobbying efforts with legislative and/or regulatory bodies, agencies or officials in order to promote the Project and the purposes of Owner; provided that the fees and expenses of such lobbying firms shall be paid in accordance with Section 2.2(f);

2.10.(b)(iii) appear before and meet with appropriate legislative and/or regulatory bodies, agencies or officials as may be reasonably requested by Owner in order to promote the Project and the purposes of Owner.

2.10.(c) Notwithstanding anything contained in Section 2.10 or elsewhere herein, Manager shall not, and shall not have the authority or present itself as having the authority to, make or disseminate any oral or written public statement containing information not otherwise already in the public domain (whether in connection with public and media relations, regulatory and legislative affairs or otherwise) regarding any of the members of Owner or their respective Affiliates, without the prior written approval of Owner and such members or their Affiliates.

## **2.11. Limitations of Manager Authority.**

Notwithstanding any provision in this Agreement to the contrary, unless expressly approved in writing by Owner, Manager (or any agent, representative or contractor of Manager) shall not:

(a) **Disposition of Assets.** Sell, lease, pledge, mortgage, encumber, convey, or make any license, exchange or other transfer or disposition of any property or assets of Owner.

(b) **Contract.** Make, enter into, execute, amend, modify or supplement any contract or agreement on behalf of or in the name of Owner.

(c) **Lawsuits and Settlements.** Settle, compromise, assign, pledge, transfer, release or consent to the compromise, assignment, pledge, transfer or release of, any claim, suit, debt, demand or judgment against or due by, Owner.

(d) Take any action that is prohibited by the Loan Agreements.

## **2.12. Duties of Owner.**

In order to assist and facilitate the provision by Manager of the Management Services, Owner shall use Commercially Reasonable Efforts to provide Manager with any information in Owner's possession reasonably requested by Manager in order to perform the Management Services and to cooperate and assist Manager. Without limiting the foregoing, Owner shall provide Manager with all operating data related to the Project and the ancillary facilities in Owner's possession, including, without limitation, the facilities related to backup power service to the Project, the supply of water to the Project and sewage service for the Project. Owner

shall provide Manager from time to time current and complete copies of all Project Documents and any amendments or supplements thereto before the effective date thereof.

### **2.13. Compliance with Laws; Taxes.**

Each Party shall comply with Applicable Law in the performance of its obligations hereunder. Each Party shall obtain and maintain, at its own cost and expense, all permits and licenses required by Applicable Law to be obtained or maintained by it pursuant to or in connection with its respective obligations contemplated by this Agreement.

### **2.14. Expenses; Employees; Offices.**

Manager shall maintain a home office in or near Portsmouth, New Hampshire of the same size and with the same equipment, capabilities and amenities as the Manager maintains in Portsmouth, New Hampshire as of the date hereof. Manager's employees to be utilized in the performance of Manager's obligations under this Agreement shall consist of, at minimum: (1) project manager; (2) accounting support; (3) technical manager and other administrative support personnel.

### **2.15. Exclusive Appointment; Independent Contractor.**

2.15.(a) The appointment of Manager by Owner hereunder is exclusive and Owner shall not, at any time during the term of this Agreement, otherwise appoint, engage or permit Persons other than Manager and its subcontractors to perform the Management Services.

2.15.(b) Except as expressly provided herein, neither Party hereto shall have any right under this Agreement to bind the other, or to transact any business in the other's name or on its behalf in any manner, or to make any representation or warranty on behalf of the other, except that Manager may represent that it is the exclusive contractor appointed by Owner to provide Management Services pursuant to this Agreement. The relationship between the Parties is solely that of independent contractor, and no company, joint venture, relationships of principal and agent, employer and employee or master and servant is intended to exist between the Parties, the existence of which is expressly denied by the Parties. Neither Party shall be liable in any way for any engagement, obligation, liability, contract, representation, warranty, act or omission to act of the other Party. Except as expressly provided herein, Owner may at any time reduce, limit or eliminate any of the Management Services to be provided by Manager hereunder by providing written notice thereof to Manager; provided, however, that any such reduction, limitation or elimination of Management Services shall not result in a reduction of the Manager Compensation.

## **ARTICLE III - MANAGER COMPENSATION**

### **3.1. Manager Compensation Generally.**

3.1 As compensation for the performance by Manager of its obligations under this Agreement, Owner shall pay to Manager the following amounts at the times and in the manner

set forth herein (collectively, the "Manager Compensation"):

(a) During the Construction Period: \$1,000,000 per Contract Year, prorated for the first partial Contract Year and the last partial Contract Year of the Construction Period and escalating on each anniversary of the first day of the Term by the Inflation Adjustor (the "Construction Period Management Fee"); and

(b) After the expiration of the Construction Period and (i) after payment in full of the Bridge Loan: \$1,000,000 per Contract Year or (ii) prior to payment in full of the Bridge Loan: \$500,000 per Contract Year; prorated for the first partial Contract Year after the expiration of the Construction Period and the last partial Contract Year of the Term and escalating on each anniversary of the first day of the Term by the Inflation Adjustor (the "Base Compensation"), such Base Compensation shall be subordinated to debt service payable under the Loan Agreements, but in priority to Distributions (as defined in the Loan Agreements). Any subordinated, unpaid Base Compensation shall accumulate and be repaid at the next distribution date, again subordinated to debt service payable under the Loan Agreements.

### **3.2. Payment of Manager Compensation.**

3.2.(a) During the Construction Period, Owner shall pay the Manager Compensation in advance and in equal monthly installments, commencing on the date hereof. After the Construction Period and during the period that any Notes remain outstanding, the Manager Compensation shall be paid in accordance with the Issuer Depositary Agreement. Thereafter, the Manager Compensation shall be paid in advance and in equal semi-annual installments on each June 15th and December 15th during the Term.

