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**FILED**  
U.S. Bankruptcy Court  
Western District of NC  
APR - 8 2008  
David E. Welch, Clerk  
Charlotte Division  
ELF

JUDGMENT ENTERED ON APR - 8 2008

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

In re: ) Case No. 05-32141  
SOUTHAVEN POWER, LLC, ) Chapter 11  
Debtor. )

**ORDER UNDER 11 U.S.C. §§ 363 AND 365 AND FED. R. BANKR. P. 2002 AND 6004  
AUTHORIZING AND APPROVING (I) SALE OF CERTAIN ASSETS FREE AND  
CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES, AND (II) ASSUMPTION AND  
ASSIGNMENT OF EXECUTORY CONTRACTS IN CONNECTION THEREWITH**

Upon the motion (the "Motion"), dated November 30, 2007, of Southaven Power, LLC (the "Seller" or the "Debtor") for orders under 11 U.S.C. §§ 363 and 365 and Fed. R. Bankr. P. 2002 and 6004: (a) (i) approving bidding procedures; (ii) granting certain bid protections; (iii) scheduling a hearing (the "Sale Hearing") to consider approval of the sale of the Purchased Assets (as defined below) to the winning bidder pursuant to bidding procedures (the winning bidder, including the Purchaser (as defined below) if appropriate, the "Successful Bidder"); and (iv) approving the form and manner of notice of the Sale Hearing (the relief requested in (a)(i), (ii), (iii), and (iv) above, the "Bid Procedures Portion"); and (b) authorizing and approving (i) the sale (the "Sale") of certain of the Debtor's assets (the "Purchased Assets"), including the Project, together with certain assets and liabilities exclusively or principally related to the Business, f

CERTIFIED TO BE A TRUE AND  
CORRECT COPY OF THE ORIGINAL  
U. S. BANKRUPTCY COURT  
WESTERN DISTRICT OF N. C.  
BY: *R. Jorgani*  
DEPUTY CLERK  
DATE: *4/22/08*



Return to:  
TN. Valley Authority  
1101 Market Street SP3C  
Chattanooga TN 37402-2801  
888-817-5201

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and clear of liens, claims and encumbrances, pursuant to the terms of the Asset Purchase Agreement, dated November 30, 2007, by and between the Debtor and Tennessee Valley Authority (the "Purchaser"), or pursuant to the terms of a higher or otherwise better offer for the Purchased Assets submitted pursuant hereto; and (ii) the assumption of certain obligations, liabilities and responsibilities (the "Assumed Liabilities") by the Successful Bidder, including the assumption by the Debtor and assignment to the Successful Bidder of certain pre-petition executory contracts (the "Assumed Contracts") (the relief requested in (b)(i) and (ii), the "Sale Portion"); and the Court having entered an order on January 17, 2008 (the "Bidding Procedures Order") granting the Bid Procedures Portion of the Motion; and the Auction having been held on March 31, 2008; and the Sale Hearing having been held on April 2, 2008, at which time all interested parties were offered an opportunity to be heard with respect to the Sale Portion of the Motion; and the Court having reviewed and considered (x) the Sale Portion of the Motion; (y) the objections thereto, if any and (z) the arguments of counsel made, and the evidence proffered or adduced, at the Sale Hearing and the hearing on the Bid Procedures Portion of the Motion; and it appearing that the relief requested in the Motion is in the best interests of the Debtor, its estate, its creditors and all other parties-in-interest; and after due deliberation thereon, and sufficient cause appearing therefor,<sup>1</sup>

IT IS HEREBY FOUND AND DETERMINED THAT:<sup>2</sup>

A. The Court has jurisdiction over this matter and over the property of the Debtor and its bankruptcy estate pursuant to 28 U.S.C. §§ 157 and 1334.

<sup>1</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion or in the Agreement (as defined below), as appropriate. To the extent of any conflict between defined terms in the Motion and in the Agreement, the defined terms in the Agreement shall control.

<sup>2</sup> Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

B. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

C. The statutory predicates for the relief sought in the Motion are sections 363 and 365 of chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"), and Federal Rules of Bankruptcy Procedure 2002, 6004, 6006 and 9014.

D. As evidenced by the affidavits of service previously filed with the Court, and based on the representations of counsel at the Sale Hearing, (i) proper, timely, adequate and sufficient notice of the Motion, the Auction, the Sale Hearing, the Sale, the assumption and assignment of the Assumed Contracts, and the Cure Amounts related thereto has been provided in accordance with sections 102(1), 363 and 365 of the Bankruptcy Code, (ii) such notice was good, sufficient and appropriate under the circumstances and (iii) no other or further notice of the Motion, the Auction, the Sale Hearing, the Sale or the assumption and assignment of the Assumed Contracts and the Cure Amounts related thereto is or shall be required.

E. As demonstrated by (i) the testimony and other evidence proffered or adduced at the Sale Hearing and (ii) the representations of counsel made on the record at the Sale Hearing, the Debtor has marketed the Purchased Assets and conducted the sale process in compliance with the Bidding Procedures Order and the Auction was duly noticed and conducted in a non-collusive, fair and good-faith manner.

F. The Debtor (i) has full power and authority to execute the Asset Purchase Agreement between the Debtor and TVA, dated as of March 31, 2008 (the "Agreement") and all other documents contemplated thereby, and the transfer and conveyance of the Purchased Assets by the Debtor has been duly and validly authorized by all necessary action of the Debtor, (ii) has all of the power and authority necessary to consummate the Transactions contemplated by the Agreement and (iii) has taken all corporate action necessary to authorize and approve the Agreement and the consummation by the Debtor of the Transactions contemplated thereby, and no consents or approvals, other than those expressly provided for in the Agreement, are required for the Debtor to consummate such Transactions. A copy of the Agreement is attached hereto as Exhibit A.

G. The Debtor has demonstrated (i) good, sufficient and sound business purpose and justification for the Sale because, among other things, the Debtor and its advisors diligently and in good faith analyzed all other available options in connection with the disposition of the Purchased Assets and determined that the terms and conditions set forth in the Agreement, and the transfer to Purchaser of the Purchased Assets pursuant thereto, represent a fair and reasonable purchase price and constitute the highest or otherwise best value obtainable for the Purchased Assets and (ii) compelling circumstances for the Sale pursuant to 11 U.S.C. § 363(b) prior to, and outside of, a plan of reorganization because, among other things, absent the Sale the value of the Purchased Assets will be substantially diminished.

H. A reasonable opportunity to object or be heard with respect to the Motion and the relief requested therein has been afforded to all interested persons and entities, including without limitation: (i) the Office of the Bankruptcy Administrator for the Western District of North Carolina, (ii) counsel for the Purchaser, (iii) counsel for the Debtor's post-petition lenders,

(iv) counsel for the Debtor's pre-petition senior lenders, (v) counsel for the Debtor's pre-petition subordinated lenders, (vi) the holders of the 10 largest unsecured claims against the Debtor, (vii) all entities known to have expressed an interest in a transaction with respect to the Purchased Assets during the past six months, (viii) all entities known to have asserted any lien, claim, interest or encumbrance in or upon the Purchased Assets, (ix) all federal, state, and local regulatory or taxing authorities or recording offices, including but not limited to environmental regulatory authorities, which have a reasonably known interest in the relief requested by the Motion, (x) all parties to Assumed Contracts, (xi) the United States Attorney's office, (xii) the United States Department of Justice, (xiii) the Securities and Exchange Commission and (xiv) the Internal Revenue Service.

I. The Purchaser is not an "insider" of the Debtor as that term is defined in 11 U.S.C. §§ 101(31).

J. The Agreement was negotiated, proposed, and entered into by the Debtor and the Purchaser without collusion, in good faith, and from arm's-length bargaining positions. Neither the Debtor nor the Purchaser has engaged in any conduct that would cause or permit the Sale to be avoidable under 11 U.S.C. § 363(n).

K. The Purchaser is a good faith purchaser under 11 U.S.C. § 363(m) and, as such, is entitled to all of the protections afforded thereby. The Purchaser will be acting in good faith within the meaning of 11 U.S.C. § 363(m) in consummating the Transactions contemplated by the Agreement at all times after the entry of this Order (the "Order").

L. The consideration provided by the Purchaser for the Purchased Assets pursuant to the Agreement: (i) is fair and reasonable, (ii) is the highest or otherwise best offer for the Purchased Assets, (iii) will provide a greater recovery for the Debtor's creditors than would be provided by any other practical available alternative and (iv) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession and the District of Columbia.

M. The transfer of the Purchased Assets to the Purchaser will be a legal, valid, and effective transfer of the Purchased Assets, and in the case of the Purchased Assets of the Debtor, will vest the Purchaser with all right, title, and interest to the Purchased Assets free and clear of any and all liens, claims, interests, and encumbrances, other than the Permitted Encumbrances specifically identified in the Agreement, of any type whatsoever (whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or unmatured, material or non material, disputed or undisputed, whether arising prior to or subsequent to the Petition Date, and whether imposed by agreement, understanding, law, equity, or otherwise, including claims otherwise arising under doctrines of successor liability), including, but not limited to those (i) that purport to give to any party a right or option to effect any forfeiture, modification, right of first refusal or termination of the Debtor's or the Purchaser's interest in the Purchased Assets, or any similar rights and (ii) relating to taxes arising under or out of, in connection with or in any way relating to the operation of the Business prior to the Closing Date, including the transfer of the Purchased Assets to the Purchaser (collectively, the "Encumbrances").

N. If the Sale of the Purchased Assets with respect to the Debtor was not free and clear of all Encumbrances as set forth in the Agreement and this Order, or if the Purchaser would, or in the future could, be liable for any of the Encumbrances as set forth in the Agreement and this Order, the Purchaser would likely not have entered into the Agreement and would likely not consummate the Transactions contemplated by the Agreement, thus adversely affecting the Debtor, its estate, and its creditors.

O. The Debtor may sell its interests in the Purchased Assets free and clear of all Encumbrances because, in each case, one or more of the standards set forth in 11 U.S.C. § 363(f)(1)-(5) has been satisfied. All holders of Encumbrances who did not object, or withdrew their objections to the Sale, are deemed to have consented to the Sale pursuant to 11 U.S.C. § 363(f)(2). Those holders of Encumbrances who did object fall within one or more of the other subsections of 11 U.S.C. § 363(f) and are adequately protected by having their Encumbrances, if any, attach to the cash proceeds of the Sale ultimately attributable to the property against or in which they claim an Encumbrance.

P. Except as expressly provided in the Agreement, the (i) transfer of the Purchased Assets to the Purchaser and (ii) assumption (where applicable) and assignment to the Purchaser of the Assumed Liabilities will not subject the Purchaser to any liability whatsoever with respect to the operation of the Business prior to the Closing of the Sale, or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof or the District of Columbia based, in whole or in part, directly or indirectly, on any theory of law or equity, including, without limitation, any theory of equitable law, antitrust, or successor or transferee liability.

Q. The Debtor has demonstrated that it is an exercise of its sound business judgment to assume (where applicable) and assign the Assumed Liabilities as applicable to the Purchaser in connection with the consummation of the Sale, and such assumption and assignment of the Assumed Liabilities is in the best interests of the Debtor, its estate and its creditors. The Assumed Liabilities, including the Assumed Contracts, being assigned to the Purchaser are an integral part of the Purchased Assets being purchased by the Purchaser and, accordingly, such assignment is reasonable, enhances the value of the Debtor's estate, and does not constitute unfair discrimination.

R. The Debtor has (i) cured, or provided adequate assurance of cure of, any default existing prior to the Closing of the Sale under any of the Assumed Contracts, within the meaning of 11 U.S.C. § 365(b)(1)(A), by payment of the amounts provided on Schedule 1 hereto and (ii) provided compensation or adequate assurance of compensation to any party for any actual pecuniary loss to such party resulting from a default prior to the date hereof under any of the Assumed Contracts, within the meaning of 11 U.S.C. § 365(b)(1)(B). The Purchaser has provided adequate assurance of its future performance of and under the Assumed Contracts, within the meaning of 11 U.S.C. §§ 365(b)(1)(C) and 365(f)(2)(B). Pursuant to 11 U.S.C. § 365(f), the Assumed Contracts to be assumed and assigned under the Agreement shall be assigned and transferred to, and remain in full force and effect for the benefit of the Purchaser notwithstanding any provision in the contracts or other restrictions prohibiting their assignment or transfer.

S. Approval of the Agreement, the Sale of the Purchased Assets and the assumption (where applicable) and assignment of the Assumed Liabilities is in the best interests of the Debtor, its stakeholders, its estate and other parties-in-interest at this time.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

General Provisions

1. The Motion is GRANTED, and all objections to the Motion or the relief requested therein that have not been withdrawn, waived, or settled, and all reservations included therein, are hereby overruled on the merits.

Approval Of The Agreement

2. Pursuant to 11 U.S.C. § 363(b), the Agreement and all of the terms and conditions thereof are hereby approved.

3. Pursuant to 11 U.S.C. § 363(b), the Debtor is authorized to perform its obligations under the Agreement and comply with the terms thereof and consummate the Sale in accordance with and subject to the terms and conditions of the Agreement.

4. Each of the parties to the Agreement is directed to take all actions necessary or appropriate to effectuate the terms of this Order.

5. The Debtor is authorized and directed to execute and deliver, and empowered to perform under, consummate and implement the Agreement, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Agreement, and to take all further actions as may be requested by the Purchaser for the purpose of assigning, transferring, granting, conveying and conferring to the Purchaser or reducing to possession the Purchased Assets and the Assumed Liabilities, or as may be necessary or appropriate to the performance of the obligations as contemplated by the Agreement.

6. This Order and the Agreement shall be binding in all respects upon all creditors (whether known or unknown) or equity holders of the Debtor, or other parties in interest in this case, the Purchaser, all successors and assigns of the Purchaser and the Debtor, all affiliates and subsidiaries of the Purchaser and the Debtor and any subsequent trustees appointed in the Debtor's chapter 11 case or upon a conversion to chapter 7 under the Bankruptcy Code, and shall not be subject to rejection. To the extent any provision of this Order is inconsistent with the terms of the Agreement, this Order shall govern.

7. The Agreement and any related agreements, documents, or other instruments may be modified, amended, or supplemented by the parties thereto in accordance with the terms thereof without further order of the Court; provided that any such modification, amendment, or supplement is not material.

#### Sale And Transfer Of The Purchased Assets

8. Except as expressly permitted or otherwise specifically provided for in the Agreement or this Order, pursuant to 11 U.S.C. §§ 363(b) and 363(f), upon the Closing of the Agreement, the Purchased Assets shall be transferred to the Purchaser free and clear of all Encumbrances, with all such Encumbrances to attach to the cash proceeds of the Sale in the order of their priority, with the same validity, force and effect which they now have as against the Purchased Assets, subject to any claims and defenses the Debtor may possess with respect thereto.

9. The transfer of the Purchased Assets to the Purchaser pursuant to the Agreement constitutes a legal, valid, and effective transfer of the Purchased Assets, and shall vest the Purchaser with all right, title and interest of the Debtor in and to the Purchased Assets free and clear of all Encumbrances of any kind or nature whatsoever.

10. If any person or entity which has filed financing statements, mortgages, mechanic's liens, *lis pendens* or other documents or agreements evidencing Encumbrances against or in the Purchased Assets with respect to the Debtor shall not have delivered to the Debtor prior to the closing of the Sale, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, or releases of all Encumbrances that the person or entity has or may have with respect to the Purchased Assets or otherwise, then (a) the Debtor is hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of and as the deemed agent and attorney in fact of the person or entity with respect to the Purchased Assets and (b) the Purchaser is hereby authorized to file, register or otherwise record a certified copy of this Order, which, once filed, registered or otherwise recorded, shall constitute conclusive evidence of the release of all Encumbrances in the Purchased Assets of any kind or nature whatsoever.

11. This Order (a) shall be effective as a determination that, upon the closing of the Sale, all Encumbrances of any kind or nature whatsoever existing as to the Debtor or the Purchased Assets prior to the closing of the Sale have been unconditionally released, discharged and terminated (other than any Assumed Liabilities), and that the conveyances described herein have been effected and (b) shall be binding upon and shall govern the acts of all entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials and all other persons and entities who may be required by operation of law, the duties of their office or contract to accept, file, register or otherwise record or release any documents or instruments, or

who may be required to report or insure any title or state of title in or to any of the Purchased Assets.

12. Except as expressly permitted or otherwise specifically provided by the Agreement or this Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax and regulatory authorities, lenders, trade creditors and other creditors, holding Encumbrances of any kind or nature whatsoever against or in the Debtor or the Purchased Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Debtor, the Purchased Assets, the operation of the Business by the Debtor prior to the closing of the Sale, or the transfer of the Purchased Assets to the Purchaser, hereby are forever barred, estopped and permanently enjoined from asserting against the Purchaser, its successors, its assigns, its property or the Purchased Assets, such persons' or entities' Encumbrances.

13. Upon the consummation of the Transactions contemplated by the Agreement, the Purchaser shall not be deemed to (a) be the successor of the Debtor, (b) have, de facto or otherwise, merged with or into the Debtor, (c) be a mere continuation or substantial continuation of the Debtor or the enterprise(s) of the Debtor or (d) be liable for any acts or omissions of the Debtor, except for the Assumed Liabilities.

Assumption And Assignment To The Purchaser Of The Assumed Contracts

14. Pursuant to 11 U.S.C. §§ 105(a) and 365, and subject to and conditioned upon the closing of the Sale, the Debtor's assumption and assignment to the Purchaser and the Purchaser's assumption on the terms set forth in the Agreement of the Assumed Contracts is hereby approved, and the requirements of 11 U.S.C. §§ 365(b)(1) and 365(f) with respect thereto are hereby deemed satisfied.

15. The Debtor is hereby authorized in accordance with 11 U.S.C. §§ 105(a), 363, and 365 to (a) assume and/or assign to the Purchaser, effective upon the closing of the Sale, the Assumed Contracts free and clear of all Encumbrances of any kind or nature whatsoever and (b) execute and deliver to the Purchaser such documents or other instruments as may be necessary to assign and transfer the Assumed Liabilities, including the Assumed Contracts, to the Purchaser.

16. The Assumed Contracts shall be transferred to, and remain in full force and effect for the benefit of, the Purchaser in accordance with their respective terms, notwithstanding any provision in any such Assumed Contract (including those of the type described in sections 365(b)(2) and (f) of the Bankruptcy Code) that prohibits, restricts, or conditions such assignment or transfer and, pursuant to 11 U.S.C. § 365(k), and the Debtor shall be relieved from any further liability with respect to the Assumed Contracts after such assignment to and assumption of such contracts by the Purchaser.

17. All defaults or other obligations of the Debtor under the Assumed Contracts arising or accruing prior to the closing of the Sale (without giving effect to any acceleration clauses or any default provisions of the kind specified in section 365(b)(2) of the Bankruptcy Code) shall be cured by the Debtor in accordance with the terms of the Agreement and each Assumption/Assignment Notice, and the Purchaser shall have no liability or obligation under such Assumed Contracts arising or accruing prior to the date of the closing of the Sale, except as otherwise expressly provided in the Agreement and/or each Assumption/Assignment Notice. Each non-Debtor party to any Assumed Contract is deemed to have consented to the assumption and assignment of the Assumed Contract to the Purchaser and is forever barred, estopped and permanently enjoined from asserting against the Debtor or the Purchaser, or the property of either of them, any default existing, arising, or accruing as of the Closing Date or any purported

written or oral modification to the Assumed Contracts. The failure of the Debtor or the Purchaser to enforce prior to the closing of the Sale one or more terms or conditions of any Assumed Contracts shall not be a waiver of such terms or conditions or of the Debtor's or Purchaser's rights to enforce every term and condition of any such Assumed Contracts.

Additional Provisions

18. The Debtor is hereby authorized to pay Severance Pay to the Employees of Southaven Operating Services, under certain circumstances and in accordance with the specific guidelines set forth in Section 6.11 of the Agreement. Except as otherwise specifically set forth in Section 6.11 of the Agreement, neither the Debtor nor any of its affiliates shall have any responsibility whatsoever for any liabilities or obligations which relate in any way to any Transferred Employee (as defined in the Agreement) following the Closing Date, and the Purchaser shall be responsible for satisfying all such liabilities and obligations to the extent provided in the Agreement. Similarly, the Purchaser shall be responsible for providing all COBRA notices, if applicable, to the Employees or their qualified beneficiaries or dependents required as a result of the Transactions contemplated in the Agreement or a COBRA qualifying event occurring prior thereto or simultaneously therewith, and the Purchaser shall be responsible for providing COBRA continuation coverage, if applicable, to Employees and their qualified beneficiaries and dependents who become entitled to COBRA continuation coverage as a result of the transaction contemplated by the Agreement or a COBRA qualifying event occurring prior to or simultaneously with the Transactions contemplated by the Agreement. Finally, the Purchaser shall be responsible for providing or discharging any and all notifications, benefits and liabilities to Employees and governmental entities under the Worker Adjustment and Retraining Notification Act of 1988 (the "WARN Act"), if applicable, or by any other applicable law

relating to plant closings or employee separations or severance pay that are first required to be provided or discharged on or after the Closing Date, including pre-closing notice or liabilities if actions by Purchaser on or after the Closing Date result in a notice requirement under such laws.

19. The consideration provided by the Purchaser for the Purchased Assets under the Agreement is hereby deemed to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code, the Uniform Fraudulent Conveyance Act, the Uniform Fraudulent Transfer Act, and the laws of the United States and any state, territory and possession thereof and the District of Columbia.

20. Upon the Closing of the Sale, this Order shall be construed as and shall constitute for any and all purposes a full and complete general assignment, conveyance and transfer of all of the Purchased Assets and the Assumed Liabilities or a bill of sale transferring good and marketable title in such Purchased Assets and Assumed Liabilities to the Purchaser pursuant to the terms of the Agreement.

21. Except as otherwise provided in the Agreement, upon the Closing of the Sale, each of the Debtor's creditors is directed to execute such documents and take all other actions as may be necessary to release its respective Encumbrances against the Purchased Assets, if any, as may have been recorded or may otherwise exist.

22. Each and every federal, state, and governmental agency or department, and any other person or entity, is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the Transactions contemplated by the Agreement.

23. All entities which are currently, or as of the Closing of the Sale may be, in possession of some or all of the Purchased Assets to be sold, transferred, or conveyed pursuant to

the Agreement are hereby directed to surrender possession of the Purchased Assets to the Purchaser upon the Closing of the Sale.

24. The Purchaser shall have no liability or responsibility for any liability or other obligation of the Debtor arising under or related to the Purchased Assets other than for the Assumed Liabilities and the Permitted Encumbrances. Without limiting the generality of the foregoing, and except as otherwise specifically provided herein and in the Agreement, the Purchaser shall not be liable for any claims against the Debtor or any of its predecessors or affiliates, and the Purchaser shall have no successor or vicarious liability of any kind or character whether known or unknown as of the closing of the Sale, whether now existing or hereafter arising, or whether fixed or contingent, with respect to the Business or any obligations of the Debtor arising prior to the closing of the Sale, except as expressly provided in the Agreement, including, but not limited to, liabilities on account of any taxes arising, accruing or payable under, out of, in connection with or in any way relating to the operation of the Business prior to the closing of the Sale.

