

## CONDITIONAL TERMINATION AGREEMENT

This Conditional Termination Agreement, dated as of [DATE] (the "**Agreement**"), by and between the New York State Energy Research and Development Authority ("NYSERDA"), having its principal place of business at 17 Columbia Circle, Albany, New York 12203-6399, and [SELLER NAME], a[n] [STATE OF ORGANIZATION] [TYPE OF ENTITY], [located/having its principal place of business] at [ADDRESS] ("**Seller**"), and together with NYSERDA, the "**Parties**", and each, a "**Party**").

WHEREAS, Seller participated in NYSERDA's offshore wind solicitation [ORECRFP18-1/20-1] and NYSERDA selected [PROJECT NAME] for an award with respect to Seller's proposal (the "**Selected Project**");

WHEREAS, the Parties have entered into an Offshore Wind Renewable Energy Certificate Purchase and Sale Agreement, dated as of [DATE OF AGREEMENT] (the "**OREC Agreement**") for the Selected Project;

WHEREAS, on June 7, 2023, Seller filed a petition with the New York State Public Service Commission ("**Commission**") stating that due to unanticipated economic conditions, Seller is unable to construct the Selected Project unless the Commission authorized the Parties to amend the OREC Agreement to increase the price paid to the Selected Project;

WHEREAS, on October 12, 2023 the Commission denied Seller's June 7, 2023 petition seeking authorization to amend the OREC Agreement to increase the price paid to the Selected Project;

WHEREAS, NYSERDA solicitations prohibit the proposing of projects with existing offtake contracts;

WHEREAS, in light of the special circumstances described further in the aforementioned petition and subsequent Commission order, NYSERDA intends to allow any project with an existing Offshore Wind Renewable Energy Certificate Purchase and Sale Agreement with NYSERDA to participate in NYSERDA's next offshore wind solicitation (ORECRFP23-1) if the counterparty to such agreement enters into a binding legal agreement pursuant to which the existing contract would automatically terminate if the project is not selected by NYSERDA in ORECRFP23-1;

WHEREAS, Seller, desiring to participate in ORECRFP23-1, is willing to conditionally terminate the OREC Agreement to allow for the Selected Project to be eligible for ORECRFP23-1;

WHEREAS, Seller has provided to NYSERDA Contract Security in accordance with Article XV of the OREC Agreement and the Parties agree to treat such Contract Security on the terms and subject to the conditions set forth herein;

WHEREAS, the Parties hereto desire to terminate the OREC Agreement on the terms and subject to the conditions set forth herein; and

WHEREAS, pursuant to Sections 14.01(b) and 19.02 of the OREC Agreement, the Parties may not terminate the OREC Agreement except by a writing signed by each Party.

NOW, THEREFORE, in consideration of the premises set forth above and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions. Capitalized terms used and not defined in this Agreement have the respective meanings assigned to them in the OREC Agreement.

2. Conditional Termination of the Agreement. Subject to the terms and conditions of this Agreement, the OREC Agreement is hereby terminated as of the earlier date (the "**Conditional Termination Date**") on which:

(a) if the Selected Project is submitted in a proposal to, but not awarded under, ORECRFP23-1, the date on which NYSERDA notifies Seller in writing that the Selected Project has not been awarded in ORECRFP23-1 (the "**Non-Award Date**");

(b) if the Selected Project is selected for an award in ORECRFP23-1, the date of execution of a new offshore wind purchase and sale agreement ("**OREC 23 Agreement**") between the Parties for the Selected Project (the "**New Contract Date**"); or

(c) if the New Contract Date has not yet occurred, the date that is ninety (90) days after the date on which the Seller is notified of its award under ORECRFP23-1 (the "**Negotiation Period Termination Date**").

From and after the Conditional Termination Date, the OREC Agreement will be of no further force or effect, and the rights and obligations of each of the Parties thereunder shall terminate, except for (a) any rights and obligations of the Parties that are expressly designated to survive the termination of the OREC Agreement and (b) any other rights and obligations of the Parties that come into being or effect upon the termination of the OREC Agreement, in each case under clause (a) and clause (b), subject to the terms and conditions of this Agreement.

3. Treatment of OREC Agreement Contract Security. As material consideration for the covenants, agreements and undertakings of the Parties under this Agreement:

(a) In the event that the Selected Project is an awardee under ORECRFP23-1, the Contract Security shall be added to, and not credited to or in substitution of, the Contract Security (as such term is defined in the OREC 23 Agreement, the “**OREC 23 Contract Security**”) to be delivered in connection with ORECRFP23-1. Such Contract Security shall be refunded or retained by NYSERDA in accordance with the terms of the OREC 23 Agreement.