3.2.(b) At least ten (10) Business Days prior to any payment date described in Section 3.2, Manager may deliver to Owner an invoice setting forth in reasonable detail all properly reimbursable third party costs incurred by Manager during the previous payment periods (that have not been the subject of a prior invoice) or payable by Manager during the next payment period (or portion thereof during the first period following the date hereof or the last period), in connection with Manager's performance of its obligations hereunder. The invoice shall be sent by first-class mail, facsimile transmission or email (with follow-up delivery of the original) or overnight delivery service to Owner at the address for Owner notices set forth in Section 10.1.

3.2.(c) All undisputed amounts reflected in an invoice submitted by Manager pursuant to Section 3.2(b) shall be paid on the applicable payment date. If Owner objects to all or a portion of an invoice, Owner shall provide an itemized statement of its objections setting forth in reasonable detail the basis therefor and, if such objection proves to be incorrect as determined by the mutual written agreement of the Parties or pursuant to dispute resolution in accordance with **Article XI**, pay the disputed amount, plus, to the extent permitted by Applicable Law, interest at the Late Payment Rate compounded monthly from the date such amount was originally due to the date of payment; provided, however, that if Owner has paid the full amount of an invoice, it may later dispute all *or* a portion of such invoice, and if such objection proves to be correct as determined by the mutual written

agreement of the Parties *or* pursuant to dispute resolution in accordance with Article XI, receive a refund of the disputed amount, plus, to the extent permitted by Applicable Law, interest at the Late Payment Rate compounded monthly from the date of its written objection thereto to the date of payment; provided, however, that Owner may not object to any invoice more than twelve (12) months after the date on which such invoice is rendered.

### **3.3. Late Payments.**

Any amounts payable to Manager under this Agreement by Owner that are not paid when due in accordance with this Agreement shall, unless otherwise specifically provided herein, bear interest, to the extent permitted by Applicable Law, at the Late Payment Rate compounded monthly.

### **3.4. Subordination.**

3.4.(a) If after the expiration of the Construction Period, Owner fails to pay when due any portion of the Subordinated Compensation Component due to the unavailability of funds necessary to pay such amount in accordance with the Project Documents, then (x) such unpaid amounts shall accrue interest pursuant to Section 3.3, (y) Owner shall continue to have the unabated obligation to pay to Manager such unpaid amounts and (z) such failure to pay shall not constitute an Owner Event of Default.

3.4.(b) The subordinated Base Compensation Component shall, in all events, be payable by Owner subject to the Priority Order.

3.4.(c) The subordinated Base Compensation Component shall be in all respects fully subordinated to the payment of all amounts owed under the Loan Agreements and otherwise as provided in the Issuer Depositary Agreement, and Manager shall have no right to exercise its remedies under this Agreement or as otherwise permitted by law to enforce repayment of such obligations for as long as any Notes are outstanding.

3.4.(d) Notwithstanding any provision of this Agreement, Manager shall continue performance of the Management Services, and shall have no right to exercise its remedies under this Agreement or as otherwise permitted by law, if any Manager Compensation is not paid when due because of insufficiency of available cash or after the occurrence of an Event of Default under the Loan Agreements. Any such failure to pay shall not constitute an Owner Event of Default.

## **ARTICLE IV - INDEMNIFICATION**

### **4.1. General Indemnification Obligations.**

4.1.(a) Subject to the limitations set forth in Article XII, Manager shall protect, indemnify and hold Owner and its respective Affiliates (other than Manager), partners, members (other than Manager), directors, officers, employees and agents (the "Owner Indemnified Parties") harmless from and against all liabilities, actions, damages, claims,

demands, judgments, costs, expenses, liens, encumbrances, suits or actions, or penalties, fines and charges of any governmental authority, and reasonable attorneys' fees, caused by the willful misconduct or negligent acts, errors or omissions of, or out of violation of Applicable Law by, or as a result of a breach hereunder by, Manager, its Affiliates (other than Owner), agents, contractors or employees in connection with or as a result of this Agreement or the performance by Manager of its obligations hereunder, except to the extent that same was the result of the willful misconduct or negligent acts, errors or omissions of such Owner Indemnified Party. Each Owner Indemnified Party shall promptly notify Manager of the assertion of any claim against which it is indemnified hereunder, shall, to the extent permitted by Applicable Law, give Manager the opportunity to defend such claim, and shall not settle such claim without the approval of Manager, which approval shall not be unreasonably withheld or delayed. These indemnification provisions are for the protection of Owner Indemnified Parties only and shall not establish, in and of themselves, any liability to third-parties.

4.1.(b) Subject to the limitations set forth in Article XII, Owner shall protect, indemnify and hold Manager and its Affiliates (other than Owner), members, directors, officers, employees and agents (the "Manager Indemnified Parties") harmless from and against all liabilities, actions, damages, claims, demands, judgments, costs, expenses, liens, encumbrances, suits or actions, or penalties, fines and charges of any governmental authority and reasonable attorneys' fees caused by the willful misconduct or negligent acts, error or omissions of, or out of violation of Applicable Law by, or as a result of a breach hereunder by, Owner, its Affiliates (other than Manager), agents, contractors or employees in connection with or as a result of this Agreement or the performance by Owner of its obligations hereunder, except to the extent that same was the result of the willful misconduct or negligent acts, errors or omissions of such Manager Indemnified Party. Each Manager Indemnified Party shall promptly notify Owner of the assertion of any claim against which it is indemnified hereunder, shall, to the extent permitted by Applicable Law, give Owner the opportunity to defend such claim, and shall not settle such claim without the approval of Owner, which approval shall not be unreasonably withheld or delayed. These indemnification provisions are for the protection of the Manager Indemnified Parties only and shall not establish, in and of themselves, any liability to third parties.