25. The Debtor has authority to (A) enter into the O&M Termination Agreement, to terminate (i) the Operation and Maintenance Agreement, dated as of August 29, 2000, as amended, by and between the Seller and Southaven Operating Services and (ii) the O&M Support Agreement, dated as of May 24, 2001, among Seller, Southaven Operating Services Cogentrix Energy, LLC, and (B) to pay the O&M Termination Fee as provided in the Agreement and in the O&M Termination Agreement. The Purchaser shall reimburse the Debtor for such O&M Termination Fee as provided in the Agreement.

26. All persons holding Encumbrances against or in the Debtor or the Purchased Assets of any kind or nature whatsoever shall be, and hereby are, forever barred, estopped and

permanently enjoined from asserting, prosecuting or otherwise pursuing such Encumbrances of any kind or nature whatsoever against the Purchaser, its property, its successors, its assigns or the Purchased Assets with respect to any Encumbrance of any kind or nature whatsoever which such person or entity had, has or may have against or in the Debtor, its estate, its officers, its directors, its shareholders or the Purchased Assets. Following the closing of the Sale, no holder of an Encumbrance against the Debtor shall interfere with the Purchaser's title to or use and enjoyment of the Purchased Assets based on or related to such Encumbrance or any actions that the Debtor may take in its chapter 11 case.

27. The transaction contemplated by the Agreement is undertaken by the Purchaser in good faith, as that term is used in section 363(m) of the Bankruptcy Code, and accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale of the Purchased Assets shall not affect the validity of the Sale to the Purchaser, unless such authorization is duly stayed pending such appeal. The Purchaser is a purchaser in good faith of the Purchased Assets and is entitled to all of the protections afforded by section 363(m) of the Bankruptcy Code.

28. The consideration provided by the Purchaser for the Purchased Assets under the Agreement is fair and reasonable and the Sale may not be avoided under section 363(n) of the Bankruptcy Code.

29. The Debtor, including, but not limited to, its officers, employees and agents, is hereby authorized to execute such documents and do such acts as are necessary or desirable to carry out the transaction contemplated by the terms and conditions of the Agreement and this Order. The Debtor shall be, and hereby is, authorized to take all such actions as may be necessary to effectuate the terms of this Order.

30. The terms and provisions of the Agreement and this Order shall be binding in all respects upon, and shall inure to the benefit of, the Debtor, its estate and its creditors, the Purchaser and its respective successors and assigns and any affected third parties, including, but not limited to, all persons asserting an Encumbrance in the Purchased Assets to be sold to the Purchaser pursuant to the Agreement, notwithstanding any subsequent appointment of any trustee, party, entity or other fiduciary under any section of any chapter of the Bankruptcy Code, as to which trustee, party, entity or other fiduciary such terms and provisions likewise shall be binding.

31. Notwithstanding anything contained herein to the contrary, the term "Purchased Assets" as defined herein does not include property that is not property of the Debtor's estate, such as funds that are trust funds under any applicable state lien laws.

32. As set forth in section 525 of the Bankruptcy Code, no governmental unit may revoke or suspend any permit or license relating to the operation of the Purchased Assets sold, transferred or conveyed to the Purchaser on account of the filing or pendency of this chapter 11 case or the consummation of the Sale.

33. The failure specifically to include or to reference any particular provision of the Agreement in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Agreement be authorized and approved in its entirety.

34. The Agreement and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto in accordance with the terms thereof without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the Debtor's estate.

35. The provisions of this Order are nonseverable and mutually dependent.

36. Nothing in this Order shall alter or amend the Agreement and the obligations of the Debtor and the Purchaser thereunder.

37. This Court shall retain exclusive jurisdiction to interpret, construe, enforce and implement the terms and provisions of this Order, the Agreement, all amendments thereto, any waivers and consents thereunder and of each of the agreements executed in connection therewith in all respects, including, but not limited to, retaining jurisdiction to (a) compel delivery of the Purchased Assets to the Purchaser, (b) compel delivery of the purchase price or performance of other obligations owed to the Debtor pursuant to the Agreement, (c) resolve any disputes arising under or related to the Agreement, except as otherwise provided therein, (d) interpret, implement and enforce the provisions of this Order, (e) protect the Purchaser against any Encumbrances against the Debtor or the Purchased Assets, of any kind or nature whatsoever and (f) determine all disputes among the Debtor, the Purchaser and any non-Debtor parties to any Assumed Contracts concerning, *inter alia*, the Debtor's assumption and/or assignment of any Assumed Contract to the Purchaser under the Agreement.

38. Pursuant to the Bidding Procedures, the Debtor has selected the bid in the amount of \$460 million (plus the \$5 million O&M Termination Fee) made by Kelson Energy III LLC ("Kelson") pursuant to an Asset Purchase Agreement by and between the Debtor and Kelson (the "Kelson Agreement"), substantially in the form attached to the Bid Procedures Order entered by this Court on January 17, 2008, (including without limitation such changes agreed to on the record at the Auction), as the Alternate Bid which is the next highest or best Qualified Bid after the bid offered by Purchaser under the Agreement. Following entry of this Order, if the Purchaser fails to consummate the Sale and the Debtor notifies Kelson in writing (the "Kelson Notice") within thirty (30) business days after the Sale Hearing (the "Alternate Return Date")

that (i) the Debtor or Purchaser has terminated the Agreement and (ii) the Debtor seeks to consummate the Sale to Kelson pursuant to the Kelson Agreement instead of a sale to Purchaser, then the Kelson Agreement shall be deemed to be the Successful Bid and the Debtor shall proceed to effectuate a sale to Kelson pursuant to the terms of the Kelson Agreement (for the avoidance of doubt, Kelson shall not be required to have obtained governmental or regulatory approvals within sixty (60) days after entry of the "Sale Approval Order" referred to in the next sentence). In such event, only a separate Sale Approval Order (as defined by the Kelson Agreement) reasonably satisfactory to the Debtor and Kelson submitted to and entered by the Court shall constitute the Sale Approval Order within the meaning of the Kelson Agreement (and if such Sale Approval Order is agreed between the Debtor and Kelson, then no entity shall be permitted to object to its form, substance or entry to the extent such order does not adversely affect any creditor of the Debtor as compared to the proposed sale order noticed pursuant to the Motion, to which the objection deadline has passed without objection). If (i) Kelson does not receive a Kelson Notice by the Alternate Return Date or (ii) the Debtor consummates a sale to the Purchaser pursuant to the Agreement, the Kelson Agreement shall be deemed terminated, Kelson's deposit (with interest) promptly returned to Kelson, and Kelson shall have no liability to the Debtor whatsoever.

39. The Debtor is authorized to enter into any agreement or other document with the agent for its pre-petition senior secured credit facility (the "Credit Facility") that may be required to evidence and effect the satisfaction in full of all amounts due under the Credit Facility.

~~This Order has been signed electronically.  
The judge's signature and court's seal appear  
at the top of the Order.~~

United States Bankruptcy Court

*Henry R. Hodges*  
Dated as of date entered

EXHIBIT A

**TVA EXECUTION VERSION**

---

**AMENDED AND RESTATED ASSET PURCHASE AGREEMENT**

by and between

**SOUTHAVEN POWER, LLC,**

as Seller,

and

**TENNESSEE VALLEY AUTHORITY,**

as Purchaser

Dated as of March 31, 2008

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## AMENDED AND RESTATED ASSET PURCHASE AGREEMENT

THIS AMENDED AND RESTATED ASSET PURCHASE AGREEMENT, dated as of March 31, 2008 (the "*Effective Date*"), is made and entered into by and between Southaven Power, LLC, a limited liability company organized and existing under the laws of the State of Delaware ("*Seller*"), and Tennessee Valley Authority, a corporate agency and instrumentality of the United States of America created by and existing under and by virtue of the Tennessee Valley Authority Act of 1933, as amended, and acting as to Real Property as agent and in the name of the United States of America ("*Purchaser*" or "*TVA*"). It is the intent of both Parties to be bound fully by the terms of this Agreement to the fullest extent permitted by applicable Laws. Notwithstanding anything herein to the contrary, this Agreement shall not be binding on Seller unless and until it has been approved by the Bankruptcy Court in accordance with the Bidding Procedures Order (defined below), except for Section 6.21, which to the extent applicable shall be binding on Seller as of the Effective Date.

### RECITALS

WHEREAS, Seller owns the Project (as defined in Article 1).

WHEREAS, on May 20, 2005 (the "*Petition Date*"), Seller filed a voluntary petition for relief (the "*Bankruptcy Case*") under chapter 11 of Title 11, U.S.C. §§ 101 et seq. (as amended as of the Petition Date) (the "*Bankruptcy Code*"), in the United States Bankruptcy Court for the Western District of North Carolina (the "*Bankruptcy Court*").

WHEREAS, upon the terms and subject to the conditions set forth in this Agreement, and as authorized under Sections 363, 365 and 1146 of the Bankruptcy Code, Seller desires to sell, transfer and assign to Purchaser, and Purchaser desires to purchase from Seller, all of Seller's right, title and interest in and to the Project and certain properties and assets associated therewith or ancillary thereto, on the terms and subject to the conditions hereinafter set forth.

WHEREAS, Seller and Purchaser originally entered into that certain Asset Purchase Agreement, dated as of November 30, 2007, as amended by that certain First Amendment to Asset Purchase Agreement dated as of January 9, 2008.

WHEREAS, after a hearing conducted on January 9, 2008, the Bankruptcy Court entered that certain order dated January 17, 2008 (the "*Bidding Procedures Order*") which, among other actions, approved Bidding Procedures; granted certain bid protections; scheduled certain dates with respect to the Sale; named Kelson Energy III LLC ("*Kelson*") as the "stalking horse" bidder pursuant to the Kelson Asset Purchase Agreement and Section 363 of the Bankruptcy Code; provided that TVA may be a Qualified Bidder in the Auction to be held for the Purchased Assets; and authorized a TVA Fee payable as provided therein.

WHEREAS, to effectuate the selection of Purchaser as the Successful Bidder at the Auction conducted pursuant to the Bidding Procedures Order, and to revise the original Asset Purchase Agreement to reflect in this Amended and Restated Asset Purchase Agreement certain different provisions contained in the Kelson Asset Purchase Agreement and other circumstances and developments occurring since the execution of the original Asset Purchase Agreement (such as entry of the Bidding Procedures Order and the activities undertaken pursuant thereto), Seller and Purchaser are entering into this Agreement to evidence their respective duties, obligations and responsibilities in respect of the purchase and sale and related transactions contemplated by this Agreement and the Ancillary Agreements as defined in Article 1 (the "*Transactions*").

NOW, THEREFORE, in consideration of the foregoing recitals and the agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, do hereby agree as follows:

## ARTICLE 1

### DEFINITIONS

**Section 1.1 Certain Defined Terms.** The following terms when used in this Agreement (or in the Schedules and Exhibits to this Agreement) with initial letters capitalized have the meanings set forth below:

*"Accounts Payable"* means all trade accounts payable and other obligations to pay suppliers and third parties to the extent arising from the conduct of the Business or related to the Purchased Assets to the extent not settled prior to the Closing.

*"Adjustment Sections"* has the meaning set forth in Section 3.3.

*"Affiliate"* has the meaning set forth in Rule 12b-2 of the General Rules and Regulations under the Securities Exchange Act of 1934, as amended; provided, however, that with respect to Seller, "Affiliate" shall not include any Goldman Affiliate.

*"Agreement"* means this Amended and Restated Asset Purchase Agreement, together with each of the Schedules (collectively, the *"Schedules"*) and Exhibits (collectively, the *"Exhibits"*) hereto.

*"Alternate Bid"* has the meaning set forth in Section 11.9.

*"Alternate Bidder"* has the meaning set forth in Section 11.9.

*"Alternate Return Date"* has the meaning set forth in Section 11.10.

*"Alternative Transaction"* has the meaning set forth in Section 10.2.

*"Ancillary Agreements"* means (i) the Bill of Sale, (ii) the Deeds, (iii) the Assignment and Assumption Agreement, (iv) the O&M Termination Agreement and (v) any additional agreements and instruments of sale, transfer, conveyance, assignment and assumption that may be executed and delivered by any Party or any Affiliate (including Southaven Properties) thereof at or in connection with the Closing, if any.

*"Assignment and Assumption Agreement"* means the Assignment and Assumption Agreement, substantially in the form of Exhibit A, to be executed and delivered by Seller and Purchaser at the Closing.

*"Assumed Contracts"* has the meaning set forth in Section 6.22.

*"Assumed Liabilities"* has the meaning set forth in Section 2.3(a).

*"Auction"* has the meaning set forth in Section 11.7.

*"Bankrupt"* means, with respect to any entity, such entity (i) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any

bankruptcy, insolvency, reorganization or similar law, (ii) has a petition filed or commenced against it for a proceeding or cause of action under any bankruptcy, insolvency, reorganization, or similar law and such petition is not dismissed within 30 days of its filing, (iii) makes an assignment or any general arrangement for the benefit of creditors, (iv) otherwise becomes bankrupt or insolvent (however evidenced), (v) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (vi) is generally unable to pay its debts as they fall due.

*"Bankruptcy Case"* has the meaning set forth in the Recitals.

*"Bankruptcy Code"* has the meaning set forth in the Recitals.

*"Bankruptcy Court"* has the meaning set forth in the Recitals.

*"Bankruptcy Court Requirements"* has the meaning set forth in Section 4.3.

*"Bankruptcy Rules"* means the U.S. Federal Rules of Bankruptcy Procedure.

*"Base Purchase Price"* has the meaning set forth in Section 3.2.

*"Bid Deadline"* has the meaning set forth in Section 11.3.

*"Bidding Procedures"* has the meaning set forth in Section 11.1.

*"Bidding Procedures Order"* means the order of the Bankruptcy Court approving the Bidding Procedures as set forth in the Recitals, as entered by the Bankruptcy Court on January 17, 2008.

*"Bidding Process"* has the meaning set forth in Section 11.1.

*"Bill of Sale"* means a Bill of Sale, substantially in the form of Exhibit B, to be executed and delivered by Seller at the Closing.

*"Business"* means the business, as conducted on the date of this Agreement, of operating and maintaining the Project, procuring fuel and generating, selling, and delivering electric energy and capacity and Other Associated Electric Products from the Project, together with related hedging activities.

*"Business Day"* means any day on which Federal Reserve member banks in New York, New York are open for business; and a Business Day shall commence at 8:00 a.m. and close at 5:00 p.m., local time, at the location of the applicable Party's principal place of business, or at such other location as the context may require.

*"Business Intellectual Property Rights"* has the meaning set forth in Section 2.1(j).

*"Casualty Event"* has the meaning set forth in Section 6.7.

*"Casualty Insurance Notice"* has the meaning set forth in Section 6.7.

*"Cause"* means (a) any act or omission by an employee which has an adverse effect on his or her employer's business or on the employee's ability to perform services for his or her employer, including, without limitation, the commission of any crime (other than ordinary traffic violations), or (b) serious misconduct, refusal or failure to satisfactorily perform assigned duties, or excessive absenteeism, all of which shall be determined in the sole discretion of the management of his or her employer.

"Closing" has the meaning set forth in Section 3.1.

"Closing Date" has the meaning set forth in Section 3.1.

"COBRA" means the Consolidated Omnibus Budget Reconciliation Act of 1985.

"Code" means the Internal Revenue Code of 1986.

"Commercially Reasonable Efforts" means efforts that are reasonable and that do not require the performing Party to expend funds or incur obligations other than expenditures and obligations that are customary and reasonable in transactions of the kind and nature contemplated by this Agreement in order for the performing Party to satisfy its obligations hereunder; provided that Commercially Reasonable Efforts shall not require Seller to make any payment to a third party in connection with obtaining any Consent hereunder.

"Compensation" has the meaning set forth in the definition of Qualified Offer.

"Competitive Information" has the meaning set forth in Section 6.10(b).

"Confidentiality Agreement" means that certain Confidentiality Agreement, dated as of February 6, 2007, by and between Seller and Purchaser.

"Consents" means consents, authorizations, approvals, releases, waivers, estoppel certificates, and any similar agreements or approvals.

"Consumables" means any and all of the following items of Inventory intended to be used or consumed exclusively for the Business and located at the Project Site: lubricants, chemicals, fluids, lubricating oils, filters, fittings, connectors, seals, gaskets, hardware, wire, safety equipment and other similar materials; maintenance, shop and office supplies; and all other materials, supplies and other items consumed for the Business in the Ordinary Course of Business and located at the Project Site.

"Contract" means any binding contract, agreement, arrangement, license, lease, commitment, sale and purchase order, and other instrument or understanding of any kind, whether written or oral, express or implied.

"Credit Support Obligation" means an outstanding guarantee, letter of comfort, letter of assurance, keepwell, letter of credit, performance bond, assurance bond, surety agreement, indemnity agreement or any other form of assurance or guaranty or other obligation.

"Cure Amounts" means all cure amounts payable in order to cure any monetary defaults required to be cured under Section 365(b)(1) of the Bankruptcy Code, or otherwise to effectuate, pursuant to the Bankruptcy Code, the assumption by Seller and assignment to Purchaser of the Purchased Project Contracts under the Sale Approval Order.

"Deed" means one or more special warranty deeds, substantially in the form of Exhibit C, conveying each of the Owned Real Properties included in the Purchased Assets, free and clear of all Encumbrances other than Permitted Encumbrances, with legal descriptions sufficient for conveyance of such Owned Real Properties of record, to be executed and delivered by Seller and its Affiliates (including Southaven Properties), as applicable, at the Closing.

"Easements" has the meaning set forth in Section 2.1(b).

"*Effective Date*" means the date on which this Agreement has been executed and delivered by Seller and Purchaser, as specified in the introductory paragraph of this Agreement.

"*Emission Allowances*" means all environmental credits, offsets and allowances issued under the federal Clean Air Act (42 U.S.C. § 7401 et seq.), any applicable emission budget programs, or any other state, regional or federal emission trading program, to specifically include the definition of NOx and SO2 allowances under the Federal Acid Rain program (40 C.F.R. 72); the NOx Budget Trading Program (40 C.F.R. 96); the CAIR NOx Trading Program (40 C.F.R. 96 Subpart AA); the CAIR SO2 Trading Program (40 C.F.R. 96 Subpart AAA); and any approved rules or regulations implementing these provisions adopted by the State of Mississippi or its departments and instrumentalities pursuant to any applicable State Implementation Plan).

"*Employee*" means any individual employed by Southaven Operating Services, LLC who performs substantially all of his or her work in support of the Project at the Project Site.

"*Employee Plan*" means and includes each Employee Pension Benefit Plan, each Employee Welfare Benefit Plan, and each other plan, Contract, program, fund or policy, whether written or oral, qualified or non-qualified, funded or unfunded, foreign or domestic, providing for (i) severance benefits, stay pay, salary continuation, bonuses, profit-sharing, equity options or other forms of incentive compensation; (ii) vacation, holiday, sickness or other time-off; (iii) health, welfare, medical, dental, disability, life, accidental death and dismemberment, employee assistance, educational assistance, relocation or fringe benefits or perquisites, including post-employment benefits; and (iv) deferred compensation, defined benefit or defined contribution, retirement, early retirement or pension benefits, or equity grants that covers any Employee, or that is maintained, administered, sponsored, made available or with respect to which contributions are made or required to be made by Seller, in respect of Employees or their beneficiaries.

"*Encumbrances*" means any and all mortgages, pledges, claims, liens, security interests, options, warrants, purchase rights, conditional and installment sales agreements, easements, rights-of-way, deed restrictions, defects or imperfections of title, encumbrances and charges of any kind.

"*Environmental Claim*" means any written or oral notice, claim, suit (whether in law or in equity), demand or other communication by any Person alleging or asserting actual or potential liability for investigation, response, or Remediation, including any costs, compliance costs, enforcement costs, response costs, fees, defense costs, capital expenditures (whether incurred to construct, alter, replace or modify any of the Purchased Assets) or the funding necessary therefor, actual damages, consequential damages, punitive damages, claims for contribution or indemnity, damages to natural resources or other property, personal injuries (including those arising from or related to toxic torts) fines or penalties, based on or resulting from, in whole or in part: (i) the presence or Release of any Hazardous Substance at any location, whether or not on the Project Site; (ii) any violation or alleged violation of Environmental Law; or (iii) any legal obligation or liability pursuant to applicable Environmental Law.

"*Environmental Condition*" means the presence, Release or threatened Release of a Hazardous Substance at, in, on or under or from the Project or the Project Site for which there is, an obligation under Environmental Law to engage in any Remediation, or other response actions, or concerning which a Governmental Authority with jurisdiction over such matter has required Remediation under Environmental Laws.

"*Environmental Laws*" means all Laws relating to pollution or the protection of the environment, natural resources or human health and safety, as the same may be amended or adopted, including all Laws relating to Releases of Hazardous Substances or otherwise relating to the manufacture, processing,

distribution, use, treatment, storage, transport, disposal or handling of Hazardous Substances, including: the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq.; the Clean Air Act, 42 U.S.C. § 7401 et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq.; the Toxic Substances Control Act, 15 U.S.C. §§ 2601 through 2629; the Oil Pollution Act, 33 U.S.C. § 2701 et seq.; the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 et seq.; the Safe Drinking Water Act, 42 U.S.C. §§ 300f through 300j; the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq. (solely to the extent related to exposure to Hazardous Substances); any similar Laws of the State of Mississippi (or its departments, agencies and instrumentalities) or of any other Governmental Authority having jurisdiction over the Project or the Project Site.

*"Environmental Permits"* means any Permit required or issued pursuant to Environmental Law, and includes any and all orders, consent orders or binding agreements relating to the Project or the Project Site issued or entered into by a Governmental Authority under any applicable Environmental Law.

*"Environmental Reports"* means any environmental audit, environmental site assessment or other report of any investigation of Environmental Conditions at the Project or the Project Site.

*"Estimated Closing Adjustment"* has the meaning set forth in Section 3.5(a).

*"Estimated Closing Statement"* has the meaning set forth in Section 3.5(a).

*"Estimated Purchase Price"* has the meaning set forth in Section 3.5(a).

*"EWG"* has the meaning set forth in Section 4.19.

*"ET Power"* has the meaning set forth in Section 2.2(n).

*"Excluded Assets"* has the meaning set forth in Section 2.2.

*"Excluded Liabilities"* has the meaning set forth in Section 2.4.

*"Excluded Project Contracts"* has the meaning set forth in Section 2.2(c).

*"Exhibits"* has the meaning set forth in the definition of Agreement.

*"Expiration Date"* means August 31, 2008.

*"Federal Power Act"* means the Federal Power Act, as amended, 16 U.S.C. § 791a et seq.

*"FERC"* means the Federal Energy Regulatory Commission.

*"Final Allocation"* has the meaning set forth in Section 3.6.

*"Final Order"* means an order or judgment: (i) as to which the time to appeal, petition for certiorari or move for review or rehearing has expired and as to which no appeal, petition for certiorari or other proceeding for review or rehearing is pending; or (ii) if an appeal, writ of certiorari, reargument or rehearing has been filed or sought, the order or judgment has been affirmed by the highest court to which such order or judgment was appealed or certiorari has been denied, or reargument or rehearing shall have been denied or resulted in no modification of such order or judgment, and the time to take any further appeal or to seek certiorari or further reargument or rehearing has expired; provided, however, that the

possibility that a motion under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be filed with respect to such order or judgment shall not prevent such order or judgment from being considered a Final Order.

*"Fuel"* means natural gas of sufficient quality to meet all technical specifications of the Project.