(b) In the event that the Selected Project is an awardee under ORECRFP23-1 but the Parties do not execute the OREC 23 Agreement by the Negotiation Period Termination Date, then, effective upon the Negotiation Period Termination Date, NYSERDA shall have the right, as its sole remedy with respect thereto, to permanently retain all Contract Security delivered to NYSERDA by Seller prior to the Negotiation Period Termination Date.

(c) In the event that the Selected Project is not an awardee under ORECRFP23-1, then, effective upon the Non-Award Date, NYSERDA shall have the right, as its sole remedy with respect thereto, to permanently retain all Contract Security delivered to NYSERDA by Seller prior to the Non-Award Date.

#### 4. Mutual Release.

(a) Effective as of the Conditional Termination Date, in consideration of the covenants, agreements, and undertakings of the Parties under this Agreement, each Party, on behalf of itself and its respective present and former parents, subsidiaries, affiliates, officers, directors, managers, shareholders, members, successors, and assigns (collectively, “**Releasors**”) hereby releases, waives, and forever discharges the other Party and its respective present and former, direct and indirect, parents, subsidiaries, affiliates, employees, officers, directors, managers, shareholders, members, agents, representatives, permitted successors, and permitted assigns (collectively, “**Releasees**”) of and from any and all actions, causes of action, suits, losses, liabilities, rights, debts, dues, sums of money, accounts, reckonings, obligations, costs, expenses, liens, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands, of every kind and nature whatsoever, whether now known or unknown, foreseen or unforeseen, matured or unmatured, suspected or unsuspected, in law, admiralty, or equity (collectively, “**Claims**”), which any of such Releasors ever had, now have, or hereafter can, shall, or may have against any of such Releasees for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of time through the date of this Agreement arising out of or relating to the OREC Agreement, except for any Claims relating to rights and obligations preserved by, created by, or otherwise arising out of this Agreement (including any surviving indemnification obligations under the OREC Agreement).

(b) Each Party, on behalf of itself and each of its respective Releasors, understands that it may later discover Claims or facts that may be different than, or in addition to, those that it or any other Releasor now knows or believes to exist regarding the subject matter of the release contained in this Section 4, and which, if known at the time of signing this Agreement, may have materially affected this Agreement and such Party's decision to enter into it and grant the release

contained in this Section 4. Nevertheless, the Releasors intend to fully, finally, and forever settle and release all Claims that now exist, may exist or previously existed, as set forth in the release contained in this Section 4, whether known or unknown, foreseen or unforeseen, or suspected or unsuspected, and the release given herein is and will remain in effect as a complete release, notwithstanding the discovery or existence of such additional or different facts. The Releasors hereby waive any right or Claim that might arise as a result of such different or additional Claims or facts.

(c) This Agreement is not intended to be and shall not be construed as an admission by either Party of any liability, including whether an event of default has occurred with respect to either Party.

(d) Each Party acknowledges that it has had the opportunity to be represented by counsel of its choice throughout the negotiations, which preceded the execution of this Agreement, and in connection with the preparation and execution of this Agreement. Each Party acknowledges that it has executed this Agreement voluntarily, without coercion or duress of any kind, and on the advice of its counsel. Neither Party, nor any person acting on behalf of either Party has made any statement or representation to any other Party regarding any fact relied upon in entering into this Agreement, and neither Party relies upon any statement, representation, or promise of the other Party, or any person acting on behalf of the other Party, in executing this Agreement, or in making the releases provided for herein, except as expressly stated herein.

(e) Each Party has made such investigation of the facts pertaining to this Agreement, and of all matters pertaining hereto, as it deems necessary. Each Party has read this Agreement and understands its contents. In executing this Agreement, each Party assumes the risk of any misrepresentation, concealment, or mistake. If either Party should subsequently discover that any fact relied upon by it in entering into this Agreement was untrue, or that any fact was concealed from it, or that its understanding of the facts below is incorrect, such Party shall not be entitled to any relief in connection therewith, including without limitation on the generality of the foregoing, any alleged right or claim to set aside or rescind this Agreement. This Agreement is intended to be and is final and binding, regardless of any claims of misrepresentation, concealment of fact, or mistake of law or fact.

(f) Notwithstanding any provision in this Agreement to the contrary, the provisions of this Section 4 shall survive the termination of this Agreement.