#### **4.2. Indemnification Procedures.**

In case any action shall be brought against any Indemnified Party in respect of which payment may be sought against Manager or Owner as the case may be (the "Indemnifying Party") pursuant to this Article IV, the Indemnified Party shall promptly notify the Indemnifying Party in writing, and the Indemnifying Party shall be entitled to participate, at its own expense, in the defense, or if it so elects, within a reasonable time after receipt of such Notice, to assume the defense of any suit brought to enforce any such claim; provided, however, that if the Indemnifying Party so elects to assume the defense, such defense shall be conducted by counsel chosen by it and approved by the Indemnified Party, which approval shall not be unreasonably withheld or delayed. If the Indemnifying Party elects to assume the defense of any such suit and retains counsel, the Indemnified Party shall cooperate in such defense and shall have the right to retain separate counsel in any such

action and participate in the defense thereof; provided, however, that the fees and expenses of such counsel shall be at the expense of the Indemnified Party unless the retaining of such counsel has been specifically authorized in writing by the Indemnifying Party. The Indemnifying Party shall not be liable for amounts payable in respect of any settlement of any such action effected without its consent (which consent shall not be unreasonably withheld or delayed), but if settled with the consent of the Indemnifying Party, or if there be a final judgment for the plaintiff in any such action, the Indemnifying Party agrees to pay all such costs.

## **ARTICLE V - CONFIDENTIALITY**

### **5.1. Confidentiality.**

For the purposes of this Article V, "Confidential Information" means information delivered to a Party by or on behalf of the other Party in connection with the transactions contemplated by or otherwise pursuant to this Agreement that is proprietary in nature and that was clearly marked or labeled or otherwise adequately identified when received as being confidential information of the Party providing the information, provided that such term does not include information that (a) was publicly known or otherwise known to the receiving Party prior to the time of such disclosure, (b) subsequently becomes publicly known through no act or omission by the receiving Party or any person acting on its behalf, (c) otherwise becomes known to the receiving Party other than through disclosure by the disclosing Party or a Person known by the receiving Party to be bound by an agreement with the disclosing Party not to disclose such information, or (d) constitutes financial statements that are otherwise publicly available. The receiving Party will maintain the confidentiality of such Confidential Information in accordance with procedures adopted by such Party in good faith to protect confidential information of third parties delivered to such Party, provided that such receiving Party may deliver or disclose Confidential Information to (i) its directors, officers, employees, agents, attorneys, trustees and affiliates, (ii) its financial advisors and other professional advisors who agree to hold confidential the Confidential Information substantially in accordance with the terms of this Section 5.1, (iii) any holder of a note of or lender to the disclosing Party, any Person to which such holder or lender sells or offers to sell such note or loan or any part thereof or any participation therein (if such Person has agreed in writing prior to its receipt of such Confidential Information to be bound by the provisions of this Section 5.1), any consultant or agent of such note holders or lenders, any federal or state regulatory authority having jurisdiction over such note holder or lender, the NAIC or the SVO or, in each case, any similar organization, or any nationally recognized rating agency that requires access to information about such note holder's or lender's investment portfolio, or (iv) any other Person to which such delivery or disclosure may be necessary or appropriate (w) to effect compliance with Applicable Law, (x) in response to any subpoena or other legal process, (y) in connection with any litigation.

The Parties hereto acknowledge and agree that any breach of the foregoing provisions by either Party would cause irreparable harm to the other Party for which there are no adequate remedies at law, and, accordingly, in the event of any threatened or anticipated such breach by either party, the other Party may obtain permanent or temporary injunctive relief against such breach or seek other equitable remedies therefor

without the necessity of proving actual damage.

## **ARTICLE VI - DEFAULT AND TERMINATION**

### **6.1. Manager Events of Default.**

Manager shall be in default of its obligations under this Agreement upon the occurrence of any of the following events or conditions (each, a "**Manager Event of Default**");

6.1.(a) Manager shall have become insolvent, or generally does not pay its debts as they become due, or admits in writing its inability to pay its debts, or makes a deed of trust or assignment for the benefit of creditors; or

6.1.(b) unless the petition commencing the proceedings is timely contested and the proceedings are dismissed or effectively stayed within sixty (60) days from the commencement thereof, any insolvency, receivership, reorganization or bankruptcy proceedings have been commenced by or against Manager; or

6.1.(c) (i) Manager shall have failed to perform any of its obligations hereunder, or (ii) any representation made by Manager herein shall have been false or misleading in any material respect when made, and in each case, such failure (other than a failure to perform Section 2.2(c) for which no cure period is provided), remains uncured for thirty (30) days following notice to Manager from Owner to cure such default (or, if such cure cannot be effected within such period, failure to commence a cure thereof within such thirty (30) day period or to thereafter diligently pursue a cure thereof within the shortest practicable time); or

6.1.(d) upon continuation for ten (10) days following notice to Manager from Owner to cure, Manager shall have failed to make any payment to Owner when due hereunder.

### **6.2. Owner Events of Default.**

Owner shall be in default of its obligations under this Agreement upon the occurrence of any of the following events or conditions (each an "**Owner Event of Default**");

6.2.(a) Owner shall have become insolvent, or generally does not pay its debts as they become due, or admits in writing its inability to pay its debts, or makes a deed of trust or assignment for the benefit of creditors; or

6.2.(b) unless the petition commencing the proceedings is timely contested and the proceedings are dismissed or effectively stayed within sixty (60) days from the commencement thereof, any insolvency, receivership, reorganization or bankruptcy proceedings have been commenced by or against Owner; or

6.2.(c) upon continuation for ten (10) days following notice to Owner from Manager to cure, Owner shall have failed to make any payment to Manager when due hereunder (taking into account the subordination provisions of Section 3.5); or

6.2.(d) (i) Owner shall have failed to perform any of its other obligations hereunder, or (ii) any representation made by Owner herein shall have been false or misleading in any material respect when made, and, in each such case, such failure remains uncured for thirty (30) days following notice to Owner from Manager to cure such default (or, if such cure cannot be effected within such period, failure to commence and diligently pursue a cure thereof within such thirty (30) day period or to thereafter diligently pursue a cure thereof within the shortest practicable time).