*"GAAP"* means United States generally accepted accounting principles as are in effect from time to time, applied on a consistent basis.

*"Genco"* has the meaning set forth in Section 12.5.

*"Goldman Affiliate"* means The Goldman Sachs Group, Inc. and any of its Affiliates that are not Cogentrix Energy, Inc. or any of its Subsidiaries.

*"Good Faith Deposit"* has the meaning set forth in Section 11.4(c).

*"Good Industry Practices"* means those practices, methods and acts engaged in or approved by a significant portion of the power and gas industries during the relevant time period, or any of the practices, methods and acts which, in exercise of reasonable judgment in light of the facts known at the time a decision is made, that could have been expected to accomplish a desired result at reasonable cost consistent with good business practices, reliability, safety and expedition. Good Industry Practices are not intended to be limited to the optimum practices, methods or acts to the exclusion of others, but rather to those practices, methods and acts generally accepted or approved by a significant portion of the power and gas industries in the relevant region, during the relevant time period, as described in the immediately preceding sentence.

*"Governmental Authority"* means any federal, state, local, foreign or other governmental subdivision, regulatory or administrative agency, commission, body, court, tribunal, arbitral panel, or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory, Tax or other authority or power over the matters specified or, if such matters are not specified, over Seller, Purchaser, the Project, the Project Site, the Transactions or any related matter.

*"Hazardous Substances"* means (i) petrochemical or petroleum products, oil, radioactive materials, radon gas, asbestos or asbestos-containing material, polychlorinated biphenyls or transformers or other equipment that contains polychlorinated biphenyls or lead-based paint, (ii) chemicals, materials, substances or wastes which are defined, listed or regulated as *"hazardous substances," "hazardous materials," "hazardous constituents," "restricted hazardous materials," "extremely hazardous substances," "hazardous wastes," "extremely hazardous wastes" "restricted hazardous wastes," "toxic substances," "toxic pollutants," "toxic air pollutants," "pollutants," "contaminants"* or words of similar meaning and regulatory effect, including as the foregoing may be defined under any Environmental Law, and (iii) any other chemical, material, waste or substance, the exposure to or treatment, storage, transportation, use, disposal or Release of which is prohibited, limited or regulated by, or may give rise to liability under, any Environmental Law.

*"HSR Act"* means the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

*"Imaged Document"* has the meaning set forth in Section 12.3.

*"Independent Accounting Firm"* means such nationally recognized, independent accounting firm that is not the principal auditor or accounting firm of either Purchaser or Seller, as is mutually appointed by Seller and Purchaser for purposes of this Agreement.

*"Initial Post-Closing Adjustment"* has the meaning set forth in Section 3.5(c).

*"Intellectual Property Rights"* means all intellectual property and proprietary rights, including (i) all inventions, all improvements thereto, and all patents, patent applications, and patent disclosures, (ii) all trademarks, service marks, trade dress, logos, brand names, trade names, domain names and corporate names, including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith, (iii) all copyrightable works, all copyrights, and all applications, registrations, and renewals in connection therewith, (iv) all trade secrets, know how, and confidential business information, (v) all Software (including data and related documentation), and (vi) all copies and tangible embodiments thereof, any rights in or licenses to or from a third party in any of the foregoing, and the right to sue for past, present, and future infringement or misappropriation of any of the foregoing.

*"Intercompany Arrangement"* has the meaning set forth in Section 2.2(m).

*"Interconnection Agreements"* means, collectively, (i) that certain Amended and Restated Interconnection and Operating Agreement, dated as of October 20, 2000, by and between Seller and Entergy Mississippi, Inc. and (ii) that certain Interconnection Agreement, dated as of October 10, 2000, by and between Seller and Purchaser.

*"Inventory"* means any and all of the inventory items and equipment used exclusively for the Business and located or held for use at the Project Site, including Consumables; new, repaired or refurbished equipment, components, assemblies, or sub-assemblies; spare, replacement or other parts; tools, special tools, or similar equipment; all associated materials, supplies, and other goods and other similar items of moveable property, provided that Inventory shall not include any Inventory associated with the LTSA or Parts Sharing Agreement until title to such Inventory transfers to Seller pursuant to the terms of the Parts Sharing Agreement.

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

*"Kelson Asset Purchase Agreement"* means that certain Asset Purchase Agreement between Seller and Kelson dated as of January 16, 2008.

*"Knowledge"* with respect to a Party means: (a) in the case of Seller, the extent of the knowledge, as of the Effective Date (or, with respect to the certificate delivered pursuant to Section 8.6, as of the date of delivery of the certificate), of any individual who is listed in Schedule 1.1A; and (b) in the case of Purchaser, the extent of the knowledge, as of the Effective Date (or, with respect to the certificate delivered pursuant to Section 9.6, the date of delivery of the certificate), of any individual who is listed in Schedule 1.1B. For purposes of this definition, an individual shall be deemed to have "knowledge" of a particular fact, circumstance or other matter if such individual is or at any time was actually aware of such fact, circumstance or other matter, without any implied duty to investigate and without imputation of the knowledge of any other Person.

*"Laws"* means all statutes, rules, regulations, ordinances, Orders, and codes of any Governmental Authority, and includes the common law.

*"Leased Real Property"* means real or immovable property leasehold estates and all appurtenances thereto, together with all buildings, leasehold improvements, fixtures and other improvements thereon and thereto.

*"LTSA"* means the Long-Term Service Agreement, dated as of October 1, 2001, between Seller and General Electric International, Inc.

"*Marked Agreement*" has the meaning set forth in Section 11.4(b).

"*Material Adverse Effect*" means: (a) any event, circumstance or condition materially impairing Seller's ability to perform any of its material obligations under this Agreement or any Ancillary Agreement, or to consummate the Transactions; or (b) any change (or changes taken together) in, or effect on, the Purchased Assets, the Project or the Project Site that is materially adverse to the operations or physical condition of the Purchased Assets, the Project or the Project Site, taken as a whole, or the business, assets, properties, financial condition, or results of operations of the Business; provided, however, that in no event shall the term Material Adverse Effect include any adverse change or effect resulting from, arising out of or attributable to (1) any changes in national or regional electric industry (including without limitation both generation and transmission of electricity) economic conditions generally affecting such national or regional electric industry as a whole and not affecting the Project materially differently from other gas-fired generation facilities located in the electric reliability region administered by Southeastern Electric Reliability Council, Inc., (2) any changes in the price of natural gas, (3) any changes in the price of real estate, (4) any changes in the price of electric generating facilities, (5) general United States or global economic or political conditions affecting capital, banking or financial markets generally (including any disruption thereof and any decline in the price of any security or any market index), (6) acts of terrorism, war (whether or not declared) or military actions or any escalation or worsening of any such acts of terrorism, war or military actions (whether or not declared), (7) any action taken pursuant to or in accordance with this Agreement, (8) changes in applicable Laws or the enforcement or interpretation thereof, (9) the negotiation, execution or announcement of this Agreement, (10) anything set forth in the Schedules as of the Effective Date and the facts and circumstances underlying such matters, (11) any failure to meet internal projections, estimates or forecasts of revenues, earnings or other measures of financial or operating performance for any period, (12) changes resulting from the filing of the Bankruptcy Case or from any action required by the Bankruptcy Court, (13) acts of God, (14) changes in GAAP or generally accepted accounting principles of any foreign jurisdiction, (15) the regulatory status of Purchaser or (16) any adverse change in, or effect on, the Project or the Business that is cured, in its entirety, by Seller before the earlier of: (i) the Closing Date; and (ii) the date on which this Agreement is terminated pursuant to Section 10.1.

"*NEGT*" has the meaning set forth in Section 2.2(n).

"*Nonassignable Asset*" has the meaning set forth in Section 6.17.

"*O&M Agreement*" means that certain Operation and Maintenance Agreement dated as of August 29, 2000, by and between Seller and Southaven Operating Services, LLC.

"*O&M Termination Agreement*" means that certain O&M Termination Agreement to be dated as of the Closing Date between Purchaser and Seller, substantially in the form attached hereto as Exhibit D.

"*OFAC*" has the meaning set forth in Section 5.10.

"*Off-Site Location*" means any real property related to or used in connection with the Project other than the Real Property.

"*Order*" means any order, injunction, judgment, decree, ruling, writ, assessment or arbitration award of a Governmental Authority.

"*Ordinary Course of Business*" means, with respect to the Business, the ordinary course of Business consistent with custom and practice of the Business from and after the Petition Date or to the extent consistent with orders issued in the Bankruptcy Case.

*"Other Associated Electric Products"* means all of the services and products associated with capabilities or operational attributes or regulatory treatment of a generating unit, including the capability to provide ancillary services, reserves, operational functions, receipt or allocation of Emissions Allowances and other power generation related services and products.

*"Other Employees"* has the meaning set forth in Section 6.11(b)(i).

*"Owned Real Property"* has the meaning set forth in Section 2.1(a).

*"Parts Sharing Agreement"* means that certain Parts Sharing Agreement, originally dated as of October 1, 2001, by and between Cogentrix Parts Company, Inc., Seller and the other parties thereto, as defined therein.

*"Party"* means Seller or Purchaser, as the context requires; *"Parties"* means, collectively, Seller and Purchaser.

*"Permits"* means any permits, registrations, licenses, franchises, certificates and Consents of Governmental Authorities, including Environmental Permits owned by Seller to the extent related to the Project, the Project Site, or the Business.

*"Permitted Encumbrances"* means (i) liens for Property Taxes and other governmental charges and assessments which are not yet due and payable or the validity of which is being contested in good faith by appropriate proceedings, (ii) mechanics', materialmen's, laborers', carriers', workers', repairers' and other similar liens arising in the Ordinary Course of Business and not resulting in a Material Adverse Effect or that individually or in the aggregate would not materially impair the marketability or value of title to the Real Property prior to or simultaneously with the Closing, (iii) Encumbrances described in Schedule 1.1C which will be and are discharged or released either prior to, or simultaneously with, the Closing, (iv) retention of title agreements with suppliers entered into in the Ordinary Course of Business, (v) encroachments, overlaps, Encumbrances and other title defects, easements and encroachments that do not, individually or in the aggregate, materially impair the marketability or value of title to the Real Property or the continued use as currently conducted of the assets to which such Encumbrances or other title defects, easements or encroachments relate and (vi) Encumbrances with respect to any of the Purchased Assets and created by or resulting from the acts or omissions of Purchaser or this Agreement.

*"Person"* means any individual, partnership, joint venture, corporation, limited liability company, estate, trust, association or unincorporated organization, any Governmental Authority or any other entity.

*"Petition Date"* has the meaning set forth in the Recitals.

*"Post-Closing Statement"* has the meaning set forth in Section 3.5(b).

*"Post-Petition Contracts"* means the Contracts of Seller relating exclusively to the Business entered into on or after the Petition Date.

*"Potential Bidder"* has the meaning set forth in Section 11.4(a).

*"Pre-Petition Contracts"* means the Contracts of Seller relating exclusively to the Business entered into before the Petition Date.

*"Predecessor-in-Interest"* means any predecessor-in-interest with respect to the Project.

*"Project"* means the nominal 810 MW dispatchable, combined cycle natural gas fired electrical generation plant located upon the Project Site, consisting of three units (each, a *"Unit"*), each Unit including a GE 7FA+e combustion turbine, an Aalborg heat recovery steam generator and a GE A10 steam turbine, and ancillary and associated properties and assets located upon the Project Site.

*"Project Contract"* means any Contract to which Seller is a party, by which Seller or any of the Purchased Assets is bound, or to which an Affiliate of Seller is a party that principally relates to the Project or the Business or that has the primary purpose of supporting the Project or the Business.

*"Project Insurance Policies"* means all material insurance policies carried by or for the benefit of Seller or any Affiliate thereof with respect to the ownership, operation or maintenance of the Project, the Project Site or the Business, including all liability, workers compensation, executive risk, fiduciary liability property damage, self insurance arrangements, retrospective assessments and business interruption and/or outage policies in respect thereof.

*"Project Site"* means the approximately 36 acre parcel of land upon which the Project is located, in Southaven, DeSoto County, Mississippi, and the parcels of land owned by Southaven Properties, on which Seller's transmission lines are located and with respect to which Seller has been granted an easement.

*"Property Tax"* means any Tax resulting from and relating to the assessment of real or personal property by any Governmental Authority (to include specifically ad valorem property or real estate taxes and any payments made to a Government Authority in lieu of such ad valorem property or real estate taxes).

*"Proposed Post-Closing Adjustment"* has the meaning set forth in Section 3.5(b).

*"Purchase Price"* has the meaning set forth in Section 3.3.

*"Purchased Assets"* has the meaning set forth in Section 2.1.

*"Purchased Inventory"* has the meaning set forth in Section 2.1(d).

*"Purchased Permits"* has the meaning set forth in Section 2.1(f).

*"Purchased Project Contracts"* has the meaning set forth in Section 2.1(e).

*"Purchaser"* has the meaning set forth in the introductory paragraph of this Agreement.

*"Purchaser Plans"* has the meaning set forth in Section 6.11(d).

*"Purchaser's Consents"* means the notices to or the Consents of any Person other than a Governmental Authority required by Purchaser to be made or obtained by or on behalf of Purchaser prior to consummation of the Transactions, as specified in Schedule 1.1D.

*"Purchaser's Regulatory Approvals"* means the notices to, applications or other filings with or Consents of or from any Governmental Authority that are necessary to be made or obtained by or on behalf of Purchaser prior to the Closing, as specified in Schedule 1.1E.

*"Qualified Bid"* has the meaning set forth in Section 11.5.

*"Qualified Bidder"* has the meaning set forth in Section 11.4.

"*Qualified Employees*" has the meaning set forth in Section 6.11(b)(i).

"*Qualified Offer*" means an offer of employment to any Employee (whether a Qualified, Suitable or Other Employee) pursuant to Section 6.11(b) that shall (i) provide for annual base compensation and employee and fringe benefits ("*Compensation*") which are comparable in the aggregate to such Qualified Employee's Compensation immediately prior to the Closing Date and are mutually agreed upon by Purchaser and Seller, plus annual bonus opportunities of Purchaser, and (ii) not require such Employee's primary place of employment to be more than fifty (50) miles from his or her primary place of employment immediately prior to the Closing Date.

"*Real Property*" means the Owned Real Property and the Easements.

"*Release*" has the meaning set forth in Environmental Laws, but also shall include (i) the releasing, spilling, leaking, discharging, disposing, pumping, pouring, emitting, emptying, injecting, leaching, dumping, or depositing of any Hazardous Substance, (ii) the abandonment or discarding of any Hazardous Substance in barrels, drums, or other containers, into or within the Environment, and (iii) the migration of any Hazardous Substance into, under, on, through, or in the air, soil, subsurface strata, surface water, groundwater, drinking water supply, any sediments associated with any water bodies, or any other environmental medium.

"*Remediation*" means any action of any kind to address an Environmental Condition or the Release or presence of Hazardous Substances at, in, on or under the Project Site (or any Off-Site Location that may be affected by any Release at the Project Site), including, to the extent relevant, the following: (i) monitoring, investigation, assessment, treatment, clean-up, containment, remediation, removal, mitigation, response or restoration work; (ii) obtaining any Permits necessary to conduct any such work; (iii) preparing and implementing any plans or studies for such work; (iv) obtaining a "no further action" letter or other written determination from a Governmental Authority with jurisdiction under applicable Environmental Laws that no material additional work is required by such Governmental Authority; (v) any response to, or preparation for, any inquiry, order, hearing or other proceeding by or before any Governmental Authority with respect to any such Environmental Condition, Release or presence of Hazardous Substances; and (vi) any other activities that are required under Environmental Laws to address an Environmental Condition.

"*Required Bid Documents*" has the meaning set forth in Section 11.4.

"*Return Date*" has the meaning set forth in Section 11.10.

"*Sale*" has the meaning set forth in Section 11.1.

"*Sale Approval Order*" means an order or orders of the Bankruptcy Court approving the Sale issued pursuant to Sections 363 and 365 of the Bankruptcy Code in form and substance reasonably satisfactory to Purchaser, authorizing and approving, among other things, the sale, transfer and assignment of the Purchased Assets and Assumed Liabilities to Purchaser in accordance with the terms and conditions of this Agreement, free and clear of all Encumbrances other than Permitted Encumbrances.

"*Sale Hearing*" has the meaning set forth in Section 11.8.

"*Schedules*" has the meaning set forth in the definition of Agreement.

"*SDN List*" has the meaning set forth in Section 5.10.

"*Seller*" has the meaning set forth in the introductory paragraph of this Agreement.

"*Seller's Consents*" has the meaning set forth in Section 4.3.

"*Seller Guaranty*" has the meaning set forth in Section 6.24.

"*Seller Litigation*" has the meaning set forth in Section 4.7.

"*Seller's Regulatory Approvals*" means the notices to, applications or other filings with or Consents of or from any Governmental Authority that are necessary to be made or obtained by or on behalf of Seller prior to the Closing, as specified in Schedule 1.1F.

"*Senior Lenders*" has the meaning set forth in Section 10.2.

"*Severance Pay*" shall mean a lump sum payment of the following severance pay to Employees pursuant to Section 6.11(b): (i) In the case of Non-Exempt Employees and Exempt Employees with annual base pay of less than \$100,000, an amount equal to one and one-half (1.5) weeks of base pay for each full year of service, subject to a minimum of six (6) weeks of base pay and a maximum of forty-five (45) weeks of base pay; and (ii) In the case of directors and senior Exempt Employees with annual base pay of \$100,000 or more: (A) one and one-half (1.5) weeks of base pay for each full year of service, subject to a minimum of twenty-six (26) weeks of base pay and a maximum of fifty-two (52) weeks of base pay (such number of weeks of base pay, the "*Severance Period*"); plus (B) the cost of continuation coverage under the Seller's health insurance plan pursuant to COBRA for the duration of the Severance Period.

"*Severance Period*" shall have the meaning set forth in the definition of Severance Pay.

"*Software*" means (i) software, firmware, middleware, and computer programs, including any and all software implementations of algorithms, models and methodologies, whether in source code, object code, executable or binary code (ii) databases and compilations, including any and all libraries, data and collections of data, whether machine readable, on paper or otherwise, (iii) descriptions, flow-charts and other work product used to design, plan, organize, maintain, support or develop any of the foregoing, (iv) the technology supporting, and the contents and audiovisual displays on any web sites, and (v) all documentation, including programmers' notes and source code annotations, user manuals and training materials relating to any of the foregoing, including any translations thereof.

"*Southaven Properties*" means Cogentrix Southaven Properties, LLC, a Delaware limited liability company.

"*Subsequent Bid*" has the meaning set forth in Section 11.5.

"*Subsidiary*" when used with respect to any Person, means any other Person of which (a) in the case of a corporation, at least (i) a majority of the equity and (ii) a majority of the voting interests are owned or controlled, directly or indirectly, by such first Person, by any one or more of such first Person's Subsidiaries, or by such first Person and one or more of such first Person's Subsidiaries or (b) in the case of any Person other than a corporation, such first Person, one or more of such first Person's Subsidiaries, or such first Person and one or more of such first Person's Subsidiaries (i) owns a majority of the equity interests thereof and (ii) has the power to elect or direct the election of a majority of the members of the governing body thereof.

"*Successful Bid*" has the meaning set forth in Section 11.7(f).

"*Successful Bidder*" has the meaning set forth in Section 11.7(f).

"*Suitable Employees*" has the meaning set forth in Section 6.11(b)(i).

"*Survey*" has the meaning set forth in Section 4.10(b).

"*Tangible Personal Property*" has the meaning set forth in Section 2.1(c).

"*Tax*" or "*Taxes*" means any federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, carbon, Btu, fuel, environmental, customs duties, tariff, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, Property Tax, transactional, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever, including any interest, penalty or addition thereto, whether disputed or not, including any item for which liability arises as a transferee or secondary liability in respect to any tax (whether imposed by Law, contractual agreement or otherwise) and any liability in respect of any tax as a result of being a member of any affiliated, consolidated, combined, unitary or similar group.

"*Tax Return*" means any return, report, information return, declaration, claim for refund or other document, together with all amendments and supplements thereto (including all related or supporting information), required to be supplied to any Governmental Authority responsible for the administration of Laws governing Taxes, including information returns or reports with respect to backup withholding and other payments to third parties.

"*Termination Date*" has the meaning set forth in Section 10.1.

"*Third Party Requirements*" has the meaning set forth in Section 4.3.

"*Title Insurer*" has the meaning set forth in Section 8.7.

"*Title Policy*" has the meaning set forth in Section 8.7.

"*Tolling Agreement*" means, collectively, that certain Master Power Purchase and Sale Agreement, dated as of August 22, 2006, that certain Conversion Services Confirmation, dated as of August 22, 2006 and approved by the Bankruptcy Court on August 29, 2007, as amended by that certain Agreement Extending Conversion Services Confirmation and Master Power Purchase and Sale Agreement, dated as of August 31, 2007, and that certain Amendment No. 2 to Conversion Services Confirmation, dated September 6, 2007, and as may be subsequently amended, in each case by and between Seller and Purchaser.

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

"*Transfer Tax*" means any sales Tax, transfer Tax, transaction Tax, conveyance fee, use Tax, real property transfer Tax, stamp Tax, stock transfer Tax or other similar Tax, including any related penalties, interest and additions thereto, incurred in the transfer of assets contemplated by this Agreement.

"*Transferred Employees*" has the meaning set forth in Section 6.11(b)(vii).

"*Unit*" has the meaning set forth in the definition of "Project" in this Section 1.1.

"Unit 2" means the Unit of the Project that experienced compressor blade failure on July 6, 2007, which is customarily referred to by Project staff as Unit 2.

"Unit 2 Test Standards" means the required standards of repair for Unit 2 set forth on Schedule 1.1G.

"Unqualified Offer" shall mean any offer of employment to an Employee which is not a Qualified Offer.

"USA Patriot Act" has the meaning set forth in Section 5.10.

"WARN Act" has the meaning set forth in Section 6.11(f).

"Warranties" has the meaning set forth in Section 2.1(k).

**Section 1.2 Certain Interpretive Matters.** In this Agreement, unless the context otherwise requires or this Agreement otherwise specifies:

- (a) the singular number includes the plural number and vice versa;
- (b) reference to any Person includes such Person's successors and assigns but, if applicable, only if such successors and assigns are permitted by this Agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity;
- (c) reference to any gender includes each other gender;
- (d) reference to any agreement (including this Agreement), document or instrument means such agreement, document or instrument as amended, restated, supplemented or otherwise modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof;
- (e) reference to any Article, Section, Schedule or Exhibit means such Article, Section, Schedule or Exhibit of or to this Agreement, and references in any Article, Section, Schedule, Exhibit or definition to any clause means such clause of such Article, Section, Schedule, Exhibit or definition unless otherwise specified;
- (f) any accounting term used and not otherwise defined in this Agreement or any Ancillary Agreement has the meaning assigned to such term in accordance with GAAP;
- (g) "hereunder," "hereof," "hereto" and words of similar import are references to this Agreement as a whole and not to any particular Section or other provision hereof or thereof;
- (h) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term;
- (i) relative to the determination of any period of time, "from" means "from and including," "to" means "to but excluding" and "through" means "through and including;"
- (j) reference to any Law (including statutes and ordinances) means such Law as amended, modified codified or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder;

(k) all calculations and computations pursuant to this Agreement shall be carried and rounded to the nearest two (2) decimal places;

(l) reference to any "day," "month" or "year" shall be to a calendar day, month or year;

(m) this Agreement and any documents or instruments delivered pursuant hereto shall be construed without regard to the identity of the Person who drafted the various provisions of the same and any rule of construction that a document is to be construed against the drafting party shall not be applicable either to this Agreement or such other documents and instruments;

(n) the captions of the various Articles, Sections, Exhibits and Schedules of this Agreement have been inserted only for convenience of reference and do not modify, explain, enlarge or restrict any of the provisions of this Agreement;

(o) the terms "real property" and "real estate" shall be deemed to include immovable property; the term "fee estate" shall include full ownership; the term "personal property" shall be deemed to include movable property; the terms "tangible property" and "intangible property" shall be deemed to include corporeal property; the term "easements" shall be deemed to include servitudes and rights of use; and the term "buildings" shall be deemed to include other constructions;

(p) the term "statute of limitations" shall be deemed to include prescriptive periods; and

(q) in the event of any conflict that cannot be reasonably reconciled between the provisions of this Agreement and those of any Exhibit or Schedule, the provisions of this Agreement shall control and prevail.