5. Seller's Representations and Warranties. As a material inducement to NYSEERDA to enter into this Agreement, Seller makes the following representations and warranties, all of which shall survive the execution and delivery of this Agreement:

(a) that it has requested to terminate the OREC Agreement as provided herein due to its conclusion that the Selected Project is not economically feasible under the pricing agreed to and set forth in the OREC Agreement;

(b) that Seller is a [corporation/limited liability company/partnership] duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization;

(c) that Seller has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by Seller of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, duly authorized by Seller, and no other actions or proceedings on the part of Seller are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby;

(d) that this Agreement has been duly executed and delivered by Seller and constitutes the legal, valid and binding obligation of Seller enforceable against Seller in accordance with the terms herein;

(e) that the execution, delivery and performance by Seller, the entry into this Agreement by Seller, and the consummation of the transactions contemplated by this Agreement will not violate (i) Applicable Law or any provision of the limited liability company agreement or other governing documents of Seller; (ii) violate, conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default or an event of default under any indenture, agreement (including the limited liability company agreement of Seller), mortgage, deed of trust, note, lease, contract or other instrument to which Seller is a party or by which it or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of Seller;

(f) there are no undisclosed material legal actions, claims, or encumbrances, or liabilities pending or, to Seller's knowledge, threatened that may adversely affect Seller's performance of this Agreement or NYSERDA's rights hereunder;

(g) to Seller's knowledge, there are no claims against Seller or NYSERDA relating to or arising out of the Agreement that are not covered by the release contained in Section 4;

(h) Seller has neither assigned nor transferred any claims released herein, and no person or entity has subrogated to or has any interest or rights in any such claims.

6. NYSERDA's Representations and Warranties. As a material inducement to Seller to enter into this Agreement, NYSERDA makes the following representations and warranties, all of which shall survive the execution and delivery of this Agreement:

(a) that NYSERDA is an instrumentality of the State of New York and a public authority and public benefit corporation, created under the New York State Public Authorities Law, validly existing and in good standing under the laws of the State of New York;

(b) that NYSERDA has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by NYSERDA of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, duly authorized by NYSERDA, and no other actions or proceedings on the part of NYSERDA are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby;

(c) that this Agreement has been duly executed and delivered by NYSERDA and constitutes the legal, valid and binding obligation of NYSERDA enforceable against NYSERDA in accordance with the terms herein;

(d) that the execution, delivery and performance by NYSERDA of this Agreement will not (i) violate Applicable Law; (ii) violate, conflict with, result in a material breach of or constitute (alone or with notice or lapse of time or both) a material default or event of default under any indenture, agreement, mortgage, deed of trust, note, lease, contract or other instrument to which NYSERDA is a party or by which NYSERDA or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of NYSERDA. This Agreement will not conflict with any other agreement or contract to which NYSERDA is a party;

(e) that NYSERDA is familiar with and in compliance with all Applicable Law, except where the failure to so comply would not result in a material adverse effect on NYSERDA's ability to perform its obligations; and

(f) that there is no action, suit or claim at law or in equity, or before or by a governmental authority pending or, to the knowledge of NYSERDA, threatened against NYSERDA or affecting any of its properties or assets which could reasonably be expected to result in a material adverse effect on NYSERDA's ability to perform its obligations.

7. Events of Default. For the purposes of this Agreement, "**Event of Default**" shall mean any of the following:

(a) Representations and Warranties. Any representation or warranty made in this Agreement that shall prove to have been false or misleading in any material respect as of the time made or deemed to be made, except for such representations or warranties that are qualified by a standard of materiality, in which case such representations and warranties shall prove to have been false or misleading in any respect, and such false or misleading representation, warranty, or guarantee is not fully cured within ten (10) days after the responsible Party discovers its error, provided, however, that such period shall be extended for an additional period of up to sixty (60) days if the responsible Party is unable to cure within the initial ten (10) day period so long as such cure is diligently pursued by the responsible Party until such breach has been corrected; or

(b) Voluntary Proceedings. A Party shall (i) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property; (ii) make a general assignment for the benefit of its creditors; (iii) commence a voluntary case under the Bankruptcy Code; (iv) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts; (v) acquiesce in writing to, any petition filed against it in an involuntary case under the Bankruptcy Code; or (vi) take any corporate action for the purpose of effecting any of the foregoing; or

(c) Involuntary Proceedings. A proceeding or case shall be commenced against a Party, without its application or consent, in any court of competent jurisdiction, seeking (i) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts; (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of all or any substantial part of its assets; or (iii) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue un-dismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue un-stayed and in effect, for a period of 60 or more days; or an order for relief against a Party, shall be entered in an involuntary case under the Bankruptcy Code.