### **6.3. Termination For Cause and Special Termination.**

Owner may, in its sole discretion, terminate this Agreement at any time for cause in the event a Manager Event of Default shall have occurred and be continuing, by giving prior written notice of such termination to Manager. Manager may, in its sole discretion, terminate this Agreement at any time for cause in the event an Owner Event of Default shall have occurred and be continuing, by giving prior written notice of such termination to Owner.

### **6.4. Performance and Cover.**

Notwithstanding any provision of this Agreement, upon any failure of Manager to timely perform any of the Management Services, Owner, in its sole discretion, may undertake to perform such non-performed Management Service, or have such Management Service performed on its behalf by a third-party selected by Owner, and Manager shall be responsible to reimburse Owner for all of its costs and expenses incurred in performing such Management Service or in having such Management Service performed on its behalf by a third party.

## **ARTICLE VII - TERM**

### **7.1. Term.**

The "Term" of this Agreement shall mean the period from and including the date of execution of this Agreement by both parties through and including the twenty first (21") anniversary of the Commencement Date, unless this Agreement is sooner terminated in accordance with its terms.

## **ARTICLE VIII - REPRESENTATIONS AND WARRANTIES**

### **8.1. Representations and Warranties of Owner.**

8.1.(a) Owner hereby represents and warrants to Manager that:

8.1.(a)(i) Owner is a limited liability company duly formed and validly

existing in good standing under the laws of Delaware, with full legal right, power and authority to enter into and perform its obligations under this Agreement;

8.1.(a)(ii) Owner has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by Owner and constitutes the legal, valid and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, moratorium and similar laws affecting creditors' rights generally and general principles of equity;

8.1.(a)(iii) neither the execution or delivery by Owner of this Agreement, nor the performance of Owner's obligations hereunder or in connection with the transactions contemplated hereby

8.1.(a)(iii)(A) does or will conflict with, violate or result in a breach of any Applicable Law, or

8.1.(a)(iii)(B) does or will, with or without the giving of notice or passage of time or both, conflict with, violate or result in a breach of any term or condition of any judgment, decree, agreement or instrument to which Owner is a party or by which Owner or any of its properties or assets are bound, or constitute a default thereunder;

8.1.(a)(iv) no approval, authorization, order or consent of, or declaration, registration or filing with, any governmental authority is required for the valid execution and delivery by Owner of this Agreement except those that have been duly obtained or made; and

8.1.(a)(v) There is no action, suit or proceeding, at law or in equity, before or by any court or governmental authority, pending or, to the best of Owner's knowledge, threatened, against Owner or any of its Affiliates, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance of its obligations hereunder or the other transactions contemplated hereby or which, in any way, would adversely affect the validity or enforceability of this Agreement or any agreement or instrument entered into by Owner in connection with the transactions contemplated hereby.

## **8.2. Representations and Warranties of Manager.**

8.2.(a) Manager hereby represents and warrants to Owner that:

8.2.(a)(i) Manager is a limited liability company duly formed and validly existing in good standing under the laws of Delaware, with full legal right, power and authority to enter into and perform its obligations under this Agreement;

8.2.(a)(ii) Manager has duly authorized the execution and delivery of this Agreement and this Agreement has been duly executed and delivered by Manager and constitutes the legal, valid and binding obligation of Manager, enforceable against Manager

in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, moratorium and similar laws affecting creditors' rights generally and by general principles of equity;

8.2.(a)(iii) neither the execution or delivery by Manager of this Agreement, nor the performance of Manager's obligations hereunder or in connection with the transactions contemplated hereby

8.2.(a)(iii)(A) does or will conflict with, violate or result in a breach of any Applicable Law, or

8.2.(a)(iii)(B) does or will, with or without the giving of notice or the passage of time or both, conflict with, violate or result in a breach of any term or condition of any judgment, decree, agreement or instrument to which Manager is a party or by which Manager or any of its properties or assets are bound, or constitute a default thereunder;

8.2.(a)(iv) no approval, authorization, order or consent of, or declaration, registration or filing with, any governmental authority is required for the valid execution and delivery by Manager of this Agreement except those that have been duly obtained or made; and

8.2.(a)(v) There is no action, suit or proceeding, at law or in equity, before or by any court or governmental authority, pending or, to the best of Manager's knowledge, threatened, against Manager or any of its Affiliates, wherein an unfavorable decision, ruling or finding would materially adversely affect the performance of its obligations hereunder or the other transactions contemplated hereby or which, in any way, would adversely affect the validity or enforceability of this Agreement or any agreement or instrument entered into by Manager in connection with the transactions contemplated hereby.

## **ARTICLE IX - ASSIGNMENT**

### **9.1. Assignment by Owner.**

Without the prior approval of Manager, Owner may, upon reasonable advance notice, assign all or part of its right, title and interest in this Agreement to the holders of Owner's notes and Owner's lenders, or an agent acting on their behalf, in connection with the financing of the Project, and any such assignee may further assign all or a part of such rights, title and interest. Owner may assign all or a part of its right, title and interest in this Agreement to any other Person only with the prior written approval of Manager; provided, however, that any such assignment shall be ineffective to relieve Owner of any of its obligations to be performed by it hereunder.

### **9.2. Assignment by Manager.**

Manager may assign all or a part of its right, title and interest in this Agreement only with the prior written approval of Owner which may be withheld in Owner's sole discretion; provided, however, that any such assignment shall be ineffective to relieve Manager of any of its obligations to be performed by it hereunder.