## ARTICLE 2

### PURCHASE AND SALE

**Section 2.1 Purchased Assets.** Upon the terms and subject to the conditions contained in this Agreement, at the Closing, Seller shall, and shall cause its Affiliates to, sell, convey, grant, assign, transfer and deliver to Purchaser, and Purchaser shall purchase, acquire and accept title to and ownership from Seller, all of Seller's right, title and interest in and to the Project and assets, properties and rights, of every kind, nature, character and description, whether real, personal, or mixed, whether accrued, contingent, or otherwise, and whether owned, leased, licensed or contracted for, used exclusively or principally in the Business as presently conducted or for or at the Project or Project Site in existence on the Closing Date, whether or not carried on the books and records of Seller, and wherever located, but in each case excluding all Excluded Assets (collectively, the "*Purchased Assets*"; provided that Purchased Assets shall not include any assets associated with the LTSA or Parts Sharing Agreement until title to such assets transfers to Seller pursuant to the terms of the Parts Sharing Agreement), with good title, free and clear of all Encumbrances, other than Permitted Encumbrances, including:

(a) The parcels of real or immovable property used exclusively for the Business and located at the Project Site, water rights and other real or immovable property rights described in Schedule 2.1(a), with covenants of special warranty, and all appurtenances thereto, together with all buildings, fixtures, component parts, other constructions and other improvements thereon and thereto, including all construction work in progress (the "*Owned Real Property*");

(b) All privileges, licenses, rights-of-way, servitudes, and easements in gross, relating to the Owned Real Property held by Seller as well as the right, by way of license, right-of-way, servitude, easement or the like, to permit access to the Project or to locate or operate the Business, including those described in Schedule 2.1(b) (the "Easements");

(c) All machinery, mobile or otherwise, equipment, vehicles, pumps, fittings, tools, parts, apparatus, Consumables, furniture and furnishings, meter equipment, leased personal property and other tangible movable property located at the Project Site or purchased by Seller exclusively or principally for use or consumption at the Project that are not tangible embodiments of Intellectual Property Rights, and that are not Inventory, including the property listed or described in Schedule 2.1(c) (collectively, the "Tangible Personal Property");

(d) All Inventory, including the Inventory listed or described in Schedule 2.1(d) (the "Purchased Inventory");

(e) The Project Contracts listed or described in Schedule 2.1(e) (the "Purchased Project Contracts"), subject to Section 6.17;

(f) The Permits listed or described in Schedule 2.1(f) (the "Purchased Permits"), if and to the extent legally transferable by sale, subject to Section 6.17;

(g) All books, records, documents, drawings, reports, data, designs, policies and procedures, and safety, operations, instruction and/or maintenance manuals exclusively or principally relating to the Purchased Assets, the Project, the Project Site, or the Business, in each case to the extent owned by Seller and located at the Project Site, including any (i) environmental logs, data sheets, studies, reports, and records, including correspondence received by or sent to Governmental Authorities, hazardous waste disposal records and chemical inventories; (ii) Permit records and files; emergency, accident, incident, safety and inspection reports and records that are not covered by the attorney-client privilege; (iii) operating, maintenance, and repair logs, data sheets, reports and records; (iv) customer and vendor lists and customer and vendor purchase orders and records; (v) engineering design and construction drawings and plans, including as-built drawings; (vi) blueprints; (vii) specifications; (viii) records, plans, deeds, reports, and drawings relating to the Real Property; (ix) drawings in AutoCAD or similar programs, OEM manuals, and the rights to use and duplicate the foregoing; and (x) to the extent not listed above, the items listed or described in Schedule 2.1(g); provided that Seller may make and keep additional copies of any of the foregoing, subject to the requirements of Section 6.10(b), any third party consents, and Law;

(h) All accounts, rights, or allowances involving Emissions Allowances, as listed or described on Schedule 2.1(h), and all rights to any future Emission Allowances, if any, that will be granted or allocated to be held in accounts maintained in the name of Seller at any time after the Effective Date (other than those Emission Allowances used in the ordinary course of operation of the Project prior to the Closing);

(i) All right, title, and interest of Seller, if any, in and to the names Southaven Power and Southaven Power Plant, it being understood that Purchaser shall not acquire any right to use the name of Seller or any of its Affiliates or any related or similar trade names, trademarks, service marks, corporate names, corporate logos or any part, derivative or combination thereof;

(j) All Intellectual Property Rights set forth in Schedule 2.1(j) (the "Business Intellectual Property Rights"); and

(k) All unexpired warranties, indemnities, and guarantees made or given by manufacturers, overhaulers, assemblers, refurbishers, vendors, service providers and other comparable third parties to the extent relating to the Project, the Project Site or the Purchased Assets, whether provided in connection with the purchase of equipment or entered into independently of such purpose, in each case to the extent permitted by the terms of such warranty, indemnity or guarantee, including the warranties and guarantees listed or described in Schedule 2.1(k) (collectively, the "Warranties").

**Section 2.2 Excluded Assets.** Nothing in this Agreement shall constitute or be construed as conferring on Purchaser, and Purchaser shall not be entitled or required to purchase or acquire, and Seller shall not be required to sell, any right, title or interest in, to or under the following assets, interests, properties, rights, licenses, Permits or Contracts, whether real, personal, or mixed, whether accrued, contingent, or otherwise (collectively, the "Excluded Assets"):

(a) All of the Tangible Personal Property or Inventory to the extent consumed or disposed of prior to the Closing as permitted hereby under Section 6.4;

(b) Any of the assets, properties, Permits, rights or interests owned, used, occupied or held by or for the benefit of Seller that are listed or described in Schedule 2.2(b);

(c) All of the rights and interests, and all of the liabilities and obligations, of Seller in, to, under or pursuant to any Project Contract that is not listed or described in Schedule 2.1(e), including those Project Contracts listed or described in Schedule 2.2(c) (collectively, the "Excluded Project Contracts");

(d) All of the rights and interests of Seller or any of its Affiliates under, and any funds and property held in trust or any other funding vehicle pursuant to any Employee Plan, and in particular, but without limitation, neither Purchaser nor any of its Affiliates shall be deemed to have assumed any Employee Plan by reason of any provision of this Agreement;

(e) Except to the extent they constitute Purchased Assets under Section 2.1(g) or otherwise hereunder, all of the books and records of Seller not relating exclusively or principally to the Purchased Assets, including Seller's minute books, limited liability company interest books, limited liability company ledger, financial statements, tax and accounting records, records related to other Excluded Assets and Excluded Liabilities and company seal;

(f) All cash, cash equivalents, bank deposits, accounts and notes receivable, trade or otherwise, including receivables under any Purchased Project Contract to the extent allocable to the pre-Closing period, including the return of any letter of credit or other posted collateral;

(g) All certificates of deposit, shares of stock, securities, bonds, debentures, evidences of indebtedness, and interests in joint ventures, partnerships, limited liability companies and other entities;

(h) All Intellectual Property Rights not set forth in Schedule 2.1(j), including those Intellectual Property Rights set forth in Schedule 2.2(h);

(i) All rights, title and interest in any transmission credits due Seller or claims of Seller in respect thereof arising under the Interconnection Agreements prior to the Closing, including Seller's rights, if any, under Section 206 of the Federal Power Act and pursuant to FERC's rules, policies and regulations promulgated thereunder with respect to the classification of upgrades and any associated recovery of transmission credits pursuant to the Interconnection Agreements;

(j) All rights and interests to be retained by Seller arising under this Agreement, the Ancillary Agreements or any other instrument or document executed and delivered pursuant to the terms of this Agreement;

(k) The right to receive mail and other communications relating to any of the Excluded Assets or Excluded Liabilities, all of which mail and other communications shall be promptly forwarded by Purchaser to Seller to the extent received by Purchaser;

(l) All refunds or credits, if any, of Taxes due to Seller and relating to time periods prior to the Closing other than to the extent provided to Purchaser by Section 6.6;

(m) Any contract, agreement, arrangement or commitment of any nature in respect of any intercompany transaction between Seller, on the one hand, and any Affiliate of Seller, on the other hand, whether or not such transaction relates to any contribution to capital, loan, the provision of goods or services, tax sharing arrangements, payment arrangements, intercompany advances, charges or balances, or the like, excluding any Purchased Project Contracts (the "*Intercompany Arrangements*");

(n) All amounts due to Seller from either NEGTEnergy Trading-Power, L.P. (f/k/a PG&E Energy Trading-Power, L.P.) ("*ET Power*") or National Energy & Gas Transmission, Inc. (f/k/a PG&E National Energy Group, Inc.) ("*NEGTE*"), pursuant to the arbitration award issued on February 1, 2007, the Dependable Capacity and Conversion Services Agreement, dated as of June 1, 2000, as amended, the Guarantee by NEGTE, dated as of May 24, 2001, the proofs of claim filed by Seller in the bankruptcy cases of ET Power and NEGTE, or otherwise;

(o) All trade accounts and notes receivable and other receivables of Seller and its Affiliates with respect to the Business, including any inter-company receivables as of the Closing arising in connection with the Business, and any amounts received after the Closing for capacity, electricity, ancillary services and fuel (including supply and transportation imbalances and settlements) sold and delivered by Seller prior to the Closing;

(p) All insurance proceeds received by Seller or its Affiliates in connection with the damage to Unit 2 resulting from the compressor blade failure that occurred on July 6, 2007 and all related repairs;

(q) All computers, servers, workstations, routers, hubs, switches, circuits, networks, data communications lines and all other information technology equipment owned, leased or licensed by Seller and used or held for use in connection with the Project that are not located on the Project Site;

(r) All claims of Seller against Enron Corp., EPC Estate Services, Inc. (f/k/a National Energy Production Corporation) and NEPCO Power Procurement Company and all proofs of claim filed with respect thereto in case numbers 02-12398 and 02-12402 in the United States Bankruptcy Court for the Southern District of New York, and all distributions from the bankruptcy estates of such entities and all proceeds, whether in cash or in kind, related thereto; and

(s) All assets, rights and claims of Seller not used exclusively or principally in the Business as presently conducted or for or at the Project or Project Site in existence as of the Closing.

All references herein to the Purchased Assets shall be deemed not to include the Excluded Assets.

**Section 2.3 Assumption of Liabilities.**

(a) At the Closing, Purchaser shall assume and agree to pay, perform and discharge when due, and shall be liable with respect to, all obligations, liabilities and responsibilities of Seller specifically referred to in this Section 2.3 (collectively, the "*Assumed Liabilities*"), other than the Excluded Liabilities, as follows:

(i) All executory obligations of Seller from and after Closing to be performed under the Purchased Project Contracts and the obligations of Seller to be performed under Purchased Permits, licenses and leases to be included in the Purchased Assets and assigned, assumed or otherwise transferred to Purchaser pursuant to this Agreement;

(ii) All liabilities, claims, demands, commitments and other obligations relating to ownership or use of the Purchased Assets or otherwise relating to the Business arising after the Closing;

(iii) All liabilities and obligations to pay for, purchase or acquire assets, goods, raw materials, supplies or services ordered but not received and consumed by Seller on or prior to the Closing (whether pursuant to purchase orders or otherwise) in the Ordinary Course of Business;

(iv) All liabilities and obligations arising out of, resulting from, or relating to sales of electric energy and capacity and Other Associated Electric Products produced after the Closing, including all product warranty, product returns, product liability and product recall liability related thereto;

(v) All liabilities and obligations to fulfill contracts or capacity, output or other orders relating to products of the Business outstanding at the Closing; and

(vi) All liabilities and obligations arising under the Purchased Project Contracts from and after the Closing.

(b) The assumption by Purchaser of the Assumed Liabilities shall in no way expand the rights or remedies of any third party against Purchaser or Seller as compared to the rights and remedies which such third party would have had against Seller absent the Bankruptcy Case, had Purchaser not assumed such Assumed Liabilities. Without limiting the generality of the preceding sentence, the assumption by Purchaser of the Assumed Liabilities shall not create any third party beneficiary rights other than with respect to the Person that is the obligee of such Assumed Liability.

**Section 2.4 Excluded Liabilities.** Except for the Assumed Liabilities, Purchaser will not assume, be deemed to have assumed, or be responsible for any obligation or liability (whether known or unknown, asserted or unasserted, absolute or contingent, matured or unmatured, conditional or unconditional, latent or patent, accrued or unaccrued, liquidated or unliquidated, or due or to become due) with respect to or concerning (i) Seller (or any Affiliate of Seller) or (ii) the Project, the Project Site, the Purchased Assets or the Business, including the following (collectively, the "*Excluded Liabilities*"):

(a) Liabilities in respect of employment or services performed on or prior to the Closing Date;

(b) All liabilities and obligations of Seller or its Affiliates to the extent exclusively relating to any Excluded Assets or other assets which are not Purchased Assets;

(c) All liabilities and obligations of Seller or its Affiliates in respect of the claims set forth on Schedule 2.4(c);

(d) All Tax liabilities for periods ending on or before the Closing Date, except for Taxes for which Purchaser is liable pursuant to Section 3.4;

(e) All liabilities and obligations of Seller for administrative fees and expenses, including without limitation "allowed administrative expenses" under Section 503(b) of the Bankruptcy Code;

(f) All liabilities and obligations of Seller for transaction fees and expenses and fees and expenses payable to lenders, brokers, financial advisors, legal counsel, accountants and other professionals in connection with this Agreement;

(g) Accounts Payable;

(h) All liabilities and obligations of Seller or any Affiliate thereof representing indebtedness for money borrowed (or any refinancing thereof);

(i) All liabilities and obligations from any intercompany payables or intercompany loans owed to Seller or any of its Affiliates from the Business;

(j) Any and all amounts owed by Seller to ET Power pursuant to the Subordinated Loan Agreement by and among Seller, ET Power and Calyon New York Branch (f/k/a Credit Lyonnais New York Branch), dated as of May 24, 2001; and

(k) All liabilities and obligations arising under the Purchased Project Contracts prior to the Closing, including starting/operating hours costs incurred in connection with the LTSA; and

(l) All interests and liabilities that have not been otherwise assumed pursuant to this Agreement, to the extent that applicable law permits this sale under Section 363 of the Bankruptcy Code to be free and clear of such interests and liabilities.

### ARTICLE 3

#### CLOSING; PURCHASE PRICE

**Section 3.1 Closing.** Subject to the terms and conditions hereof, the consummation of the Transactions (the "Closing") shall take place at the New York office of Latham & Watkins LLP, at 10:00 a.m. local time, or at some other mutually agreeable time and location, on a mutually acceptable date within three (3) Business Days following the date on which the conditions set forth in Article 8 and Article 9, other than those conditions that by their nature are to be satisfied at the Closing, have been either satisfied or waived by the Party for whose benefit such conditions exist, or at such other time and place as the Parties may mutually agree. The date on which the Closing occurs is referred to herein as the "Closing Date." The Closing shall be effective for all purposes immediately upon receipt of the Purchase Price by Seller on the Closing Date. At the Closing, and subject to the terms and conditions hereof, the following shall occur:

(a) Seller shall execute and deliver, or cause to be executed and delivered, to Purchaser the following:

(i) instruments of transfer and conveyance, properly executed and acknowledged by Seller in such customary form as is reasonably acceptable to both Seller and Purchaser, that are necessary to transfer to and vest in Purchaser all of Seller's right, title and interest in and to the Purchased Assets or which would otherwise be required by a Title Insurer (including such entity documents and authorizations as a Title Insurer would require), including:

- (A) the Bill of Sale;
- (B) the Assignment and Assumption Agreement; and
- (C) the Deeds;

(ii) a certificate and affidavit of non-foreign status of Seller pursuant to Section 1445 of the Code, properly executed by Seller (or Seller's tax parent Affiliate, as applicable);

(iii) those documents required to be delivered to Purchaser by Seller pursuant to Article 8 or in accordance with the provisions of any Ancillary Agreement;

(iv) all Consents obtained by Seller with respect to the sale and purchase of the Purchased Assets, if any, with respect to the transfer of any Purchased Project Contract or Purchased Permit or the consummation of the Transactions;

(v) evidence, in form and substance, reasonably satisfactory to Purchaser, demonstrating that Seller has obtained Seller's Regulatory Approvals; and

(vi) the O&M Termination Agreement.

(b) Purchaser shall execute, or cause to be executed, to the extent required, and deliver, or cause to be delivered, to Seller the following:

(i) the Estimated Purchase Price by wire transfer of immediately available funds to an account or accounts designated by Seller in writing at least three (3) Business Days prior to the Closing Date;

(ii) the Bill of Sale;

(iii) the Assignment and Assumption Agreement;

(iv) those documents required to be delivered to Seller by Purchaser pursuant to Article 9 or in accordance with the provisions of any Ancillary Agreement; and

(v) evidence, in form and substance reasonably satisfactory to Seller, demonstrating that Purchaser has obtained Purchaser's Regulatory Approvals.

(c) Subject to the occurrence of and contemporaneously with the Closing, each Party shall execute and deliver, or cause to be executed and delivered, such of the Ancillary Agreements which such Party is required to execute and deliver, or cause to be executed and delivered, as applicable, at or upon the Closing and which such Party has not previously executed and delivered, or caused to be executed and delivered, as applicable.

**Section 3.2 Base Purchase Price.** The base purchase price for the Purchased Assets being sold shall be Four Hundred and Sixty-One Million and Three Hundred Thousand Dollars (U.S. \$461,300,000.00) (such price on the Closing Date being referred to as the "*Base Purchase Price*").

**Section 3.3 Adjustments to Base Purchase Price.** The Base Purchase Price shall be subject to such adjustments as are specified in this Section 3.3 and as may occur under the provisions of Section 3.5 (this Section 3.3 and Section 3.5 being referred to as the "*Adjustment Sections*," and the Base Purchase Price as so adjusted is herein referred to as the "*Purchase Price*"). The Base Purchase Price shall be adjusted to account for (i) the items prorated as of the Closing Date pursuant to Section 3.4 and (ii) any Nonassignable Assets pursuant to Section 6.17.

(a) The Base Purchase Price shall be adjusted to account for the items prorated as of the Closing Date pursuant to Section 3.4.

**Section 3.4 Prorations.**

(a) Purchaser and Seller agree that, except as otherwise specifically provided in this Agreement, (i) all of the prepaid items (excluding all Taxes and except specifically as to Property Taxes, which shall be handled in the manner provided in Section 6.6) incurred by Seller prior to the Closing Date but on account of periods both prior to and following the Closing Date, shall be prorated and charged as of the Closing Date, without any duplication of payment under the Purchased Project Contracts or this Agreement, with Seller liable to the extent such items relate to any time periods ending on or prior to the Closing Date, and Purchaser liable to the extent such items relate to periods after the Closing Date (measured in the same units used to compute the item in question and otherwise measured by calendar days) including, subject to Section 2.1(e), payments for supplies delivered after the Closing Date whether or not ordered prior to the Closing Date, and (ii) all unpaid liabilities and obligations, as of the Closing Date, to pay for, purchase or acquire assets, goods, raw materials, supplies or services ordered by Seller in the Ordinary Course of Business prior to the Closing Date, shall be prorated and charged as of the Closing Date, without any duplication of payment under the Purchased Project Contracts or this Agreement, with Seller liable to the extent such items were received and consumed during any time periods ending on or prior to the Closing Date, and Purchaser liable for all other such liabilities and obligations; provided, in each case, that, notwithstanding anything to the contrary herein, Purchaser shall not pay any amount under this Section 3.4 that constitutes an Excluded Liability, and Seller shall not pay any amount under this Section 3.4 that constitutes an Assumed Liability.

(b) In connection with the prorations referred to in Section 3.4(a), in the event that actual figures are not available at the Closing Date, the proration shall be based upon the applicable amounts accrued through the Closing Date or paid for the most recent year or other appropriate period for which such amounts paid are available. All prorated amounts shall be recalculated and paid to the appropriate Party within thirty (30) days after the date that the previously unavailable actual figures become available and, in any event, Seller or Purchaser, as applicable, shall provide written notice to the other Party within three (3) months from the Closing Date with respect to any items that will be prorated hereunder. Seller and Purchaser shall furnish each other with such documents and other records as may be reasonably requested in order to confirm all proration calculations made pursuant to this Section 3.4.

**Section 3.5 Procedures for Closing and Post-Closing Adjustments.**

(a) At least twenty (20) but not more than thirty (30) calendar days prior to the anticipated Closing Date, Seller shall prepare and deliver to Purchaser an estimated closing statement (the "*Estimated Closing Statement*") that shall set forth Seller's best estimate of all estimated adjustments to the Base Purchase Price required by this Agreement to be made as of the Closing Date (the "*Estimated*

*Closing Adjustment*"). Within ten (10) calendar days after the delivery of the Estimated Closing Statement by Seller to Purchaser, Purchaser may object in good faith to the Estimated Closing Adjustment in writing. If Purchaser objects in good faith to the Estimated Closing Adjustment within such ten (10)-calendar day period, the Parties shall attempt to resolve their differences by negotiation. If the Parties are unable to reach resolution prior to the anticipated Closing Date (or if Purchaser does not timely object to the Estimated Closing Adjustment as provided above), the Base Purchase Price shall be adjusted at the Closing by the amount of the Estimated Closing Adjustment. The Base Purchase Price adjusted by the Estimated Closing Adjustment or such other amount agreed to by the Parties shall be the "*Estimated Purchase Price*".

(b) As soon as practicable after the Closing Date but not later than sixty (60) calendar days after the Closing Date, Seller shall prepare and deliver to Purchaser a final closing statement (the "*Post-Closing Statement*") that shall set forth Seller's determination of all actual adjustments to the Base Purchase Price required by this Agreement to be made as of the Closing Date to the extent not reflected in the Estimated Purchase Price (the "*Proposed Post-Closing Adjustment*"). The Post-Closing Statement shall be prepared using substantially the same accounting principles, policies, methods and procedures as Seller used in connection with the calculation or determination of the items reflected on the Estimated Closing Statement. Seller and Purchaser agree to cooperate, and will cause their and their Affiliates' agents, representatives and personnel to cooperate, to exchange information and material used to prepare or necessary for Seller to prepare, the Post-Closing Statement and information relating thereto.