8. Indemnification. Seller shall protect, indemnify and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' and/or experts' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to Seller's breach of this Agreement. The obligations of Seller under this Article shall survive any expiration or termination of this Agreement and shall not be limited by the amount of Seller's insurance coverage. Notwithstanding any provision of this Agreement to the contrary, this Section 8 shall survive the termination of this Agreement.

9. Miscellaneous.

(a) Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. The Parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in a United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

(b) All Legal Provisions Deemed Included. It is the intent and understanding of Seller and NYSERDA that each and every provision of law required by the laws of the State of New

York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or Seller, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions. In such event, the Parties shall negotiate such amendment in good faith with the intent that such amendment reflects, as closely as possible, the terms and conditions of this Agreement in effect prior to such amendment.

(c) Other Legal Requirements. The references to particular laws of the State of New York in this Article and elsewhere in this Agreement are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of Seller to comply with all legal requirements.

(d) Term. The term of this Agreement (the “**Term**”) shall commence on the execution of this Agreement and shall expire upon the Conditional Termination Date; provided that in the event that the Selected Project is an awardee under ORECRFP23-1, this Agreement shall not expire until either (i) the steps described in Section 3(a) have been completed or (ii) NYSERDA has exercised its rights to permanently retain Contract Security under Section 3(b).

(e) Waiver. NYSERDA’s determination to hold and not draw on the Contract Security delivered by Seller in accordance with and subject to the conditions set forth in this Agreement shall not be deemed to be a waiver of any rights or remedies NYSERDA may have under the OREC Agreement with respect to such Contract Security. Either Party to this Agreement may (a) extend the time for the performance of any of the obligations or other acts of the other Party, (b) waive any inaccuracies in the representations and warranties of the other Party contained herein or in any document delivered by the other Party pursuant hereto, or (c) waive compliance with any of the agreements or conditions of the other Party contained herein. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the Party to be bound thereby. Any waiver of any term or condition shall not be construed as a waiver of any subsequent breach or a subsequent waiver of the same term or condition, or a waiver of any other term or condition, of this Agreement. No provision of this Agreement will be deemed to have been waived unless the waiver is in writing; no delay by either Party in exercising its rights hereunder, including the right to terminate this Agreement, shall be deemed to constitute or evidence any waiver by such Party of any right hereunder. The rights granted in this Agreement are cumulative of every other right or remedy that the enforcing Party may otherwise have at law or in equity or by statute.

(f) Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this Agreement shall not be affected and shall remain in full force and effect. If any provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broad as will enable it to be enforced.



(g) Assignment. This Agreement may not be assigned by Seller without the prior written consent of NYSERDA. Any assignment by Seller in conflict with this Section 9(g) shall be void *ab initio*.

(h) No Third-Party Beneficiaries. Nothing herein is intended to or should be construed to create any rights of any kind whatsoever in any persons not party to this Agreement.

(i) Good Faith Negotiation. Both Parties agree that, should any dispute arise during the term of this Agreement, the Parties will make a good faith, though non-binding effort to reconcile any difference or dispute before the filing of an action in any court.

(j) Damages. Neither Party shall be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages, lost profits or other business interruption damages arising from the breach of this Agreement.

(k) Notices. All notices to be provided under this Agreement shall be delivered in the manner set forth for delivery of notices in the OREC Agreement.

(l) Confidentiality.

(i) Freedom of Information Law. Seller acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL;" see Public Officers' Law Article 6).

(ii) Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA receives a request from a third party for information or a document received from Seller and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations.

(iii) Claim of Confidentiality. Information of any tangible form including any document that Seller wishes to be protected from disclosure to third parties, must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

(iv) Publication of Agreement. Seller acknowledges that NYSERDA may publish this Agreement. Prior to such publication, NYSERDA will redact any critical electric infrastructure information contained in the Agreement, if any, including in the exhibits hereto, and will consider Seller's requests for the redaction of confidential business information; provided, however that NYSERDA shall not accept any request to redact price information contained in this Agreement, specifically any terms which may contribute to the calculation of financial obligations under the Agreement.

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

By:  
SELLER  
Signature: \_\_\_\_\_

By:  
NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

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

Signature: \_\_\_\_\_  
NYSERDA Authorized Signatory

By:  
SELLER  
Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_