## **ARTICLE X - NOTICES AND COMMUNICATIONS**

### **10.1. Notices.**

Any notice required to be given by any Party pursuant to the terms and conditions of this Agreement shall be in writing and either (i) delivered personally; (ii) sent by certified mail, return receipt requested; (iii) sent by a recognized overnight mail or courier service with delivery receipt requested; or (iv) sent by facsimile transfer (provided the sender receives acknowledgement of receipt from the recipient):

If to Manager:

Cate Street Capital, Inc.  
One Cate Street, Suite 100  
Portsmouth, NH 03801  
Attention: Charles Grecco  
Phone: (603) 319-4400  
Fax: (603) 584-1315

If to Owner:

Berlin Station, LLC  
57 Hutchins Street  
Berlin, NH 03570  
Attention: Plant Manager

In each case, with a copy to:

Berlin Station, LLC  
c/o One Cate Street, Suite 100  
Portsmouth, NH 03801  
Attention: Robert Desrosiers

### **10.2. Effect of Notices.**

A Party may change its address for communications hereunder by notice to the other Party. Any such communications given by mail in accordance with Section 10.1 shall be deemed to have been given five (5) Business Days after the date of mailing; communications given by any other means shall be deemed to have been given when received.

## **ARTICLE XI - DISPUTE RESOLUTION**

### **11.1 Dispute Resolution.**

Any controversy or claim between the Parties arising out of or relating to this Agreement or any agreement or instruments relating hereto or delivered in connection herewith, including but not limited to a claim based on or arising from an alleged tort, shall at the written request of any such Party be determined by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Such arbitration shall take place in Concord, New Hampshire. The arbitrators shall have the qualifications set forth in Section 11.2 hereof. All statutes of limitations which would otherwise be applicable in a judicial action brought by any such Party shall apply to any arbitration proceeding hereunder.

### **11.2. Arbitrators.**

The arbitrators shall be selected in accordance with the rules of the American Arbitration Association from panels maintained by the Association. The panel shall consist of two arbitrators, one selected by each Party. The Party prevailing in any arbitration shall be entitled to payment of all of its costs arising from the arbitration by the other Party to such arbitration, which costs shall include, but not be limited to, attorneys' fees, administrative fees, and arbitrators' fees. The arbitrators also may grant provisional or ancillary remedies such as, for example, injunctive relief, attachment or the appointment of a receiver, either during the pendency of the arbitration or as part of the arbitration.

### **11.3. Applicable Law.**

Notwithstanding the applicability of other law to any other provision of this Agreement, the Federal Arbitration Act, 9 U.S.C. § 1 et seq., shall apply to the construction and interpretation of this Article XI.

### **11.4. Arbitration Procedures.**

In any demand or claim for arbitration relating to a matter in which an award in excess of \$10,000 is or may be sought, the Party seeking arbitration shall set forth in detail the basis of its claim in a written demand for arbitration. The arbitrators shall establish a period prior to the arbitration date during which each Party shall have the right to obtain discovery from the other Party that would ordinarily be available under the civil rules applicable in the New Hampshire state courts. Similarly, a Party proposing to present expert testimony in the arbitration shall, within a reasonable time period established by the arbitrators, provide the other Party with a detailed written summary of the proposed testimony of such expert.

### **11.5. Duration of Arbitration.**

Each of the Parties recognizes the benefits of quick dispute resolution. It is the intent of the Parties that each arbitration proceeding be concluded within three (3) months after the written request for arbitration.

#### **11.6. Results of Arbitration.**

Any award, order or judgment pursuant to such arbitration shall be deemed final and may be entered and enforced in any state or federal court of competent jurisdiction. Each Party agrees to submit to the jurisdiction of any such court for purposes of the enforcement of any such award, order or judgment.

### **ARTICLE XII - LIMITATION OF LIABILITY**

#### **12.1. Consequential Damages.**

In no event, whether as a result of breach of contract, warranty, guarantee, indemnity or tort, including negligence, strict liability or otherwise, shall either Party hereto be liable to other Party for indirect, special, incidental, consequential, punitive or exemplary damages; and Owner hereby releases Manager, and Manager hereby releases Owner, therefrom.

#### **12.2. Limitation of Liability.**

NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY, IN NO EVENT SHALL MANAGER'S AGGREGATE LIABILITY HEREUNDER IN ANY CONTRACT YEAR EXCEED THE MANAGER BASE COMPENSATION ACTUALLY PAYABLE TO MANAGER FOR SUCH CONTRACT YEAR.

#### **12.3. Applicability.**

Except to the extent prohibited by law, the waivers and disclaimers of liability, releases from liability, limitations on liability and exclusive remedy provisions set forth in this Agreement (if any) shall apply even in the event of the fault, negligence (in whole or in part), strict liability or other basis of liability of the Party to the benefit of which such provisions operate.

### **ARTICLE XIII - MISCELLANEOUS**

#### **13.1. Effect of Invalid Provisions.**

The invalidity or unenforceability of any portion or provision of this Agreement (other than the payment provisions contained in Article III) shall not affect the validity or enforceability of any other portion or provision of this Agreement. Any portion or provision of this Agreement found to be invalid or unenforceable by a court of competent jurisdiction shall be deemed severed from this Agreement, and the Parties shall negotiate an equitable adjustment in such portions or provisions of this Agreement remaining valid and enforceable to effectuate the underlying purposes of this Agreement.

#### **13.2. Governing Law.**

This Agreement shall be governed by the laws of the State of New Hampshire.

**13.3. Entire Agreement.**

This Agreement, and the Schedules attached hereto, constitute the entire agreement between the Parties with respect to the subject matter hereof and there are no oral or written understandings, representations or commitments of any kind, express or implied, which are not expressly set forth herein.

**13.4. Modification in Writing.**

No oral or written modification of this Agreement by any officer, agent or employee of Manager or Owner, either before or after execution of this Agreement, shall be of any force or effect unless such modification is in writing and signed by both Parties.

**13.5. Waivers.**

The waiver of any breach or failure to enforce any of the terms, covenants or conditions of this Agreement shall not in any way affect, limit, modify or waive the future enforcement of such terms, covenants or conditions, or constitute a waiver of any breach or failure of any other terms, covenants or conditions, any course of dealing or custom of the trade notwithstanding.