(c) Within thirty (30) calendar days after the delivery of the Post-Closing Statement by Seller to Purchaser, Purchaser may object in good faith to the Proposed Post-Closing Adjustment in writing, stating in reasonable detail each of its objections thereto and the basis therefor and its proposed calculation of any disputed adjustment. To the extent any amounts are undisputed or not timely objected to, the Estimated Purchase Price shall be further adjusted (the "*Initial Post-Closing Adjustment*") by the amount of the Proposed Post-Closing Adjustment not in dispute or not timely objected to, effective as of the earlier of the date Seller receives Purchaser's written objections to the Proposed Post-Closing Statement or the date such objections are due.

(d) If Purchaser objects in good faith to any portion of the Proposed Post-Closing Adjustment as provided above, the Parties shall attempt to resolve such objection by negotiation, and to the extent the Parties are unable to resolve any such objection, then the Independent Accounting Firm shall be retained to resolve all remaining objections. The Parties shall submit in addition such memoranda, arguments, briefs and evidence in support of their respective positions, and in accordance with such procedures, as the Independent Accounting Firm may determine.

(e) Within twenty (20) Business Days following the due date of such submissions, as to each objection to the Estimated Purchase Price, the Independent Accounting Firm shall resolve all remaining objections (and only such matters) on a timely basis. Such determination by the Independent Accounting Firm shall be final and binding between the Parties as to such adjustments of the Estimated Purchase Price and shall not be subject to further challenge by the Parties.

(f) Upon the determination of the appropriate adjustments, the Parties shall effectuate such adjustments by including them in the payments to occur at the Closing or, if such adjustments result in payments being due from one Party to the other after the Closing, by the Party from whom such payment is due delivering the payment to the other Party no later than ten (10) Business Days after such determination, by wire transfer in immediately available funds or in any other manner as reasonably requested by the payee, together with interest thereon from the Closing Date to the date of payment at a rate of interest equal to the rate payable under the Prompt Payment Act, 31 U.S.C. Section

3901 et seq. In each case, the recipient Party shall designate the account to which such payment is to be made at least two (2) Business Days prior to the date such payment is due.

(g) Subject to the foregoing, the Independent Accounting Firm may determine the issues in dispute following such procedures, consistent with the provisions of this Agreement, as it deems appropriate to the circumstances and with reference to the amounts in issue. The Parties do not intend to impose any particular procedures upon the Independent Accounting Firm, it being the desire of the Parties that any such disagreement shall be resolved as expeditiously and inexpensively as reasonably practicable. Each of the Parties shall provide the Independent Accounting Firm with such reasonable access to documents and personnel as the Independent Accounting Firm may reasonably request and otherwise shall cooperate with the Independent Accounting Firm in the conduct of its work under this Section 3.5. The Independent Accounting Firm shall have no liability to the Parties in connection with services, except for acts of bad faith, willful misconduct or gross negligence, and the Parties shall provide such indemnities to the Independent Accounting Firm as it may reasonably request consistent with the foregoing.

(h) The fees and disbursements of the Independent Accounting Firm for the resolution of any dispute sent to such firm shall be paid one-half by Seller and one-half by Purchaser.

**Section 3.6 Allocation of Purchase Price.** The Purchase Price and the Assumed Liabilities shall be allocated among the Purchased Assets in accordance with an allocation proposed by Seller and reasonably acceptable to Purchaser, which shall be prepared in accordance with Section 1060 of the Code and delivered by Seller to Purchaser within ninety (90) days after the Purchase Price has been determined ("*Final Allocation*"). Seller (and its Affiliates) will, at their own cost, file Internal Revenue Service Form 8594 and all other Tax Returns, consistently with the allocation of the Purchase Price and the Assumed Liabilities to the Purchased Assets as provided in accordance with this Section 3.6, as necessary for Seller or its Affiliates' tax filings. Each Party agrees promptly to provide the other with any additional information and reasonable assistance required to complete Form 8594 or as may be required under applicable Law to report the Final Allocation.

## ARTICLE 4

### REPRESENTATIONS AND WARRANTIES OF SELLER

Seller represents and warrants to Purchaser, as of the Effective Date and as of the Closing Date, except as set forth in the Schedules prepared by Seller, as follows:

**Section 4.1 Organization and Existence.** Seller is a limited liability company, duly formed, validly existing and in good standing under the laws of the State of Delaware, and has all requisite power and, subject to any required Bankruptcy Court approval, authority to own, use, lease, operate and transfer its properties and to carry on the Business as now being conducted. Seller is duly qualified to do business and is in good standing in all jurisdictions in which Seller is conducting activities of the Business, including the State of Mississippi; except where such failure to be in good standing would not, individually or in the aggregate, be reasonably likely to have a Material Adverse Effect.

**Section 4.2 Execution, Delivery and Enforceability.** Subject to any required Bankruptcy Court approval, Seller has all requisite limited liability company power and authority to execute and deliver, and perform its obligations under, this Agreement and the Ancillary Agreements to which it is or becomes a party and to consummate the Transactions. Subject to any required Bankruptcy Court approval, the execution and delivery by Seller of this Agreement and of the Ancillary Agreements to which it is or becomes a party, the performance by Seller of its obligations hereunder and thereunder and the

consummation by Seller of the Transactions, have been duly and validly authorized by all necessary limited liability company action required on the part of Seller and no other action is required on the part of Seller or its members to give effect to Seller's obligations hereunder and thereunder. Subject to the entry and effectiveness of the Bidding Procedures Order and the Sale Approval Order, and assuming that this Agreement and the Ancillary Agreements to which Purchaser is or becomes a party constitute valid and binding obligations of Purchaser, this Agreement constitutes, and the Ancillary Agreements to which Seller is or becomes a party when executed and delivered by it shall constitute, the valid and binding obligations of Seller, enforceable against it in accordance with its and their respective terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

**Section 4.3 No Violation.** No Consent, approval, authorization of, declaration, filing or registration with any Governmental Authority is required to be made or obtained by Seller in connection with the execution, delivery and performance by Seller of this Agreement and the Ancillary Agreements and the consummation by Seller of the Transactions contemplated by this Agreement and the Ancillary Agreements to which it is or becomes a party, other than: (i) Consents, approvals, authorizations of, declarations or filings with, the Bankruptcy Court ("*Bankruptcy Court Requirements*"), (ii) Seller's Regulatory Approvals, (iii) the filing of required notifications under the HSR Act and the receipt of any necessary approvals thereunder, in each case if applicable, and (iv) other approvals, Consents, declarations, filings and registrations, set forth in Schedule 4.3. The items referred to in clauses (i), (ii) and (iii) are hereinafter referred to as the "*Third Party Requirements*" and the items referred to in clause (iv) above are hereinafter referred to as the "*Seller's Consents*".

**Section 4.4 Compliance with Laws.** To Seller's Knowledge, Seller is not (by virtue of any past or present action, omission to act, Project Contract or any occurrence or state of facts whatsoever) in violation or in breach of any provision or term of any Law applicable to Seller, the Project, the Project Site, or the conduct of the Business, except where such violation would not reasonably be expected to have a Material Adverse Effect.

**Section 4.5 Permits.** Except for the Permits listed on Schedule 2.2(b), Schedule 2.1(f) sets forth all material Permits required by Law for the ownership, lease and operation by Seller of the Purchased Assets, the Project and the Project Site, as operated by Seller on the Effective Date, except for such Permits the failure of which to obtain or maintain would not reasonably be expected to have a Material Adverse Effect. Except as set forth in Schedule 4.5, each material Purchased Permit is held by Seller and is valid and in full force and effect. Except as set forth in Schedule 4.5, Seller is in compliance with the Purchased Permits and all of its obligations with respect thereto, except to the extent that any such failure to comply would not reasonably be expected to have a Material Adverse Effect.

**Section 4.6 Consents and Approvals.** Subject to entry and effectiveness of the Bidding Procedures Order and the Sale Approval Order, assuming that all other Third Party Requirements are satisfied, made or obtained and remain in full force and effect, upon receipt of the Consents, approvals and authorizations listed in Schedule 4.3 and except as set forth in Schedule 4.6, none of the execution, delivery nor performance of this Agreement and the Ancillary Agreements to which Seller is or becomes a party by Seller, will:

- (a) violate, or conflict with, or result in a breach of, any provisions of the certificate of formation, limited liability company agreement or other organizational documents of Seller;
- (b) (i) result in a default (or give rise to any right of termination, purchase, first refusal, cancellation, acceleration or guaranteed payment) under, or conflict in any material respect with,

or result in a material breach of, any of the terms, conditions or provisions of any Project Contract or any note, bond, mortgage, loan agreement, deed of trust, indenture, license or agreement or other instrument or obligation to which Seller is a party or by which Seller or any of the Purchased Assets is bound or (ii) violate in any material respect any Law applicable to Seller or the Purchased Assets, except, in the case of clauses (i) and (ii) above, for such defaults (or rights of termination, purchase, first refusal, cancellation, acceleration or guaranteed payment), conflicts, breaches or violations which (x) would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect or (y) are excused by or unenforceable as a result of the filing of the Bankruptcy Case or the applicability of any provision or any applicable law of the Bankruptcy Code; or

(c) result in a material Encumbrance on the Purchased Assets, other than Permitted Encumbrances.

**Section 4.7 Litigation.** (i) Except as raised in connection with the pendency of the Bankruptcy Case and except as set forth in Schedule 4.7, as of the Effective Date, there is no suit, action, proceeding or investigation (whether at law or equity, before or by any Governmental Authority, or before any arbitrator) pending or, to the Knowledge of Seller, threatened against or affecting Seller (collectively, "*Seller Litigation*"), the outcome of which would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, nor is there any Order outstanding against Seller that would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, nor is there any suit, action, proceeding or investigation pending or, to the Knowledge of Seller, threatened that challenges or seeks to enjoin, alter or delay the Transactions; and (ii) assuming the entry and effectiveness of the Bidding Procedures Order and the Sale Approval Order, Purchaser shall not be subject to claims, litigation or liabilities in connection with the consummation of the sale of the Purchased Assets as contemplated by this Agreement.

**Section 4.8 Project Contract Matters.**

(a) Seller has made available complete and accurate copies of all Purchased Project Contracts (including all amendments, modifications, supplements, schedules and exhibits thereto material to Seller) to Purchaser.

(b) Each of the Purchased Project Contracts is valid, binding and, subject to payment of all Cure Amounts payable to effectuate, pursuant to the Bankruptcy Code, the assumption and assignment to Purchaser of such of those Purchased Project Contracts which are also Assumed Contracts under the Sale Approval Order, if applicable, enforceable against Seller, to the extent set forth therein, and, to Seller's Knowledge, the other parties thereto, in accordance with its terms, in each case except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles, and is in full force and effect. Except as set forth in Schedule 4.8(b)(i), and other than with respect to monetary defaults by Seller under Purchased Project Contracts that are curable by payment of all Cure Amounts payable to effectuate, pursuant to the Bankruptcy Code, the assumption and assignment to Purchaser of such Purchased Project Contracts under the Sale Approval Order, if applicable, Seller, and to Seller's Knowledge each of the other parties thereto, has performed all obligations required to be performed by it to date under, and is not in default in respect of, any of such Purchased Project Contracts, and there is not a default thereunder or claim of default and there has not occurred any event which, with the passage of time or the giving of notice or both, would constitute a default thereunder, on the part of Seller, or to Seller's Knowledge, on the part of any other party thereto; in each case, other than where the failure to perform or such default would not, individually or in the aggregate, be reasonably likely to have a Material Adverse Effect. Except as set forth in Schedule 4.8(b)(ii), and other than with respect to monetary defaults by Seller under Purchased Project Contracts

that are curable by payment of all Cure Amounts payable to effectuate, pursuant to the Bankruptcy Code, the assumption and assignment to Purchaser of such Purchased Project Contracts under the Sale Approval Order, if applicable, to Seller's Knowledge, Seller has received no written claim or notice from any other party to any such Purchased Project Contracts that Seller has breached any obligations to be performed by it thereunder, where the consequence of such breach or default would reasonably be expected to have a Material Adverse Effect. Schedule 4.8(b)(iii) identifies all Post-Petition Contracts included within the Purchased Project Contracts other than open purchase orders or other Contracts that do not meet the requirements of Purchased Project Contracts and which were entered into in the Ordinary Course of Business. Except as set forth in Schedule 4.8(b)(iv), none of the Post-Petition Contracts included within the Purchased Project Contracts contains any provisions restricting its assumption and assignment to Purchaser pursuant to the terms of this Agreement.

(c) Except for the Excluded Project Contracts, the Purchased Project Contracts and Permitted Encumbrances, there are no contracts, licenses or any other written agreements relating to the Purchased Assets that, after Closing, will result in the imposition of any material liability or obligation on Purchaser or the Purchased Assets.

**Section 4.9 Tangible Personal Property and Inventory.** Seller has, in all materials respects, good and marketable title to, or a valid leasehold interest in, or valid rights to use, the Tangible Personal Property and Inventory, free and clear of all Encumbrances, except Permitted Encumbrances and other minor encumbrances that in the aggregate do not materially interfere with the present use thereof.

**Section 4.10 Owned Real Property; Easements.**

(a) Schedule 2.1(a) lists all of the Owned Real Property. Schedule 2.1(b) lists each of the Easements. Seller or Southaven Properties, as applicable, has, and shall convey to Purchaser at the Closing, (i) with respect to the Owned Real Property, good, marketable, indefeasible and insurable (at ordinary rates) fee simple title of record in all of the Owned Real Property, free and clear of all Encumbrances, except Permitted Encumbrances, and (ii) with respect to the Easements, valid title in its rights as grantee, free and clear of all Encumbrances, except Permitted Encumbrances.

(b) True and correct copies of the existing title insurance policies, documents referenced in such policies and current as-built surveys (collectively, the "Survey") related to the Real Property have been made available to Purchaser. Seller or Southaven Properties, as applicable, is in possession of all Real Property. There are no outstanding options or rights of first refusal to purchase the Owned Real Property or Easements or any portion thereof or interest therein, or similar Encumbrances pertaining to the Owned Real Property or Easements, except Permitted Encumbrances, and there are no tenants under any written leases on the Owned Real Property.

(c) Except as set forth in Schedule 4.10, as of the Effective Date, Seller has not received actual written notice of any proceedings pending or, to the Knowledge of Seller, any threatened condemnation of, or for the reduction of (or any contemplated increase in) the assessed valuation of, the Purchased Assets.

(d) Except as set forth in Schedule 4.10, none of the Easements requires any Consent of the grantor to the sale, conveyance, assignment, transfer or delivery thereof to Purchaser.

(e) As of the Effective Date, Seller has not received actual written notice from any Governmental Authority having the power of condemnation or eminent domain over the Real Property that it has commenced or, to Seller's Knowledge, intends to exercise the power of condemnation, eminent domain or a similar power with respect to all or any part of the Real Property.

**Section 4.11 Leased Real Property.** Seller has no Leased Real Property.

**Section 4.12 Condition and Sufficiency of Purchased Assets.**

(a) Except as set forth in Schedule 4.12(a), all of the Tangible Personal Property and Purchased Inventory, and each appurtenance to the Owned Real Property, including all buildings, fixtures, component parts, other constructions and other improvements thereon and thereto, is, in all material respects, in good operating condition and repair, subject only to ordinary wear and tear, has been maintained, in all material respects, by Seller since May 30, 2003 in accordance with Good Industry Practices, and is reasonably suitable for its present use, reasonable wear and tear and routine maintenance excepted; provided that Seller makes no representations or warranties to Purchaser as to the absence of latent defects or any other deficiency, or damage, wear or tear not discovered or reasonably discoverable in the course of the most recently conducted routine inspection of the Project conducted in accordance with Good Industry Practices.

(b) Except (i) to the extent any Purchased Project Contract or Purchased Permit may not be assigned or may not be assignable in whole or in part to Purchaser, (ii) for changes occurring after the Effective Date in the Ordinary Course of Business and the provisions of this Agreement, (iii) items of movable property readily available commercially, (iv) Fuel, (v) the Project Insurance Policies owned by Seller or its Affiliates, (vi) the Excluded Assets set forth in Part I of Schedule 4.12(b) and (vii) any approvals required for Purchaser's operation of the Project that were not required for Seller as of the Effective Date, the Purchased Assets constitute in all material respects all of the assets, properties, rights (including any real property rights) and interests used in connection with the operation of the Project as of the Effective Date and are sufficient for the continued operation of the Project in substantially the same manner as operated by Seller as of the Effective Date. Except as set forth in Part II of Schedule 4.12(b), as of the Effective Date, there have been no material changes in the operation of the Project since May 30, 2003.

**Section 4.13 Intellectual Property.** Any and all registered patents, trademarks, and copyrights, and applications therefor, owned by Seller or its Affiliates and used in connection with the Business or the Project are set forth in Part I of Schedule 4.13. Except as set forth in Part II of Schedule 4.13 and except as would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect: (i) Seller (A) owns, free and clear of all Encumbrances, except Permitted Encumbrances, or (B) pursuant to the terms of the Purchased Project Contracts listed or described in Part III of Schedule 4.13 and the Excluded Project Contracts listed or described in Part IV of Schedule 4.13, otherwise possesses a valid right to use, all Intellectual Property Rights currently employed in the operation of the Business or the Project, as they are currently used or authorized to be used by or for Seller in connection with the Business or the Project, and (ii) to Seller's Knowledge, the business and activities of Seller and its Affiliates related to the Business or the Project, do not conflict with or infringe upon any valid and enforceable Intellectual Property Right of any other Person. As of the Effective Date, no Person has notified Seller or its Affiliates in writing that Seller's or its Affiliates' conduct of the Business or the Project infringes on or otherwise violates the Intellectual Property Rights of any Person and, to Seller's Knowledge, except as would not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, no Person is infringing on or violating any Intellectual Property Rights owned by Seller and used in connection with the Business or the Project. All Intellectual Property Rights set forth in Part III of Schedule 4.13 consist of license and similar rights from third parties who are not Affiliates of Seller. Subject to receipt of the counterparty consents described in Part I of Schedule 4.13, and except with respect to any shrink-wrap, click-wrap, or off-the-shelf software, upon entry by the Bankruptcy Court of the Sale Approval Order, Seller has the right to provide and transfer to Purchaser for Purchaser's use in connection with the Business and the Project all of the Purchased Intellectual Property.

**Section 4.14 Brokers.** Except for Houlihan Lokey Howard & Zukin, whose fees will be paid by Seller on the Closing Date, no agent, broker, finder, investment or commercial banker, or any other Person is, has earned or will be entitled to any broker's, finder's or similar fee, commission or payment arising in connection with this Agreement or any of the Transactions as a result of any agreement, commitment or action by Seller or any Affiliate thereof.

**Section 4.15 Environmental Matters.**

(a) Except as set forth in Schedule 4.15(a), to Seller's Knowledge, during the period of Seller's ownership or control of the Project or the Project Site: (i) the Project is in material compliance with applicable Environmental Laws, including Environmental Permits issued pursuant thereto; (ii) no Environmental Conditions exist at, on, or under the Project Site (including any resulting from any disposal, release or migration of Hazardous Substances onto the Project Site), except those that are in compliance with Environmental Laws or for which Remediation has been substantially completed in material compliance with all Environmental Laws; (iii) no underground storage tanks are owned, operated, leased or used by Seller at the Project Site; and (iv) all material Permits required under Environmental Laws for conducting the operations of the Project or the Project Site as currently being operated (complete copies of each of which have been heretofore provided to Purchaser), have been obtained or applied for and, to the extent obtained, are currently in full force and effect, and there are no liens or deed restrictions (other than Permitted Encumbrances) that have arisen or have been imposed pursuant to any Environmental Law on the Project or the Project Site.

(b) Except as disclosed in Schedule 4.15(b): (i) the Purchased Assets, the Project and the Project Site are not the subject of any pending or, to Seller's Knowledge, threatened Environmental Claims; and (ii) to Seller's Knowledge (A) Seller has disclosed to Purchaser all pending Environmental Claims with respect to the Project or the Project Site and (B) no circumstances or conditions exist which reasonably would be expected to give rise to an Environmental Claim with respect to the Project or Project Site.

(c) Seller has made available to Purchaser all material Environmental Reports that are within the possession or control of Seller, excluding any Environmental Reports in the possession or control of a Goldman Affiliate but not in the possession of Seller or any of its subsidiaries.

**Section 4.16 Tax Matters.**

(a) Seller or an Affiliate of Seller has prepared and timely filed all Tax Returns relating to the Business and the Purchased Assets required to be filed by Seller or any of its Affiliates with any Governmental Authority, and has paid in full all Taxes due and payable by Seller.

(b) With respect to all amounts in respect of Taxes imposed with respect to the Purchased Assets relating to all taxable periods (or portions thereof) ending on or before the Closing Date, all such amounts due and payable and required to be paid by Seller have been paid, and there are no liens for Taxes upon the Purchased Assets except for liens for Taxes not yet due.

**Section 4.17 Employee Matters.**

(a) The Employees as of the Effective Date are listed in Schedule 4.17(a). Except for the Employees, no other individuals work regularly at the Project Site and no other individuals employed by Seller or Seller's Affiliates perform substantially all of their work in support of the Project. To the Knowledge of Seller, all Employees are legally able to work in the United States.

(b) With respect to the Employees, and except as listed in Schedule 4.17(b), to Seller's Knowledge and in each case as would not reasonably be expected to result in a Material Adverse Effect, (i) Seller has properly classified each Employee as exempt or non-exempt under the Fair Labor Standards Act and has paid or properly accrued in the Ordinary Course of Business all wages and compensation due to Employees, including overtime pay, vacations or vacation pay, holidays or holiday pay, sick days or sick pay, and bonuses; (ii) Seller is in compliance with all applicable Laws; and (iii) there is no suit, action, investigation, charge, claim or proceeding pending or threatened.

(c) As of the Effective Date, none of Seller or any of its Affiliates is a party to any collective bargaining agreement or other union Contract applicable to any Employee. To Seller's Knowledge and except with respect to matters or events that have arisen or occurred since the Effective Date that have not resulted in, or would not be reasonably expected to result in, a Material Adverse Effect: no such collective bargaining agreement determines the terms and conditions of any Employee; no collective bargaining agent has been certified as a representative of any of the Employees; no representation campaign or election is now in progress with respect to any of the Employees; and no representation petition has been filed with the National Labor Relations Board. To the Knowledge of Seller, except as set forth in Schedule 4.17(c) and except with respect to matters or events that have arisen or occurred since the Effective Date that have not resulted in, or would not be reasonably expected to result in, a Material Adverse Effect, (i) no current or former Employees are represented by, and there are no union organizing efforts with respect to the Project or any Employees by, any union or labor organization; (ii) there is no labor strike, slowdown, sickout, dispute, lockout or work stoppage pending or threatened by any current or former Employees or any other Person relating to or affecting the Project; and (iii) there is no pending or threatened claim, complaint, grievance, or proceeding against Seller or any of its Affiliates arising out of or under any collective bargaining agreement which relates to or once related to current or former Employees or other Persons with respect to work performed in support of the Project.

**Section 4.18 Employee Benefit Plans.**

(a) Schedule 4.18 contains a complete list of all Employee Plans as of the Effective Date. No Employee Plan has terms requiring assumption thereof by Purchaser.

(b) There are no liabilities, breaches, violations or defaults under or with respect to any Employee Plan that could subject the Purchased Assets, Purchaser or any of Purchaser's employee benefit plans to any Encumbrance, tax, penalty or other liability that would result in, or could reasonably be expected to result in, a Material Adverse Effect.

**Section 4.19 Regulatory Status.** Seller is an exempt wholesale generator ("EWG") within the meaning of the Public Utility Holding Company Act of 2005.