**13.6. Headings.**

The headings contained herein are included solely for the convenience of the Parties and are not part of this Agreement.

**13.7. Counterparts.**

This Agreement may be executed in one or more counterparts and by facsimile, and may be signed by each party on a separate counterpart, each of which, taken together, shall be an original, and all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have caused this Project Management Agreement to be executed as of the date and the year first above written.

Owner:

Berlin Station, LLC,  
a Delaware LLC

By: 

Name: ROBERT DESROSIER

Title: Director

Manager:

Cate Street Capital, Inc.  
a Delaware Corporation

By: 

Name: ROBERT DESROSIER

Title: VP COMPLIANCE

### Schedule 1 - Definitions

**"Administer" or "Administration"** has the meaning set forth in Section 2.4(b).

**"Affiliate"** means, with respect to any Person, any other Person or entity, which controls, is controlled by, or is under common control with such Person directly or indirectly. The term "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person.

**"Agreement"** means this Project Management Agreement including all Schedules hereto, as may be amended from time to time in accordance with its terms.

**"Applicable Law"** means the Project Permits, and any law, regulation, requirement, order or consent decree of any federal, state or local agency, court or other governmental body having jurisdiction over the Project, Project Site, Owner or Manager.

**"Article"** means any article of this Agreement.

**"Ash Recycling Agreement"** means that Wood Ash Recycling Services Agreement between Owner and Resource Management, Inc. dated as of April 17, 2011, as amended from time to time in accordance with its terms.

**"Base Compensation Component"** has the meaning set forth in Section 3.1(b).

**"Bridge Loans"** means the 10.00% Senior Secured Notes due [\_\_\_\_\_, 2013] issued by Burgess Holdings, LLC.

**"Business Day"** means any day other than Saturday, Sunday or a legal holiday or other day on which banks are authorized to be closed in the State of New Hampshire.

**"Change"** has the meaning set forth in Section 2.6(b)(i).

**"City"** means the City of Berlin, New Hampshire.

**"Commencement Date"** means the In-Service Date, as such term is defined in the Power Purchase Agreement.

**"Commercially Reasonable Efforts"** means with respect to any Person, the level of effort that is commercially and technically reasonable and acceptable in the industry of such Person.

**"Construction Agreement"** means that Engineering, Procurement and Construction Agreement between Owner and the Contractor dated as of August 29, 2011, as amended from time to time in accordance with its terms.

**"Construction Period"** shall mean the period commencing on the first day of the Term through, but not including, the Commencement Date.

**"Construction Period Management Fee"** has the meaning set forth in Section 3.1(a).

**"Consumer Price Index"** means the Consumer Price Index- Urban Area (CPI-U) for the Northeast Urban Region Consumer Price Index, All-Items for all Urban Consumers, 1982-1984 Base, published by the United States Department of Labor Bureau of Labor Statistics, or, if such index is no longer published or its method of computation is substantially modified, a substitute index published by the United States Government or by a reputable publisher of financial or economic statistics that will fairly and reasonably reflect the same or substantially the same information as the discontinued or modified index.

**"Contract Administration Services"** has the meaning set forth in Section 2.4(a).

**"Contract Year"** means each full calendar year commencing on January 1 and ending December 31 of the Term; provided, however, that the first Contract Year shall begin on the first day of the Term and end on December 31 of such calendar year and the last Contract Year shall end on the date of termination of this Agreement; provided, further, that with respect to any Contract Year which is shorter than twelve (12) months, calculations of amounts for such Contract Year based on a full twelve (12) month year shall be prorated for the number of months in such Contract Year.

**"Contractor"** means Babcock & Wilcox Construction Co., Inc. its successors or permitted assigns, solely in its capacity as the Contractor under the Construction Agreement.

**"Day"** or "day" means a calendar day.

**"Disability"** means any mental or physical condition that renders the employee unable to perform the essential functions of his position, with or without reasonable accommodation, as is consistent with the Americans with Disabilities Act and the Family and Medical Leave Act; for a period in excess of ninety (90) consecutive days or more than one hundred twenty (120) days during any period of three hundred sixty five (365) calendar days.

**"Issuer Depositary Agreement"** means the "Depositary Agreement" as defined in the Loan Agreements, as amended from time to time in accordance with its terms.

**"Project"** means an approximate 75-megawatt biomass-fired electric generating Project to be constructed on a 62 acre parcel located at 57 Hutchins Drive, Berlin New Hampshire.

**"Project Site"** means that tract of land constituting approximately 62 acres located in Berlin, New Hampshire upon which the Project will be located.

**"Owner"** means Berlin Station, LLC a Delaware limited liability company, and its successors and permitted assigns.

**"Owner Event of Default"** has the meaning set forth in Section 6.2.

**"Owner Indemnified Parties"** has the meaning set forth in Section 4.1(a).

**"Financing Documents"** means the agreements executed or to be executed by Owner in connection with the financing or re-financing of the Project, including, without limitation, the agreements listed in Schedule 3, each as amended from time to time in accordance with its terms.

**"Fuel"** means "Biomass Fuel" as defined in the Fuel Supply Agreement.

**"Fuel Procurement Services"** has the meaning set forth in Section 2.7(a).

**"Fuel Supply Agreement"** means the Biomass Fuel Supply Agreement between Owner and Richard Carrier Trucking, Inc., dated as of March 1, 2011, as amended from time to time in accordance with its terms.

**"Fuel Supply Plan"** has the meaning set forth in Section 2.7(b)(i).

**"GAAP"** means generally accepted accounting principles in the United States.

**"Indemnified Party"** means an Owner Indemnified Party or a Manager Indemnified Party.

**"Indemnifying Party"** has the meaning set forth in Section 4.2.

**"Independent Engineer"** means either (i) for so long as indebtedness of Owner under the Financing Documents remains outstanding, any firm of engineers designated in accordance with the Financing Documents, or (ii) at any other time, any other firm of engineers designated by the Owner for purposes of this Agreement.

**"Inflation Adjustor"** means for each Contract Year an amount equal to one hundred percent (100%) of a fraction rounded to four decimal places, the numerator of which is the Consumer Price Index published on the date closest to the last day of the immediately preceding Contract Year and the denominator of which is the Consumer Price Index published on the date closest to December 1, 2004; provided, however, that for any Contract Year the Inflation Adjuster shall not be less than 1.00.

**"Interconnection Agreement"** means that Interconnection and Operating Agreement between ISO-New England, Inc. and Owner dated as of June 27, 2011, as amended from time to time in accordance with its terms.

**"Late Payment Rate"** means an amount equal to the rate published from time to time in The Wall Street Journal or any successor publication or similar index as the prime rate of interest plus two hundred (200) basis points.

**"Management Services"** has the meaning set forth in Section 2.2(a).

**"Manager"** means Cate Street Capital, Inc., a Delaware Corporation, and its successors or permitted assigns.

**"Manager Compensation"** has the meaning set forth in Section 3.1.

**"Manager Event of Default"** has the meaning set forth in Section 6.1.

**"Manager Indemnified Parties"** has the meaning set forth in Section 4.1(b).

**"Marketing Services"** has the meaning set forth in Section 2.3(a).

**"O&M Agreement"** means the Operation and Maintenance Agreement, dated as of May 31, 2011, between the Owner and the Operator, DPS Berlin, LLC.

**"Operator"** means the 3<sup>rd</sup> party service provider of the Project or any Person (including an Affiliate of Owner) who operates the Project pursuant to an operating and maintenance agreement with Owner.

**"OSHA"** has the meaning set forth in Section 2.8(b).

**"Owner's Engineers"** means Waldron/Shaw Group and includes any successor or permitted assign under the Owner's Engineer Agreement.

**"Party"** means either Manager or Owner; "Parties" means Manager and Owner.

**"Person"** means any individual, firm, corporation, trust, company, utility or other public or private entity.

**"Power Purchase Agreement - Amended and Restated"** means that Power Purchase Agreement between Public Service and New Hampshire and Owner dated as of May 18, 2011 as further amended from time to time in accordance with its terms.

**"Power Purchaser"** means Public Service of New Hampshire or its successors or permitted assigns.

**"Priority Order"** means the priority of payments to be made in accordance with the Issuer Depository Agreement.

**"Project"** has the meaning set forth in the Recitals.

**"Project Contract(s)"** means the Amended and Restated Power Purchase Agreement, the Lease, the Construction Agreement, the O&M Agreement, the MSA/Construction Management Agreement, the Interconnection Agreement, the Ash Recycling Agreement, the Owner's Engineer Agreement, the Fuel Supply Agreement, and modifications, supplements, amendments or extension of such agreements, and any other agreements executed after the date hereof which pertain to the construction, operation, fuel supply, electric production or other operational aspects of the Project (other than the financing thereof).

**"Project Document(s)"** means the Project Contracts and the Financing Documents.

**"Project Permits"** the State of New Hampshire Site Evaluation Committee – Order and Certificate of Site and Facility with Conditions, including all modifications, supplements, amendments or extension of such agreements and any other agreements executed after the date hereof related to the Order and Certificate of Site and Facility, as the same may be in effect from time to time.

**"Qualified Replacement Individual"** means an individual (i) approved by Owner with the requisite consent of the holders of its notes, and (ii) with substantial experience in the operation and management of biomass fuel generated facilities.

**"Related Persons"** means, with respect to any Party, such Party's partners, shareholders, directors, officers, employees, agents and any of their respective Affiliates; provided that in no event shall Owner or Manager be a Related Person.

**"Required Insurance"** has the meaning set forth in Section 2.3(d)(i).

**"Schedule"** means any schedule to this Agreement, unless the context requires otherwise.

**"Section" or "§."** means any section or subsection of this Agreement, including all Schedules hereto (and in the case of "§" to any section or subsection of any Schedule), unless the context requires otherwise.

**"Loan Agreements"** has the meaning set forth in the Recitals.

**"State"** means the State of New Hampshire."

**"Term"** has the meaning set forth in Section 7.1.

**FIRST AMENDMENT TO  
PROJECT MANAGEMENT AGREEMENT**

This First Amendment to Project Management Agreement (the “**Amendment**”) is made and entered into as of the Effective Date by and between CS Operations, Inc., a Delaware corporation, with an address at 631 US Hwy 1, Suite 300, North Palm Beach, FL 33408 (“**Manager**”) and Berlin Station, LLC, a Delaware limited liability company with an address of 631 US Hwy 1, Suite 300, North Palm Beach, FL 33408 (“**Owner**”). Manager and Owner are each individually referred to in this Amendment as a “**Party**” and collectively, as the “**Parties**”.

**WHEREAS**, Owner and Cate Street Capital, Inc., a Delaware corporation, entered into that certain Project Management Agreement, dated June 29, 2011 (the “**Project Management Agreement**”), with regard to the management of the Project, as defined therein, a nominal 75 MW biomass electric generation Project in Berlin, New Hampshire, together with all related facilities, property, assets, rights and obligations;

**WHEREAS**, Cate Street Capital, Inc., assigned all of its rights and obligations under the Project Management Agreement to Manager pursuant to that certain Assignment Agreement, dated March 1, 2018; and

**WHEREAS**, the Parties entered into that certain Amendment to Project Management Agreement, dated December 31, 2023 (the “**Initial Amendment**”), which was subsequently rescinded pursuant to that certain Rescission Agreement, dated February 8, 2024, and all terms and provisions contained in such Initial Amendment terminated and were deemed null and *void ab initio* (as if the Initial Amendment never existed) and of no effect whatsoever, retroactive to the effective date of the Initial Amendment;

**WHEREAS**, Section 13.4 of the Project Management Agreement provides that the Project Management Agreement may be amended only by a modification in writing signed by each Party; and

**WHEREAS**, the Parties desire to amend the Project Management Agreement as provided herein.

**NOW, THEREFORE**, in consideration of the promises and mutual covenants contained in this Amendment, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by all Parties, it is hereby agreed by and between the Parties as follows:

1. Recitals. The recitals set forth here and above are true and correct and incorporated by reference as if reinstated in full.
2. Effective Date. The Effective Date of this Amendment shall be February 8, 2024.
3. Terms. Terms not otherwise defined herein shall have the meaning set forth in the Project Management Agreement.