**Section 4.20 Insurance Coverage.** Schedule 4.20 sets forth a complete and correct list, in all material respects, of all Project Insurance Policies on the Effective Date. As of the Effective Date, all such policies, bonds and arrangements are outstanding and in full force and effect in accordance with their terms, and Seller and its Affiliates have paid all premiums or other amounts due and owing to the insurers in respect of the Project Insurance Policies.

## ARTICLE 5

### REPRESENTATIONS AND WARRANTIES OF PURCHASER

Purchaser represents and warrants to Seller, as of the Effective Date and as of the Closing Date, except as set forth in the Schedules prepared by Purchaser, as follows:

**Section 5.1 Organization and Existence.** Purchaser is a corporate agency and instrumentality of the United States of America, duly organized and validly existing under the Tennessee Valley Authority Act of 1933, as amended, and has all requisite power and authority under the laws of the United States of America and under its governing documents to enter into, execute and deliver and perform its obligations under this Agreement and the Ancillary Agreements and to consummate the Transactions.

**Section 5.2 Execution, Delivery and Enforceability.** The execution and delivery by Purchaser of this Agreement and of the Ancillary Agreements to which Purchaser is, or becomes a party, the performance by Purchaser of its obligations hereunder and thereunder and the consummation by Purchaser of the Transactions, have been duly and validly authorized by all necessary action required on the part of Purchaser and no other acts, approvals, or proceedings on its part are necessary to authorize the same. Notwithstanding TVA's status as a corporate agency and instrumentality of the United States of America created by and existing under and by virtue of the Tennessee Valley Authority Act of 1933, as amended, and as acting as to Real Property as agent and in the name of the United States of America, assuming the due authorization, execution and delivery by Seller of this Agreement and the Ancillary Agreements to which Seller is or becomes a party, this Agreement constitutes, and the Ancillary Agreements to which Purchaser is or becomes a party when executed by Purchaser shall constitute, the valid and legally binding obligations of Purchaser, enforceable against Purchaser in accordance with its and their respective terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

**Section 5.3 No Violation.** Subject to Purchaser obtaining Purchaser's Regulatory Approvals and Purchaser's Consents, and except for compliance with the requirements of the HSR Act, if applicable, neither the execution and delivery by Purchaser of this Agreement or any of the Ancillary Agreements to which Purchaser is or becomes a party, nor Purchaser's performance or compliance with any provision hereof or thereof, nor Purchaser's consummation of the Transactions will:

(a) violate, or conflict with, or result in a breach of any provisions of the organizational documents of Purchaser;

(b) (i) result in a material default (or give rise to any right of termination, cancellation, acceleration or guaranteed payment) under, or conflict in any material respect with, or result in a material breach of, any material terms, conditions or provisions of any note, bond, mortgage, loan agreement, deed of trust, indenture, license or agreement or other instrument or obligation to which Purchaser is a party or by which Purchaser is bound, or (ii) violate in any material respect any Law applicable to Purchaser or any of its assets, except, in the case of clauses (i) and (ii) above, for such defaults (or rights of termination, cancellation, acceleration or guaranteed payment), conflicts or breaches which, individually or in the aggregate, could not reasonably be expected to have a material adverse effect on Purchaser's authority, right or ability to perform its obligations under this Agreement or any Ancillary Agreement or to consummate the Transactions;

(c) violate, conflict with or result in a breach of any Law, Order or Permit applicable to Purchaser or any of its assets; or

(d) require the Consent of or from any Person which, if not obtained, would prevent Purchaser from performing its obligations hereunder, or require the declaration, filing or registration with or notice to, authorization of, Consent or approval from any Person which, if not made, would prevent, materially delay or materially impair Purchaser's performance of its obligations hereunder or materially impair Purchaser's authority, right or ability to consummate the Transactions.

**Section 5.4 Brokers.** No agent, broker, finder, investment or commercial banker, or any other Person is, has earned or will be entitled to any broker's, finder's or similar fee, commission or payment arising in connection with this Agreement or any of the Transactions as a result of any agreement, commitment or action by Purchaser.

**Section 5.5 Litigation.** Except as raised in connection with the pendency of the Bankruptcy Case and except as set forth in Schedule 5.5, there is no claim, action, proceeding or investigation pending or, to Purchaser's Knowledge, threatened against Purchaser before any arbitrator or Governmental Authority or any Order of any arbitrator or Governmental Authority binding on Purchaser that, individually or in the aggregate, would reasonably be expected to result, or has resulted, in (a) the institution of legal proceedings to prohibit or restrain the performance by Purchaser of Purchaser's obligations under this Agreement or any of the Ancillary Agreements to which Purchaser is or becomes a party, or the consummation of the Transactions, (b) a claim against Seller or any of its Affiliates for damages as a result of Purchaser entering into this Agreement or any of the Ancillary Agreements to which Purchaser is or becomes a party or the consummation by Purchaser of the Transactions or (c) a material delay in or material impairment of Purchaser's performance of its obligations under this Agreement or any of the Ancillary Agreements to which Purchaser is or becomes a party or a material impairment of the authority, right or ability of Purchaser to consummate the Transactions.

**Section 5.6 Financing.** Purchaser has sufficient immediately available funds to pay, in cash, the Purchase Price and all other amounts payable pursuant to this Agreement, the O&M Termination Agreement and the Ancillary Agreements or otherwise necessary to consummate the Transactions contemplated hereby and thereby.

**Section 5.7 No Additional Representations and Warranties.** Purchaser acknowledges and agrees that, except as otherwise expressly set forth in this Agreement or any Ancillary Agreement, (a) Seller does not make any representations or warranties about the Purchased Assets, the Project, the Project Site or the Business, and (b) the Purchased Assets shall be transferred to Purchaser in their condition at the time of Closing without any further representation or warranty of condition whatsoever. Notwithstanding the foregoing, nothing in this Section 5.7 shall in any way diminish the liability of Seller with respect to any breach of a representation or warranty expressly set forth in this Agreement or any Ancillary Agreement.

**Section 5.8 Solvency.** Upon the consummation of the transactions contemplated by this Agreement: (i) Purchaser will not be insolvent; (ii) Purchaser will not be left with unreasonably small capital; (iii) Purchaser will not have incurred debts beyond its ability to pay such debts as they mature; (iv) the capital of Purchaser will not be impaired; and (v) immediately following Closing, Purchaser will have sufficient capital to continue the Business as a going concern (it being understood that Purchaser will have no obligation to continue all or any portion of the Business as a going concern, subject to Purchaser's obligations to perform covenants and otherwise fulfill its commitments made pursuant to this Agreement).

**Section 5.9 Compliance with Law.** Purchaser is in compliance with all Laws applicable to it, except with respect to those violations that could not reasonably be expected to result in the issuance of an Order restraining, enjoining or otherwise prohibiting Purchaser from consummating the Transactions.

**Section 5.10 Anti-Money Laundering.** If and to the extent applicable, Purchaser is in material compliance with all applicable provisions of: (i) the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-57) ("*USA PATRIOT Act*"); (ii) Executive Order No. 13224 on Terrorist Financing, effective September 24, 2001, and relating to Blocking Property and Prohibited Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism; (iii) the International Emergency Economic Power Act (50 U.S.C. 1701 et seq.), and any applicable implementing regulations; (iv) the Trading with the Enemy Act (50 U.S.C. 50 et seq.), and any applicable implementing regulations; and (v) all applicable legal requirements relating to anti-money laundering, anti-terrorism and economic sanctions in the jurisdictions in which such Purchaser operates or does business. Neither Purchaser nor any of its directors, officers or Affiliates is identified on the United States Treasury Department Office of Foreign Asset Control's ("*OFAC*") list of "Specially Designated Nationals and Blocked Persons" (the "*SDN List*") or otherwise the target of an economic sanctions program administered by OFAC, and Purchaser is not affiliated in any way with, or providing financial or material support to, any such persons or entities. Purchaser agrees that should it, or any of its directors, officers or Affiliates be named at any time prior to the Closing on the SDN List, Purchaser shall inform Seller in writing immediately.

**Section 5.11 Adequate Assurance of Future Performance.** Purchaser has provided or will be able to provide, at or prior to the Closing, adequate assurance of its future performance under each Assumed Contract to the parties thereto (other than Seller) in satisfaction of Section 365(f)(2)(B) of the Bankruptcy Code, and no other or further assurance will be necessary thereunder with respect to any Assumed Contract.

## ARTICLE 6

### COVENANTS OF EACH PARTY

**Section 6.1 Efforts to Close.** Subject to the terms and conditions herein, each of the Parties shall cooperate, and shall cause their agents and representatives to cooperate, with the other and use Commercially Reasonable Efforts to consummate and make effective, as soon as reasonably practicable, the Transactions, including the satisfaction of all conditions to the Closing set forth herein. Such actions shall include, in the case of Seller, exercising Commercially Reasonable Efforts to obtain each of the Consents of any Governmental Authority or other Person which is required for the Closing to occur or required to transfer, convey and assign to Purchaser at the Closing any and all rights of Seller, including contractual rights, necessary to operate the Purchased Assets, including Seller's Regulatory Approvals, Seller's Consents and the Title Policy, and effecting all other necessary notifications, registrations and filings, including filings under applicable Laws, including the HSR Act, if applicable, and all other necessary filings with any Governmental Authority having jurisdiction over Seller or the Project. Such actions shall include, in the case of Purchaser, exercising Commercially Reasonable Efforts to obtain each of the Consents of any Governmental Authority or other Person which is required for the Closing to occur, including Purchaser's Regulatory Approvals and Purchaser's Consents, and effecting all other necessary notifications, registrations and filings, including filings under applicable Laws, including the HSR Act, if applicable, and all other necessary filings with any Governmental Authority having jurisdiction over Purchaser. Each Party will provide the other with copies of all written communications received by it from Governmental Authorities relating to the approval or disapproval of this Agreement, the Ancillary Agreements or the Transactions and periodic updates with respect to the status of obtaining such approval.

**Section 6.2 Expenses.** Except as otherwise provided in any provision of this Agreement, all costs, fees and expenses incurred in connection with this Agreement and the Transactions, whether or not the Closing occurs, shall be paid solely by the Party incurring such expenses. Notwithstanding the

foregoing, (i) costs associated with preliminary title reports or commitments and the Title Policy and the endorsements thereto shall be borne by Purchaser; (ii) documentary, Purchased Project Contract and license transfer or assignment fees, if any, will be borne by Purchaser; (iii) Transfer Taxes will be borne by Purchaser, except that Seller shall bear the full cost of removing or releasing any Encumbrances on the Project Site or any of the Purchased Assets (such as, for illustrative purposes only, any mortgages or mechanic's or materialmen's liens) required to be removed or released prior to Closing in accordance with the terms of this Agreement; and (iv) the filing fee payable in connection with any notifications required to be filed under the HSR Act and the rules and regulations promulgated thereunder with respect to the Transactions shall be borne by Purchaser. All such charges and expenses shall be promptly settled between the Parties at the Closing or upon termination or expiration of further proceedings of or under this Agreement, or with respect to such charges and expenses not determined as of such time, as soon thereafter as is reasonably practicable.

### **Section 6.3 Notice of Certain Events.**

(a) Prior to Closing, upon obtaining Knowledge of the same, Seller shall promptly notify Purchaser in writing of (i) any notice or other communication from any Governmental Authority in connection with or relating to the Transactions; (ii) any material damage, destruction or other casualty loss (whether or not covered by insurance) or any material emergency condition or unanticipated material maintenance or repair with respect to the Purchased Assets, (iii) any event or circumstance that makes any representation or warranty of Seller materially untrue, misleading or inaccurate and (iv) any fact or condition that is reasonably likely to cause the satisfaction of the conditions in Article 8 to be impossible or unlikely.

(b) Prior to Closing, upon obtaining Knowledge of the same, Purchaser shall promptly notify Seller in writing of (i) any notice or other communication from any Governmental Authority in connection with or relating to the Transactions; (ii) any material change in any condition with respect to the Purchased Assets, (iii) any event or circumstance that makes any representation or warranty of Purchaser materially untrue, misleading or inaccurate and (iv) any fact or condition that is reasonably likely to cause the satisfaction of the conditions in Article 9 to be impossible or unlikely.

**Section 6.4 Conduct Pending Closing.** Prior to consummation of the Transactions or the termination or expiration of this Agreement pursuant to its terms, unless Purchaser shall otherwise consent in writing (such consent not to be unreasonably withheld), and except (i) for actions which are required by Law, (ii) for reasonable actions taken in response to an emergency or force majeure event and promptly disclosed in writing to Purchaser, (iii) for actions which arise solely from or are related to and only affect the Excluded Assets or the Excluded Liabilities, (iv) as required by or resulting from the Bankruptcy Case or otherwise approved by the Bankruptcy Court, (v) as required to comply with its fiduciary duties as a debtor under Chapter 11 of the Bankruptcy Code or (vi) as otherwise contemplated by this Agreement or disclosed in Schedule 6.4, Seller shall (and, except with respect to clause (d)(i) below, where applicable, shall cause its Affiliates to):

(a) Operate and maintain the Project, or cause the Project to be operated and maintained, in all material respects in accordance with the Ordinary Course of Business consistent with Good Industry Practices, including (i) ensuring the provision of customary maintenance of the systems, equipment and machinery of the Project in compliance with the manufacturer's technical requirements and information and (ii) obtaining and maintaining all Emissions Allowances required under Environmental Laws for the operation of the Project and the Project Site, all as may be consistent with Section 6.10(a);

(b) Not materially amend, modify, terminate, renegotiate or, except as required by its terms, renew any Purchased Project Contract or waive any material default by or termination right against, or release, settle or compromise any material claim against, any other party to a Purchased Project Contract, in each case except in accordance with the Ordinary Course of Business;

(c) Not sell, lease, license, transfer or dispose of, or remove from the Project Site, or make or enter into any Contract for the sale, lease, license, transfer, disposition, or removal of, any material assets or properties (other than obsolete or worn out assets) which would be included in the Purchased Assets, except disposition of Consumables in the Ordinary Course of Business consistent with past practices and Good Industry Practices and any sale, lease, license, transfer, or disposition made to Purchaser;

(d) Not (i) incur any obligation for borrowed money or guarantee or otherwise become liable for the obligations of, or make any loan or advance to, any Persons, except as would after the Closing constitute an Excluded Liability, or (ii) delay beyond its due date the payment or discharge of any account payable or other liability that, upon or after the Closing, would be an Assumed Liability, provided that Seller may delay the payment or discharge of any liability or obligation the validity of which Seller is disputing or contesting in good faith, to the extent such delay is in compliance with Seller's obligations under Section 6.4(b) and could not reasonably be expected to adversely affect, in any material respect, the operations, maintenance or physical condition of the Project, and such liability or obligation, and any liability or obligation arising from Seller's delay in the payment or discharge thereof, constitute Excluded Liabilities;

(e) Except as otherwise required by the terms of any Employee Plan and applicable Law or as would not result in any liability for Purchaser, not (i) materially increase the rates payable for budgets for salaries, wages, employee benefits or any other aspect of compensation of any Employee prior to the Closing Date, except in the Ordinary Course of Business, or (ii) make any promise, directly or indirectly, to Employees (whether in writing or not) with respect to continued employment related to the Project; provided that (for the avoidance of doubt) Seller may enter into employment agreements and retention bonus plans, policies, or agreements with Employees so long as such plans, policies or agreements are deemed Excluded Liabilities and do not result in any liability or obligation of or for Purchaser;

(f) Use Commercially Reasonable Efforts to preserve the goodwill of all lessors, licensors, independent contractors, distributors, suppliers, Governmental Authorities and others having business relations with the Project or the Purchased Assets and otherwise maintain existing customary business relationships with any lessor, licensor, independent contractor, distributor, or supplier of Seller to the extent relating to the Project and customary relations with Governmental Authorities and Employees, each in accordance with the Ordinary Course of Business;

(g) Not resolve, settle, waive or compromise any Environmental Claim or any contingent liability or matter pending before a Governmental Authority or arbitrator relating to the Project or the Business, except to the extent that such resolution, settlement, waiver or compromise could not impose any post-Closing liabilities on Purchaser, require any post-Closing Remediation at Purchaser's expense or otherwise adversely impact Purchaser's ownership, operation or use of the Project, the Project Site or the Purchased Assets or conduct of the Business after the Closing;

(h) Not make any fundamental change to the Business;

(i) Not take any action that would result in the incurrence of any Encumbrance, other than Permitted Encumbrances, on the Project Site or Purchased Assets;

(j) Not take any action that would reasonably be expected to result in the alteration of the FERC regulatory status of the Project;

(k) Not enter into any material agreement or obligation with respect to the Business, except in the Ordinary Course of Business; and

(l) Not cancel, terminate, fail to renew or materially amend, modify or change any Permit;

(m) Not authorize or commit to do or agree to take, whether in writing or otherwise, any of the foregoing prohibited actions;

provided, however, that nothing in this Section 6.4 shall preclude Seller from (i) paying, prepaying or otherwise satisfying any liability, (ii) incurring any liability or obligation to any third party in connection with obtaining such party's Consent to any Transaction; provided that any and all such liabilities and obligations incurred under this clause (ii) shall be Excluded Liabilities, other than as set forth in Section 6.2, (iii) instituting, participating in, or completing any program designed to promote compliance or comply with applicable Laws or Good Industry Practices with respect to the Project or Purchased Assets or (iv) incurring liabilities reasonably required to be incurred in connection with the repair and restoration of Unit 2, or other damage to the Project.

#### **Section 6.5 Regulatory Approvals.**

(a) If and to the extent applicable, and subject to Section 6.1, as promptly as practicable (taking into account the possible expiration of any approval received) after the Effective Date, Seller and Purchaser shall each file or cause to be filed with the Federal Trade Commission and the Department of Justice all notifications and filings required to be filed under the HSR Act with respect to the Transactions. The Parties shall consult with each other as to the appropriate time of filing such notifications and filings and shall agree in good faith upon the timing of such filings and use Commercially Reasonable Efforts to cause the waiting periods under the HSR Act to terminate or expire at the earliest possible date after the date of filing.

(b) With respect to the necessary application with FERC pursuant to the Federal Power Act and the necessary application(s) to the Mississippi Department of Environmental Quality with respect to the Transactions, (i) Purchaser and Seller shall reasonably cooperate with one another as necessary and appropriate regarding such applications; (ii) any information provided by any Party to another Party relating to such applications will be provided in accordance with and subject to Section 6.5(b)(i); and (iii) Purchaser and Seller, as applicable, shall use good faith efforts to file such Section 203 application with FERC and such necessary application(s) with the Mississippi Department of Environmental Quality as soon as practicable and in any event (unless unexpected, material substantive legal or regulatory issues arise, including, for the avoidance of doubt, any material issues affecting the necessary application with FERC pursuant to Section 203 of the Federal Power Act arising from discussions with FERC staff prior to such application) within thirty (30) days from the Effective Date; provided, however, that nothing in this Section 6.5 shall be interpreted to require Seller to be an applicant or an intervenor in the necessary proceeding(s) before the Mississippi Department of Environmental Quality.

(c) Subject to Section 6.5(e), Purchaser shall, with respect to Purchaser's Regulatory Approvals, and Seller shall, with respect to Seller's Regulatory Approvals:

(i) promptly enter into negotiations, provide information or make proposals to the extent necessary and consistent with Commercially Reasonable Efforts to eliminate any concerns on the part of any Governmental Authority regarding the legality under any applicable Law of the consummation of the Transactions and provide such other information and communications to such Governmental Authorities or other Persons as such Governmental Authorities or other Persons may reasonably request in connection therewith;

(ii) use Commercially Reasonable Efforts to prevent the entry in a judicial or administrative proceeding brought by any Governmental Authority or any other Person for a permanent or preliminary injunction, temporary restraining order or other Order that would make consummation of the Transactions unlawful or that would prevent or delay such consummation;

(iii) provide counsel for the other Party reasonable opportunity to review in advance, and make reasonable comments on, any proposed joint written communication or joint filing with any Governmental Authority in connection with obtaining such approvals, and provide prompt notification when any waiver, consent, approval, authorization, filing or notice referred to is obtained, taken, made, given or denied, as applicable, and advise such counsel of any material communications with any Governmental Authority or other Person regarding any of the Transactions; and

(iv) take promptly, in the event that such an injunction or other Order has been issued in such a proceeding, any and all Commercially Reasonable Efforts, including the appeal thereof, the posting of a bond or the steps contemplated by Section 6.5(c)(i), necessary to vacate, modify or suspend such injunction or Order so as to permit such consummation on a schedule as close as possible to that contemplated by this Agreement.

(d) Purchaser shall have the primary responsibility for securing the transfer, reissuance or procurement of the Purchased Permits, Environmental Permits and Emissions Allowances held by Seller and required to be held by Purchaser for Purchaser's ownership and operation of the Project or the Project Site under Environmental Laws effective as of the Closing Date. Seller shall cooperate and assist Purchaser with, and cause its agents and representatives to cooperate with Purchaser and assist Purchaser with, the transfer, reissuance or procurement of Purchased Permits, Environmental Permits and Emissions Allowances, including by executing and delivering any required forms or providing timely and appropriate notices and information to Governmental Authorities for Purchaser to obtain all Purchased Permits, Environmental Permits and Emissions Allowances that are to be transferred to it, reissued or procured pursuant to Section 2.1(f) and Section 2.1(h). Purchaser and Seller further acknowledge and agree that such action may be required prior to, on or after the Closing.

(e) Notwithstanding anything herein to the contrary, nothing in this Agreement shall require Purchaser to dispose of or sell any assets or properties or businesses, hold separate particular assets or categories of assets or properties or businesses, or agree to dispose of or hold separate one or more assets or properties, or to take any other action that could have an adverse effect on Purchaser.

(f) Except as otherwise provided in this Agreement, with regards to the actions contemplated by this Section 6.5, each Party shall not (and in Seller's case, shall cause its Affiliates to not) take any action (i) that could reasonably be expected to adversely affect the approval of any Governmental Authority of any of the aforementioned filings or (ii) take any action which could reasonably be expected to materially delay the consummation of the transactions contemplated hereby or result in the failure to satisfy any condition to consummation of the transactions contemplated hereby.

### Section 6.6 Tax Matters.

(a) Pursuant to section 1146(c) of the Bankruptcy Code, the transactions contemplated by this Agreement are determined to be under or in contemplation of a plan to be confirmed under section 1129 of the Bankruptcy Code in that the net proceeds of the sale of the Project are essential and required to fund a chapter 11 plan and; therefore, are exempt from any transfer, stamp or similar tax or any so-called "bulk-sale" law in all necessary jurisdictions arising as a result of or in connection with the sale and transfer of the Project to Purchaser.

(b) With respect to Property Taxes, Seller shall be liable for all Property Taxes relating to the Purchased Assets for all prior Tax years and for the current Tax year on a pro rata basis up to and including the Closing Date, including any special assessments, ad valorem property Taxes, payment in lieu of ad valorem property Taxes or other comparable charges by Governmental Authorities. If any Taxes constitute liens on said property which are not due and payable at the date of such conveyance, Purchaser shall retain from the Purchase Price such sum as is sufficient to discharge Seller's pro rata share of said Tax liens and shall make payment therefrom so as to pay off such Tax liens, but Seller shall remain liable for any deficiency or be entitled to a refund of any excess in the amount so retained for Seller's pro rata share.