4. Article III – Manager Compensation. Article III of the Project Management Agreement is amended to add the following section:

**3.5 Manager Compensation and Expenses Forgiveness**

Notwithstanding anything herein to the contrary, (i) the past due amount owed by Owner to Manager pursuant to this Agreement in the amount of \$857,803.32 and, without duplication, any other fees, expenses, charges, claims, or other amounts that have been incurred as of February 5, 2024 pursuant to this Agreement and which are or will be payable by Owner, and (ii) any accrued interest in respect of any past due amounts under this Agreement, that, in each case, have not been paid by Owner as of February 5, 2024, are, in each case, forgiven and no longer due or payable and any obligation by Owner to pay any such amounts is discharged as of the Effective Date in case of clauses (i) and (ii); *provided, however*, that (x) all amounts of Manager Compensation that have been incurred since February 1, 2024 and (y) all other fees, expenses, charges, claims, or other amounts that have been incurred since February 5, 2024 which will be payable by Owner under this Agreement are and remain, in each case, payable when due.

5. Section 3.1 – Manager Compensation Generally. Section 3.1 of the Project Management Agreement is amended to add the following subsections:

(c) Notwithstanding the foregoing Section 3.1(a) and Section 3.1(b), during the period commencing on December 1, 2023 through April 30, 2024: \$150,000 per month;

(d) Notwithstanding the foregoing Section 3.1(a) and Section 3.1(b), during the period commencing on May 1, 2024 through the date that is the earlier to occur of (i) the consummation of a Sale Transaction or (ii) the Chapter 11 Plan Effective Date: \$125,000 per month; and

(e) Following the date that is the earlier to occur of (i) the consummation of a Sale Transaction or (ii) the Chapter 11 Plan Effective Date: \$92,000 per month, with the monthly fee escalating on each anniversary of the first day of the Term by the by the Inflation Adjuster.

6. Section 3.2 – Payment of Manager Compensation. Section 3.2 of the Project Management Agreement is amended to add the following subsection:

3.2(d) Notwithstanding anything herein to the contrary, including but not limited to the provisions of Section 3.2(a), but subject to Section 3.5 in all respects, the Manager Compensation payable pursuant to Section 3.1(c), Section 3.1(d) and Section 3.1(e) shall be paid in equal, monthly installments, to Manager, on the last day of the month for which payment is due. The first payment of Manager Base

Compensation payable pursuant to Section 3.1(c) shall be due on December 31, 2023, with monthly payments continuing thereafter.

7. Schedule 1 – Definitions. Schedule 1 of the Project Management Agreement is amended to add the following definitions:

**“Chapter 11 Plan Effective Date”** means the effective date of a plan of reorganization or liquidation of either or both of Burgess BioPower, LLC and Owner (each, a **“Debtor”** and such plan, the **“Chapter 11 Plan”**) confirmed by the United States Bankruptcy Court for the District of Delaware or such other court of competent jurisdiction (the **“Bankruptcy Court”**) after the commencement by such entities of voluntary petitions for relief (the **“Chapter 11 Cases”**) under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the **“Bankruptcy Code”**).

**“Interests”** means the rights of the holders of the common stock, membership interests or other equity interests issued by a Debtor and outstanding immediately prior to the date on which the Debtors commence the Chapter 11 Cases in the Bankruptcy Court, and any options, warrants or other rights with respect thereto, or any other instruments evidencing an ownership interest in the applicable Debtor and the rights of any Person to purchase or demand the issuance of any of the foregoing.

**“Reorganized Debtors”** means the Debtors on and after the Chapter 11 Plan Effective Date, together with any successor or assign thereto, by merger, consolidation, reorganization, or otherwise, whether in the form of a corporation, limited liability company, partnership, or other form, as the case may be, on and after the Chapter 11 Plan Effective Date.

**“Sale Transaction”** means a sale or sales of (a) all or substantially all of the right, title, and interest in the assets of either of the Debtors or (b) all or substantially all of the Interests in either of the Reorganized Debtors, pursuant to sections 1129 and 363 of the Bankruptcy Code.

8. Ratification. In all other respects the Project Management Agreement, as assigned, and as amended by this Amendment, shall remain in full force and effect in accordance with its terms and the Parties hereto ratify and confirm the Project Management Agreement as if restated in full.
9. Binding. This Amendment and all of the provisions hereof shall be binding upon and inure to the benefit of each of the Parties and their respective successors and permitted assigns.
10. Miscellaneous. The provisions of Article XI (Dispute Resolution) and Article XIII (Miscellaneous) of the Project Management Agreement shall apply *mutatis mutandis* to this Amendment.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have executed this Amendment as of the Effective Date.

**Owner:**

BERLIN STATION, LLC

By: 

Name: Dean Vomero

Title: Chief Restructuring Officer

**Manager:**

CS OPERATIONS, INC.

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

Name: Jean R. Hallé

Title: Chief Executive Officer

IN WITNESS WHEREOF, the Parties have executed this Amendment as of the Effective Date.

**Owner:**

BERLIN STATION, LLC

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

Name: Dean Vomero

Title: Chief Restructuring Officer

**Manager:**

CS OPERATIONS, INC.

DocuSigned by:

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

Name: Jean R. Hallé

Title: Chief Executive Officer