(c) From and after the Closing, Purchaser and Seller shall provide the other Party with such cooperation and assistance, and shall cause their agents and representatives, if any, to provide the other Party with such cooperation and assistance, as may reasonably be requested by the other Party in connection with the preparation or filing of any Tax Return, any audit or other examination by any Tax authority, or any judicial or administrative proceedings relating to liability for Taxes, or any claim for refund of Taxes (if not inconsistent with this Agreement) and each shall retain and provide the requesting Party with any records or information which may be relevant to such return, audit or examination, or proceedings and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. Any information obtained pursuant to this Section 6.6(c) or pursuant to any other Section providing for the sharing of information relating to or review of any Tax Return or other schedule relating to Taxes shall be kept confidential by the Parties. In any event, Seller shall not be required to furnish any information or data relating to any Affiliate.

(d) The amount of any refund or credit received with respect to Taxes attributable to any of the Purchased Assets shall be promptly paid by the Party receiving the refund or credit as follows: (i) to Seller if attributable to Taxes with respect to any Tax year or portion thereof ending on or before the Closing Date (or for any Tax year beginning before and ending after the Closing Date to the extent allocable to the portion of such period beginning before and ending on the Closing Date); and (ii) to Purchaser if attributable to any Tax year or portion thereof beginning after the Closing Date (or for any Tax year beginning before and ending after the Closing Date to the extent allocable to the portion of such period ending after the Closing Date).

(e) In the event that a dispute arises between the Parties as to the amount of Taxes, the Parties shall attempt in good faith to resolve such dispute, and any amount so agreed upon shall be paid to the appropriate Party.

**Section 6.7 Risk of Loss.** Purchaser will assume the risk of loss of the Purchased Assets on the Closing Date, and risk of loss shall remain with Seller at all times prior to the Closing Date; provided, however, that if, before the Closing, the Project, the Project Site or any significant Purchased Asset is destroyed or all or any portion(s) of the Project, the Project Site or any significant Purchased Asset suffers damage that constitutes a Material Adverse Effect that, in each case, cannot be cured prior to the Expiration Date (a "Casualty Event"), Seller shall notify Purchaser promptly in writing of the Casualty

Event and the facts and circumstances surrounding the Casualty Event, and shall provide notice (the "Casualty Insurance Notice"), when available, whether or not, and the extent to which, any losses sustained as a result of such Casualty Event are covered by one or more Project Insurance Policies then in effect with respect to, or applicable to, the Project. Within thirty (30) days after receipt of the Casualty Insurance Notice, Purchaser may elect, in its sole discretion, by written notice to Seller, either to (x) proceed with the Transactions (and Seller shall not be deemed to be in breach of this Agreement as a result of such Casualty Event), in which event Seller shall be required to transfer or cause to be transferred to Purchaser the proceeds (or the right to the proceeds) of applicable insurance (other than business interruption insurance) which Seller or any of its Affiliates are paid in connection with such Casualty Event; or (y) terminate this Agreement if any of Purchaser's conditions to Closing set forth in Article 8 would not, or could not, be satisfied as a result of such Casualty Event. If Seller fails to notify Purchaser of a Casualty Event within thirty (30) days after the occurrence of such Casualty Event, Purchaser may elect, in its sole discretion, by written notice to Seller, to terminate this Agreement.

**Section 6.8 Insurance.** Purchaser acknowledges that, effective upon the Closing, Seller or any Affiliate thereof shall terminate or modify the Project Insurance Policies to exclude coverage of the Purchased Assets by Seller or any Affiliate thereof, and as a result Purchaser shall be responsible at or before the Closing to obtain, at its sole cost and expense, such replacement insurance as it may desire.

**Section 6.9 Post Closing – Further Assurances.** At any time or from time to time after the Closing, each Party shall, upon the reasonable request of the other Party, execute and deliver any further instruments or documents, and exercise Commercially Reasonable Efforts to take such further actions as may reasonably be required, to fulfill and implement the terms of this Agreement or realize the benefits intended to be afforded hereby. For a period of seven (7) years after the Closing Date (or if requested in writing by Seller within seven (7) years after the Closing Date, until the closing of the examination of Seller's Tax Returns for all periods prior to and including the Closing Date, if later) Purchaser shall preserve in its possession (and shall cause any purchaser of the Purchased Assets to preserve in its possession) all books and records that constitute Purchased Assets. After the Closing, and upon prior reasonable request, each Party shall exercise Commercially Reasonable Efforts to cooperate with the other, at the requesting Party's expense (but including only out-of-pocket expenses to third parties and not the costs incurred by any Party for the wages or other benefits paid or payable to its officers, directors or employees in furnishing assistance), in furnishing non-privileged books and records (the disclosure of which would not cause a breach of an obligation of confidentiality to a third party) in connection with any actions, audits, proceedings or disputes involving the Purchased Assets (other than in connection with disputes between the Parties) and based upon Contracts, arrangements or acts of Seller or Purchaser which were in effect or occurred on or prior to the Closing Date and which relate to the Purchased Assets or the Business; provided that such access shall be during normal business hours and shall not interfere with Seller's, Seller's Affiliates' or Purchaser's operation of their respective businesses.

**Section 6.10 Information and Records.**

(a) Prior to the Closing, and with the understanding and agreement of Purchaser that all information obtained pursuant to this Section 6.10 shall be subject to the Confidentiality Agreement, Seller shall provide or cause to be provided to Purchaser and its officers, employees, counsel, accountants, consultants, and agents and representatives, upon reasonable notice, to the maximum extent permitted by Law, including antitrust Laws, (i) reasonable access to books and records and other material information reasonably relating to the Project, the Project Site, the Purchased Assets or the Business, in each case that constitute Purchased Assets; and (ii) such access to the Project, the Project Site, the Purchased Assets and the Project's plant manager and the Project's operations manager and other senior managers of Seller and its Affiliates primarily involved with the Business, in each case during normal business hours, as Purchaser may request solely for the purpose of monitoring the ongoing operation and

maintenance of the Project and not for the purpose of any other due diligence investigation or otherwise; provided that such activities do not interfere with Seller's normal operations at the Project and provided further that the provision of such information would not, in Seller's reasonable discretion, jeopardize attorney-client privilege.

(b) Seller agrees, if the Closing occurs, until the two (2) year anniversary of the Closing Date, except as may be required of or useful to Seller in connection with the transactions or other actions contemplated by Article 11, including the Bidding Procedures and the Bidding Process, to (i) keep all confidential, proprietary or competitively sensitive information relating to the Project, the Project Site, or the other Purchased Assets ("*Competitive Information*") confidential and not disclose or reveal any such information to any other third party (other than its Affiliates, representatives and agents) and (ii) not use any such information for any purpose other than in connection with the consummation of the Transactions; provided, however, that Competitive Information shall not include any such information which (A) is or becomes generally available to the public other than as a result of a disclosure by Seller or its representatives in violation of this Agreement or (B) is or becomes available to Seller or its representatives on a non-confidential basis from a source not known by Seller or such representative, after due inquiry, to be bound by a contractual, legal or fiduciary obligation of confidentiality to Purchaser. Notwithstanding the foregoing, if Seller is requested or required by Law, a Governmental Authority or a stock or commodity exchange to disclose any Competitive Information, or required to do so in connection with any dispute, suit or proceeding, then Seller shall provide Purchaser with prompt notice of such request or requirement in order to enable Purchaser to (x) seek an appropriate protective order or other remedy, (y) consult with Seller with respect to Seller taking steps to resist or narrow the scope of such request or legal process or (z) waive compliance, in whole or in part, with the terms of this Section 6.10(b). If, in the absence of a protective order or other remedy or waiver of the terms of this Section 6.10(b), Seller is required by Law or any Governmental Authority or a stock or commodity exchange or if required to do so in connection with any dispute, suit or proceeding to disclose any Competitive Information, then Seller may disclose such Competitive Information without any liability to Purchaser.

#### **Section 6.11 Employee Matters.**

(a) Seller will, within seven (7) days from the Effective Date, provide to Purchaser a complete list of all Employees and a list of the base and incentive compensation of each Employee, the current status of each Employee (e.g., whether, to the Knowledge of Seller, such Employee, to Seller's Knowledge, is on leave or anticipated leave, and, where permitted by law, the terms of such leave) and, for any Employees who are not United States citizens, a description of the legal status under which such Employees are permitted to work in the United States based on Employee I-9 forms.

(b) Purchaser shall be required to make offers of employment to each of the Employees in accordance with, and to the extent set forth in, this Section 6.11(b).

(i) Purchaser may require that each Employee (A) satisfy a reasonable, customary background check that shall be conducted and administered in good faith, (B) pass an Edison Electric Institute test, as administered and evaluated in good faith consistent with Purchaser's customary practice and which shall be substantially identical to the Edison Electric Institute test Purchaser utilizes to evaluate similarly situated new hires; and (C) meet additional standards as set forth in Schedule 6.11(b) hereto (such Employees who meet the requirements of subsections (A), (B) and (C), shall be referred to herein as the "*Qualified Employees*"). Employees who meet the requirements of subsections (A) and (B) above, but do not meet the requirements of subsection (C), shall be referred to as "*Suitable Employees*." Employees who do not meet the requirements of subsections (A), (B) and (C) of this Section 6.11(b)(i) will be referred to herein as "*Other Employees*."

- (ii) If Purchaser makes a Qualified Offer to any Employee and such Employee does not accept such Qualified Offer, neither Seller nor Purchaser shall have an obligation to pay such Employee any Severance Pay. Notwithstanding anything to the contrary contained herein, with respect to each Qualified Offer which is accepted by an Employee, for a period of not less than one (1) year following the Closing Date, Purchaser shall provide each such Employee with Compensation which is comparable in the aggregate to that in effect immediately prior to the Closing Date, provided, for the avoidance of doubt, that such Compensation shall not be required to be paid by Purchaser to any such Employee who is either terminated for Cause or who voluntarily resigns from Purchaser's employment.
- (iii) With respect to each Other Employee, Purchaser will not be required to make an offer of employment (although Purchaser may do so). If Purchaser does not make an offer of employment to an Other Employee, Seller shall pay to such eligible Other Employee his or her Severance Pay. If the Purchaser makes an Unqualified Offer to such Other Employee and if such Other Employee does not accept such offer, Seller shall pay to such eligible Other Employee his or her Severance Pay.
- (iv) With respect to each Suitable Employee, Purchaser will not be required to make an offer of employment (although Purchaser may do so). If Purchaser does not make an offer of employment to a Suitable Employee, Purchaser shall, no later than the Closing Date, reimburse Seller for the Seller's payment to such eligible Suitable Employee his or her Severance Pay. If Purchaser makes an Unqualified Offer to an Suitable Employee and such Suitable Employee does not accept such offer of employment, Purchaser shall, no later than the Closing Date, reimburse Seller for the Seller's payment to such eligible Suitable Employee his or her Severance Pay.
- (v) With respect to each Qualified Employee, Purchaser will be required to either (A) make an offer of employment to such Qualified Employee or (B) no later than the Closing Date, reimburse Seller for Seller's payment to such eligible Qualified Employee of his or her Severance Pay.
- (vi) All offers of employment (whether to Qualified, Suitable or Other Employees or whether Qualified or Unqualified Offers) shall be made no less than ten (10) Business Days prior to the Closing Date. If Purchaser's Qualified Offer is not accepted by such Qualified Employee not less than three (3) Business Days prior to the Closing Date, such Qualified Offer will be deemed rejected by such Qualified Employee. All offers of employment or decisions not to make offers of employment shall be made by Purchaser in a non-discriminatory manner and in accordance with applicable Laws.
- (vii) Seller shall cooperate and use its efforts to cause Employees (whether Qualified or Other Employees) to accept all Qualified Offers. Employees who accept the offer of employment (whether Qualified or Unqualified Offers) described in this Section 6.11(b) shall be referred to herein as "*Transferred Employees*."
- (c) Except as otherwise specifically set forth in this Section 6.11, neither Seller nor any of its Affiliates shall have any responsibility whatsoever for any liabilities and obligations which relate in any way to any Transferred Employee following the Closing Date, and Purchaser and its Affiliates shall be responsible for satisfying all such liabilities and obligations. Seller and Purchaser shall each cooperate with the other and shall provide to the other such documentation, information and assistance as is reasonably necessary to effect the provisions of this Section 6.11. Purchaser shall deliver

to Seller, a reasonable period of time prior to distribution, copies of any offer letter (or other correspondence with Employees to be made prior to the Closing Date) for Seller's review and comment.

(d) To the extent that any Transferred Employee becomes eligible to participate in any employee benefit plans, programs and arrangements maintained or established by Purchaser (the "Purchaser Plans"), then all health and welfare plans of Purchaser and its Affiliates shall waive any waiting periods and pre-existing condition exclusions with respect to participation by and coverage of the Transferred Employees and their eligible dependents. Without limiting the foregoing, Purchaser and its Affiliates shall cooperate with Seller and its Affiliates to take all such actions as are necessary to enable the Transferred Employees (upon their request) to make a direct rollover into a tax-qualified defined contribution plan of Purchaser or one of its Affiliates of any amounts distributed to such Transferred Employees from the Cogentrix Energy Retirement Savings Plan.

(e) Purchaser or one of its Affiliates shall be responsible for providing all COBRA notices to Employees or their qualified beneficiaries or dependents required as a result of the Transactions contemplated hereby or a COBRA qualifying event occurring prior thereto or simultaneously therewith, and Purchaser or one of its Affiliates shall be responsible for providing COBRA continuation coverage to Employees and their qualified beneficiaries and dependents who become entitled to COBRA continuation coverage as a result of the Transactions contemplated hereby or a COBRA qualifying event occurring prior to or simultaneously with the Transactions contemplated hereby.

(f) Purchaser shall be responsible for providing or discharging any (if any) and all notifications, benefits and liabilities to Employees and governmental entities under the Worker Adjustment and Retraining Notification Act of 1988 (the "WARN Act") if applicable or by any other applicable law relating to plant closings or employee separations or severance pay that are first required to be provided or discharged on or after the Closing Date, including pre-closing notice or liabilities if actions by Purchaser on or after the Closing Date result in a notice requirement under such laws.

(g) Nothing in this Section 6.11 shall create any third party beneficiary right in any Person other than the parties to this Agreement, including any current or former Employee, any participant in any Employee Plan, or any dependent or beneficiary thereof, or any right to continued employment with Seller, any of Seller's Affiliates, or Purchaser. Nothing in this Section 6.11 shall constitute an amendment to any Employee Plan or any other plan or arrangement covering the Employees. Seller and Purchaser shall each cooperate with the other and shall provide to the other such documentation, information and assistance as is reasonably necessary to effect the provisions of this Section 6.11. In the event that Purchaser or any of its successors and assigns (i) consolidates with or merges into any person or entity and is not the continuing or surviving corporation or entity in such consolidation or merger, or (ii) transfers all or substantially all of its assets to any person or entity, then, in each case, proper provision shall be made so that the successors and assigns of Purchaser honor the obligations of Purchaser set forth in this Section 6.11.

**Section 6.12 Public Announcements.** Without limiting the generality of the obligations under the Confidentiality Agreement, except to the extent required by applicable Law or the regulations of any applicable stock or commodities exchange (and then only after consultation with the other Party), and except as may be permitted by the Confidentiality Agreement or required of or useful to Seller in connection with the transactions or other actions contemplated by Article 11, including the Bidding Procedures and the Bidding Process, none of the Parties nor their Affiliates shall issue any press release or make any other public announcements concerning the Transactions, the Auction or the contents of this Agreement without the prior written consent of the other Party; provided that in any such case the disclosing Party shall promptly furnish the other Party with a copy of such press release or public statement so made. The Parties will consult with each other before issuing, and provide each other a

reasonable opportunity to review and make reasonable comment upon, any press release or making any public statement with respect to this Agreement and the transactions contemplated hereby. For the avoidance of doubt, (i) motions or filings made to the Bankruptcy Court or in connection with the Bankruptcy Case and (ii) communications related to the Bidding Process shall not be deemed a public announcement or public statement for purposes of this Section 6.12.

**Section 6.13 Trade Name Removal.** With respect to any name of Seller or any related or similar trade names, trademarks, service marks, corporate names, logos or any part, derivative or combination thereof that may appear on certain of the Purchased Assets, Purchaser (i) shall use Commercially Reasonable Efforts to remove, conceal, or obscure the same from the fixed Purchased Assets and equipment within six (6) months following the Closing Date, and (ii) shall not send to third parties any stationary, letters, envelopes, invoice statements or other material bearing the same with respect to Project business conducted by Purchaser after the Closing.

**Section 6.14 Removal of Excluded Assets.** At any time or from time to time, up to sixty (60) days following the Closing Date, any and all of the Excluded Assets may be removed from the Project by Seller; provided that Seller shall do so (i) in a manner that does not unduly or unnecessarily disrupt normal business activities at the Project and (ii) after coordinating reasonably in advance the dates and times of removal with Purchaser.

**Section 6.15 Emission Allowances Transfer.** Notwithstanding anything to the contrary herein, Purchaser and Seller shall take all necessary actions, including executing any required forms or providing appropriate notices to Governmental Authorities, in a timely fashion, to ensure that Purchaser shall obtain all, or the rights to all, Emission Allowances that are to be transferred to it pursuant to Section 2.1(h). Purchaser and Seller further acknowledge and agree that such actions may be required before, on or after the Closing Date.

**Section 6.16 Waiver of Implied Warranties.** Purchaser and its agents, consultants and representatives have had a reasonable opportunity to inspect the Purchased Assets. Except for the representations and warranties of Seller set forth in this Agreement or any Ancillary Agreement, Purchaser acknowledges that Seller is not making any other representations or warranties, written or oral, statutory, express or implied, to Purchaser, and that all other express or implied warranties (including warranties of merchantability and fitness for a particular purpose) are specifically disclaimed, including §75-2-314 (Merchantability) and §75-2-315 (Fitness for Purpose Intended) of the Mississippi Code Annotated and §47-2-314 (Merchantability) and §47-2-315 (Fitness for Particular Purpose) of the Tennessee Codes Annotated.

WITHOUT LIMITING THE FOREGOING, PURCHASER ACKNOWLEDGES, EXCEPT AS SPECIFICALLY SET FORTH HEREIN, THAT (A) THE PURCHASED ASSETS ARE BEING SOLD AND TRANSFERRED "AS IS, WHERE IS" AND (B) NONE OF SELLER OR ANY OF ITS AFFILIATES OR REPRESENTATIVES HAVE MADE ANY REPRESENTATION OR WARRANTY CONCERNING (I) THE PURCHASED ASSETS, OR ANY FUTURE REVENUES, COSTS, EXPENDITURES, CASH FLOWS, RESULTS OF OPERATIONS, COLLECTIBILITY OF ACCOUNTS RECEIVABLE, FINANCIAL CONDITION OR PROSPECTS OF THE PROJECT, (II) CONDITION, VALUE OR QUALITY OF THE ASSETS, PROPERTIES AND OPERATIONS OF THE PROJECT OR THE PROSPECTS OF, AND RISKS FACED BY, THE PROJECT, OR (III) THE BUSINESS, ASSETS OR LIABILITIES OF SELLER. SELLER, ON BEHALF OF ITSELF AND ITS AFFILIATES, HEREBY DISCLAIMS ALL LIABILITY AND RESPONSIBILITY FOR ANY REPRESENTATION, WARRANTY, STATEMENT OR INFORMATION NOT INCLUDED IN THIS AGREEMENT THAT WAS MADE, COMMUNICATED OR FURNISHED (ORALLY OR IN WRITING) TO PURCHASER OR ANY OF ITS AFFILIATES OR REPRESENTATIVES.

**Section 6.17 Assignability and Consents.**

(a) Notwithstanding anything contained in this Agreement to the contrary, but subject to Section 6.17(b), Seller shall not be obligated or entitled to assign a Purchased Asset, if the attempted assignment or assumption of the same, without Seller first having obtained the applicable Seller's Consent, would, after giving effect to Bankruptcy Code Section 365, (i) constitute a breach or default under any Purchased Project Contract or (ii) violate any applicable Law (each a "Nonassignable Asset"); provided, however, that with respect to any Purchased Asset with respect to which Seller shall not have obtained any such Seller's Consent prior to the Closing, Seller shall continue to use Commercially Reasonable Efforts to obtain as promptly as practicable after the Closing any such Seller's Consent not obtained prior to the Closing. Purchaser shall cooperate as reasonably requested by Seller in connection with Seller's efforts to obtain any such Seller's Consent.

(b) To the extent any Seller's Consent shall not have been obtained prior to the Closing, to the extent and for so long as the related Nonassignable Asset shall not have been assigned and transferred to Purchaser, Seller's sole responsibility with respect to such matters, notwithstanding Section 2.1, shall be to use, during the one hundred eighty (180) day period commencing with the Closing Date, Commercially Reasonable Efforts to place Purchaser in the same position as if such Seller's Consent had been obtained, or to provide Purchaser the maximum benefit of, any Nonassignable Asset not assigned and transferred to Purchaser; provided, however, if Seller is unable or unwilling to place Purchaser in the same position (with the maximum benefits attributed thereto) within such period, the Base Purchase Price will be adjusted for any diminution in the fair market value of such Nonassignable Assets in accordance with the Adjustment Sections.

(c) Nothing herein shall be construed to require Purchaser to consummate the Transactions if any condition in Article 8 has not been satisfied.

(d) To the extent that Seller takes action under Section 6.17(b) pursuant to which Purchaser is provided the benefits of any Nonassignable Asset, Purchaser shall perform for the benefit of the other party or parties thereto the obligations of Seller thereunder or in connection therewith. If Purchaser shall fail to perform in any material respect any material obligation under any Nonassignable Asset subject to the arrangements entered into pursuant to Section 6.17(b) (and shall fail to cure such breach within any cure period provided by the relevant Nonassignable Asset), Seller, without waiving any rights or remedies that it may have under this Agreement or applicable Law, may suspend its performance under Section 6.17(b) in respect of the instrument which is the subject of such failure to perform, unless and until such situation is remedied and Purchaser shall indemnify Seller for any Losses incurred by Seller in connection with such breach (including any Losses that arise out of, are in connection with or relate to any obligation, the validity of which Purchaser is disputing).

**Section 6.18 Seller Receivables.** Purchaser shall (i) reasonably cooperate with Seller in invoicing and collecting any amounts owed to Seller or any of Seller's Affiliates under any Purchased Project Contract to the extent that such amounts constitute Excluded Assets pursuant to Section 2.2(j) hereof and (ii) promptly remit to Seller any amounts received by Purchaser under such Purchased Project Contracts, under any Excluded Contracts or otherwise to the extent that such amounts constitute Excluded Assets pursuant to Section 2.2(j) hereof.

**Section 6.19 Release from Purchased Project Contracts.** Prior to and following the Closing, Purchaser shall reasonably cooperate with Seller's efforts to secure the unconditional release of Seller and its Affiliates, as applicable, from the Purchased Project Contracts that require consent thereunder to obtain such release, provided, however, that such reasonable cooperation shall not cause

Purchaser to assume liability to any third party with respect to any Purchased Project Contract for which the Parties cannot reasonably obtain such consents or releases unless expressly required in this Agreement

**Section 6.20 Communications with Customers and Suppliers.** Subject to applicable Law, prior to the Closing, Purchaser shall not, and shall cause its representatives not to, contact, engage in any substantive discussions or otherwise communicate with any of the Business's customers, suppliers and others with whom Seller has material commercial dealings, in each case with respect to Seller, the Project or the Transactions, without obtaining the prior written consent of Seller. Purchaser and Seller shall work together in good faith to arrange for an orderly transition of customer, supplier and other third party relationships.

**Section 6.21 Bankruptcy Actions.**

(a) **Intentionally Omitted.**

(b) Seller shall use Commercially Reasonable Efforts to comply (or obtain an order from the Bankruptcy Court waiving compliance) with all requirements under the Bankruptcy Code and Bankruptcy Rules, as modified by order, if any, of the Bankruptcy Court, in connection with obtaining approval of the sale of the Purchased Assets under this Agreement, including serving on all required Persons in the Bankruptcy Case, notice of the Sale Approval Motion, the Sale Hearing and all applicable objection deadlines in accordance with Rules 2002, 6004, 6006 and 9014 of the Bankruptcy Rules, the Bidding Procedures Order or other orders of the Bankruptcy Court, and any applicable local rules of the Bankruptcy Court.

(c) With respect to any and all proceedings before the Bankruptcy Court and subject to Seller's fiduciary duties, Seller agrees: (i) that it will take no action inconsistent with the terms of this Agreement; and (ii) that it will take any actions and make any filings with the Bankruptcy Court necessary and prudent to ensure that the obligations of Seller under this Agreement are fully funded and are not impacted or mitigated in any respect by the Bankruptcy Court.

**Section 6.22 Assumed Contracts; Cure Amounts.** As soon as practicable after the execution hereof, Seller shall, pursuant to a motion or other appropriate notice in form and substance reasonably acceptable to Purchaser (which motion may be incorporated into the Sale Motion), move to assume and assign to Purchaser the Pre-Petition Contracts listed on Schedule 6.22 (collectively, the "Assumed Contracts") and shall provide notice thereof in accordance with all applicable Bankruptcy Rules as modified by any orders of the Bankruptcy Court. Seller shall pay all Cure Amounts required to effect assumption and assignment of the Assumed Contracts as agreed to by Seller and each party to an Assumed Contract or, absent such agreement, by Final Order of the Bankruptcy Court in the time and manner specified by the Sale Approval Order.

**Section 6.23 Certain Transactions.** Purchaser shall not acquire or agree to acquire by merging or consolidating with, or by purchasing a substantial portion of the assets of or equity in, or by any other manner, any business or any corporation, partnership, association or other business organization or division thereof, or otherwise acquire or agree to acquire any assets if the entering into of a definitive agreement relating to or the consummation of such acquisition, merger or consolidation would reasonably be expected to: (i) impose any material delay in the obtaining of, or significantly increase the risk of not obtaining, any authorizations, consents, orders, declarations or approvals of any Governmental Authority necessary to consummate the Transactions contemplated by this Agreement or the Ancillary Agreements or the expiration or termination of any applicable waiting period; (ii) significantly increase the risk of any Governmental Authority entering an order prohibiting the consummation of the Transactions contemplated by this Agreement or the Ancillary Agreements; (iii) significantly increase the risk of not

being able to remove any such order on appeal or otherwise; or (iv) materially delay or prevent the consummation of the Transactions contemplated by this Agreement or the Ancillary Agreements.

#### **Section 6.24 Replacement of Credit Support.**

(a) Purchaser shall use Commercially Reasonable Efforts to effect the full and unconditional release of, and, where necessary to effect such release, to cause itself or a letter of credit or a guarantee of Purchaser to be substituted, as of the Closing Date, for Seller and each of Seller's Affiliates in respect of, each Credit Support Obligation provided by Seller or any of its Affiliates for the benefit of the Business set forth on Schedule 6.24 (each, a "Seller Guaranty"), in each case such that (i) all contractual requirements of Seller and each of Seller's Affiliates relating to such Credit Support Obligations are satisfied in full and (ii) Seller and each of Seller's Affiliates are fully released from any obligations to any third parties relating to such Credit Support Obligations. At Seller's option, if a release cannot be obtained, then Seller may require Purchaser to enter into a "back-to-back" guarantee with respect to any obligations to any third parties relating to such Credit Support Obligations.

(b) In the event that Seller enters into an agreement with one or more Successful Bidder(s) in connection with an Alternative Transaction, Purchaser shall reasonably cooperate with any such Successful Bidder(s) in respect of granting any consent or release, including with respect to the Tolling Agreement, under all agreements or arrangements Purchaser may have with Seller and/or one or more of Seller's Affiliates; provided, however, that in the event that the Purchased Assets are sold pursuant to an Alternative Transaction, Seller's rights, duties and obligations under the Tolling Agreement shall be assigned, delegated and transferred in full to such Successful Bidder(s) in an Alternative Transaction.

**Section 6.25 O&M Termination Agreement Reimbursement.** On or prior to the Closing Date, Purchaser shall pay to Seller Five Million Dollars (U.S. \$5,000,000) by wire transfer of immediately available funds to an account or accounts designated by Seller in writing, as reimbursement for the payment by Seller to Southaven Properties of the "Termination Payment" pursuant to and as defined in the O&M Termination Agreement.

### **ARTICLE 7**

#### **NO SURVIVAL; SPECIFIC PERFORMANCE**

**Section 7.1 No Survival.** The representations, warranties and agreements in this Agreement and in any certificate delivered pursuant hereto shall terminate at the earlier of the conclusion of Closing and the termination of this Agreement pursuant to Section 10.1, as the case may be, except that, as provided herein, (a) if there has been a termination pursuant to Section 10.1, (i) obligations incurred and liabilities relating to periods prior to the termination for willful breach of this Agreement shall survive and (ii) the obligations under Section 6.2, this Article 7 and Article 12 and the Confidentiality Agreement shall survive, (b) the agreements set forth in Article 6 shall survive until the Closing (unless specifically stated therein to terminate prior to the Closing or to survive the Closing, or unless specifically stated in the subsequent clause (c)) and (c) the agreements set forth in Articles 2 and 3 and Sections 6.2, 6.6, 6.9, 6.10, 6.11, 6.12, 6.15, 6.17, 6.19, 6.20, 6.21, this Article 7 and Article 12 shall survive the Closing. Upon termination or expiration of any representation, warranty or agreement, neither Party shall have any liability with respect thereto, and any claim for breach of any representation, warranty or covenant must be brought prior to the termination or expiration of the provision at issue, it being understood that in the event notice of any claim for breach of such representation, warranty or agreement shall have been given on or prior to the termination or expiration of the survival period, such representation, warranty or agreement that is the subject of such claim shall survive until such time as such claim is finally resolved

and a claim that was otherwise timely made shall not thereafter be barred by the termination of the survival period. Notwithstanding anything herein to the contrary, in no event shall Seller's aggregate liability for damages suffered by Purchaser with respect to any claim for breach of Seller's covenants or agreements that survive the Closing exceed an amount equal to Two Million Five Hundred Thousand Dollars (U.S. \$2,500,000), provided that foregoing limitation shall not be construed as limiting, restricting or otherwise curtailing Purchaser's rights under the Tolling Agreement or to assert a cause of action against any third party as authorized by Laws, whether such cause of action sounds in tort, contract or otherwise.

**Section 7.2 Specific Performance.** Seller acknowledges that the Transactions are unique and that Purchaser will be irreparably injured should such Transactions not be consummated in a timely fashion. Consequently, Purchaser will not have an adequate remedy at law if Seller shall fail to sell the Purchased Assets when required to do so hereunder. In such event, Purchaser shall have the right, in addition to any other remedy available in equity or law, to specific performance of such obligation by Seller, subject to (a) Purchaser's performance of its obligations hereunder, and (b) the other terms and conditions hereof. Purchaser acknowledges that the Transactions are unique and that Seller will be irreparably injured should such Transactions not be consummated in a timely fashion. Consequently, Seller will not have an adequate remedy at law if Purchaser shall fail to purchase the Purchased Assets when required to do so hereunder. In such event, Seller shall have the right, in addition to any other remedy available in equity or law, to specific performance of such obligation by Purchaser, subject to Seller's performance of its obligations hereunder and the other terms and conditions hereof.

## ARTICLE 8

### PURCHASER'S CONDITIONS TO CLOSING

The obligation of Purchaser to consummate the Transactions shall be subject to fulfillment at or prior to the Closing of the following conditions, except to the extent Purchaser waives such fulfillment in writing:

**Section 8.1 Compliance with Provisions.** Seller shall have performed or complied in all material respects with all covenants, obligations and agreements contained in this Agreement and the Ancillary Agreements on its part required to be performed or complied with at or prior to the Closing; provided, however, that notwithstanding anything herein to the contrary, this Section 8.1 shall be deemed to have been satisfied even if such covenants, obligations and agreements have not been so performed unless Seller's failure to so perform, individually or in the aggregate, has had a Material Adverse Effect.

**Section 8.2 HSR Act.** If and to the extent applicable, the waiting period under the HSR Act applicable to the consummation of the sale of the Purchased Assets contemplated hereby shall have expired or been terminated.

**Section 8.3 No Restraint.** There shall be no:

- (a) Preliminary or permanent Order which prevents the consummation of the Transactions as herein provided; or
- (b) Action taken, or Law enacted, promulgated or deemed applicable to the Transactions, by any Governmental Authority which prohibits the consummation of the Transactions as herein provided.

**Section 8.4 Regulatory Approvals and Consents; Other Approvals.**

(a) All of Purchaser's Regulatory Approvals, if any, shall have been obtained and shall be in form and substance reasonably acceptable to Purchaser.

(b) All of Seller's Regulatory Approvals shall have been made or obtained and shall be in such forms as could not reasonably be expected, individually or in the aggregate, to (i) materially impair the authority, right or ability of Purchaser to consummate the Transactions, (ii) have a material adverse effect on the business, assets, properties, financial condition or results of operations of the Business, (iii) require any material modification to this Agreement, any Ancillary Agreement or the Transactions, or (iv) impose any material restrictions upon Purchaser's ownership or operation of the Purchased Assets or Purchaser's ownership of their respective assets or operation of their respective businesses, including any material restrictions on use of the Purchased Project Contracts.

(c) The Sale Approval Order, in form and substance reasonably satisfactory to Purchaser, shall be entered by the Bankruptcy Court, shall not be subject to a stay or injunction and shall have become a Final Order.

(d) Except as expressly obviated by the terms of the Sale Approval Order, all consents, approvals and filings in connection with the Bankruptcy Court Requirements shall have been obtained or made in form and substance reasonably satisfactory to Purchaser.

**Section 8.5 Representations and Warranties.** The representations and warranties of Seller set forth in this Agreement that are qualified with respect to materiality shall be true and correct in all respects, and the representations and warranties of Seller set forth in this Agreement that are not so qualified shall be true and correct in all material respects, on and as of the Closing Date, except to the extent that such representations and warranties by their terms speak as of a date earlier than the Closing Date, in which case they shall be true and correct as of such date; provided, however, that notwithstanding anything herein to the contrary, this Section 8.5 shall be deemed to have been satisfied even if such representations or warranties are not so true and correct unless the failure of any such representation or warranty to be so true and correct, individually or in the aggregate, has had a Material Adverse Effect.

**Section 8.6 Officer's Certificate.** Purchaser shall have received a certificate from Seller, executed on its behalf by an authorized officer, dated the Closing Date, to the effect that the conditions set forth in Section 8.1, Section 8.4(b) (to the extent relating to Seller's Regulatory Approvals) and Section 8.5 have been satisfied.

**Section 8.7 Title Insurance.** If Purchaser so elects, title to the Real Property shall have been evidenced by the willingness of a title insurance company reasonably acceptable to Purchaser (the "*Title Insurer*") to issue an owner's policy of title insurance (at Purchaser's sole cost and expense) insuring Purchaser's ownership of the Real Property subject only to Permitted Encumbrances (the "*Title Policy*"). The willingness of the Title Insurer to issue the Title Policies shall be evidenced either by the issuance thereof at the Closing or by the Title Insurer's delivery of written commitments or binders, dated as of the Closing Date (but insuring title as of the date title conveyance documents are recorded), to issue such Title Policies within a reasonable time after the Closing, subject to actual transfer of the Real Property.

**Section 8.8 No Condemnation.** None of the Purchased Assets, including the Project or the Project Site, in whole or in part, shall be subject to or threatened with any condemnation or eminent domain proceeding except where such proceeding would not, individually or in the aggregate, be reasonably likely to have a Material Adverse Effect.

**Section 8.9 Receipt of Other Documents.** Purchaser shall have received the following:

(a) Certificates of Good Standing with respect to Seller within ten (10) days of the Closing Date issued by the Secretary of State of Delaware and the Secretary of State of Mississippi;

(b) Copies of the limited liability company agreement and the certificate of formation of Seller and certified by the Secretary of State of Delaware, together with a certificate of the Secretary or an Assistant Secretary (or similarly situated individual) of Seller that none of such documents have been amended;

(c) Copies, certified by the Secretary or an Assistant Secretary (or similarly situated individual) of Seller, of resolutions of Seller's board of directors or similar governing body authorizing the execution and delivery by Seller of this Agreement and each of the Ancillary Agreements to which it is a party and authorizing the performance of its obligations hereunder and thereunder, as applicable, and authorizing or ratifying the execution and delivery of, and performance of its obligations under, all of the other agreements and instruments, in each case, to be executed and delivered by Seller in connection herewith;

(d) A certificate of the Secretary or an Assistant Secretary (or similarly situated individual) of Seller identifying the name and title and bearing the signatures of the officers of Seller authorized to execute and deliver this Agreement and each Ancillary Agreement to which it is a party and the other agreements and instruments contemplated hereby;

(e) The documents referenced in Section 3.1(a);

(f) Evidence that all Encumbrances on the Purchased Assets that fall within subsection (iii) of the definition of Permitted Encumbrances have been fully satisfied;

(g) A receipt for the Estimated Purchase Price;

(h) A bill of sale and certificate of title for any vehicle included among the Purchased Assets;

(i) A list of any new material agreements relating to the Business entered into prior to the Closing; and

(j) An affidavit addressed from Seller to Purchaser as to possession and encumbrances, in forms reasonably satisfactory to Purchaser or its title company.

**Section 8.10 Bankruptcy Court Orders.** The Sale Approval Order and the Bidding Procedures Order, each in form and substance reasonably satisfactory to Purchaser, shall be entered by the Bankruptcy Court and shall not be subject to a stay or injunction, and the Sale Approval Order shall have become a Final Order.

**Section 8.11 O&M Termination Agreement.** The transactions required by the O&M Termination Agreement shall have been consummated, including payment of any amounts due thereunder.

**Section 8.12 Turbine Repair.** Unit 2 shall have been repaired and restored to operation such that the Unit 2 Test Standards are met, and all payments for such repair and restoration shall have been made by Seller in the Ordinary Course of Business.

## ARTICLE 9

### SELLER'S CONDITIONS TO CLOSING

The obligation of Seller to consummate the Transactions shall be subject to fulfillment at or prior to the Closing of the following conditions, except to the extent Seller waives such fulfillment in writing:

**Section 9.1 Compliance with Provisions.** Purchaser shall have performed or complied in all material respects with all covenants, obligations and agreements contained in this Agreement and the Ancillary Agreements on its part required to be performed or complied with at or prior to the Closing; provided, however, that notwithstanding anything herein to the contrary, this Section 9.1 shall be deemed to have been satisfied even if such covenants and agreements have not been so performed unless Purchaser's failure to so perform, individually or in the aggregate, has had a material adverse effect on Purchaser or would have a Material Adverse Effect after giving effect to the Transaction.

**Section 9.2 HSR Act.** If and to the extent applicable, the waiting period under the HSR Act applicable to the consummation of the sale of the Purchased Assets contemplated hereby shall have expired or been terminated.

**Section 9.3 No Restraint.** There shall be no:

- (a) Preliminary or permanent Order which prevents the consummation of the Transactions as herein provided; or
- (b) Action taken, or Law enacted, promulgated or deemed applicable to the Transactions, by any Governmental Authority which prohibits the consummation of the Transactions as herein provided.

**Section 9.4 Regulatory Approvals and Consents.**

(a) All of Seller's Regulatory Approvals shall have been obtained and shall be in form and substance reasonably acceptable to Seller.

(b) All of Purchaser's Regulatory Approvals shall have been made or obtained and shall be in such forms as could not reasonably be expected, individually or in the aggregate, to (i) materially impair Seller's or Purchaser's authority, right or ability to consummate the Transactions, (ii) have a material adverse effect on the business, assets, properties, financial condition, results of operations or prospects of Seller or any affiliate of Seller or (iii) require without the prior consent of Seller any material modification of Seller's rights or obligations under or with respect to this Agreement, any Ancillary Agreement or the Transactions.

(c) All consents, approvals and filings in connection with the Bankruptcy Court Requirements shall have been obtained in form and substance reasonably satisfactory to the Parties.

**Section 9.5 Representations and Warranties.** The representations and warranties of Purchaser set forth in this Agreement that are qualified with respect to materiality shall be true and correct in all respects, and the representations and warranties of Purchaser set forth in this Agreement that are not so qualified shall be true and correct in all material respects, on and as of the Closing Date, except to the extent that such representations and warranties by their terms speak as of a date earlier than the Closing Date, in which case they shall be true and correct as of such date; provided, however, that notwithstanding anything herein to the contrary, this Section 9.5 shall be deemed to have been satisfied even if such

representations or warranties are not so true and correct unless the failure of any such representation or warranty to be so true and correct, individually or in the aggregate, has had a material adverse effect on Purchaser or would have a Material Adverse Effect after giving effect to the transactions contemplated by this Agreement.

**Section 9.6 Officer's Certificate.** Seller shall have received a certificate from Purchaser, executed on its behalf by an authorized officer, dated the Closing Date, to the effect that the conditions set forth in Section 9.1, Section 9.4(b) (to the extent relating to Purchaser's Regulatory Approvals) and Section 9.4(a) have been satisfied.

**Section 9.7 Receipt of Other Documents.** Seller shall have received the following:

(a) If and to the extent applicable, a Certificate of Good Standing with respect to Purchaser, as of a recent date, issued by the Secretary of State of Purchaser's State of incorporation, formation or organization, as applicable;

(b) If and to the extent applicable, certified copies of the certificate of incorporation, formation or organization, as applicable, and the by-laws or operating agreement, as applicable, of Purchaser certified by the Secretary of State of Purchaser's State of incorporation, formation or organization, as applicable, together with a certificate of the Secretary or an Assistant Secretary of Purchaser that none of such documents have been amended;

(c) Copies, certified by the Secretary or an Assistant Secretary of Purchaser, of resolutions of the board of directors or similar governing body of Purchaser authorizing and delegating where appropriate the authority for Purchaser to acquire the Purchased Assets and execute and deliver into this Agreement, and each of the Ancillary Agreements to which it is a party and the performance of its obligations hereunder and thereunder, and authorizing the execution and delivery of, and performance of its obligations under, all of the other agreements and instruments, in each case, to be executed and delivered by Purchaser in connection herewith;

(d) A certificate of the Secretary or an Assistant Secretary of Purchaser identifying the name and title and bearing the signatures of the officers of Purchaser authorized to execute and deliver this Agreement, and each Ancillary Agreement to which Purchaser is a party and the other agreements and instruments contemplated hereby;

(e) All releases, satisfactions, termination agreements or instruments necessary to terminate and cancel or return all cash, existing letters of credit and other Credit Support Obligations under the Seller Guarantees.

**Section 9.8 Bankruptcy Court Orders.** The Sale Approval Order and Bid Procedures Order, each in form and substance reasonably satisfactory to Seller, shall be entered by the Bankruptcy Court and shall not be subject to a stay or injunction, and the Sale Approval Order shall have become a Final Order.

**Section 9.9 O&M Termination Agreement Payment.** The transactions required by the O&M Termination Agreement shall have been consummated, and Purchaser shall have paid Seller Five Million Dollars (U.S. \$5,000,000) as required under Section 6.25.

## ARTICLE 10

### TERMINATION

**Section 10.1 Rights to Terminate.** To the extent set forth in Section 7.1, this Agreement may be terminated (the date of such termination being the "*Termination Date*") and the consummation of the transactions contemplated hereby may be abandoned at any time prior to the Closing only under one of the following circumstances:

(a) By either Party, upon written notice to the other Party:

(i) By mutual written consent of Seller and Purchaser;

(ii) Provided the terminating Party is not in default of its obligations under this Agreement, if consummation of the Sale would violate any non-appealable Final Order of any regulatory Governmental Authority, other than the Bankruptcy Court;

(iii) Intentionally Omitted;

(iv) Provided the terminating Party is not in default of its obligations under this Agreement, if the Closing shall not have occurred within one (1) year after entry of the Sale Approval Order;

(v) If the Bankruptcy Court has not entered the Sale Approval Order within one hundred eighty (180) days after the date of this Agreement; provided, however, that the right to terminate this Agreement pursuant to this Section 10.1(a)(v) shall not be available to a Party if such Party shall have failed to perform, or caused any of its Affiliates to perform, any of its respective material obligations under this Agreement; or

(vi) If the Closing has not occurred on or prior the Expiration Date; provided, however, that the right to terminate this Agreement pursuant to this Section 10.1(a)(vi) shall not be available to a Party if such Party's breach of this Agreement is the cause for the delay until past the Expiration Date.

(b) (i) By Purchaser upon written notice to Seller if there has been a default or breach of any representation, warranty, covenant or other provision under this Agreement by Seller, and such default or breach (x) causes either of the conditions set forth in Sections 8.1 or 8.5 to not be satisfied at the time of such default or breach, and (y) cannot be cured by the earlier of the Expiration Date or the date thirty (30) days after receipt by Seller of written notice from Purchaser specifying with particularity such default or breach, or (ii) by Seller upon written notice to Purchaser if there has been a default or breach of any representation, warranty, covenant or other provision under this Agreement by Purchaser, and such default or breach (x) causes either of the conditions set forth in Sections 9.1 or 9.5 to not be satisfied at the time of such default or breach, and (y) cannot be cured by the earlier of the Expiration Date or the date thirty (30) days after receipt by Purchaser of written notice from Seller specifying with particularity such default or breach;

(c) By Purchaser in accordance with Section 6.7;

(d) By one Party upon written notice to the other Party if at any time prior to the Closing, (i) any Governmental Authority of competent jurisdiction shall have issued an Order permanently restraining, enjoining or otherwise prohibiting the Closing, and such Order shall have become final without the possibility of appeal or any Seller Regulatory Approval or Purchaser Regulatory Approval is denied in a final non-appealable order or other final non-appealable action issued or taken by the appropriate Governmental Authority; or (ii) any Law shall have been enacted or issued by any

Governmental Authority which, directly or indirectly, restrains, enjoins, prohibits or otherwise makes illegal the consummation of the Transactions;

(e) By Seller upon written notice to Purchaser if Purchaser is or becomes Bankrupt;  
or

(f) **Intentionally Omitted.**

**Section 10.2 Intentionally Omitted.**

## ARTICLE 11

### BIDDING PROCEDURES

**Section 11.1 Seller Initial Bankruptcy Actions.** This Article 11 sets forth the bidding procedures (the "*Bidding Procedures*") to have been employed with respect to the sale (the "*Sale*") of the Purchased Assets. The Sale is to have been subject to competitive bidding as set forth herein and approval by the Bankruptcy Court in the Sale Approval Order. The following overbid provisions and related bid protections were designed to compensate Purchaser for its efforts and agreements to date and to facilitate a full and fair process (the "*Bidding Process*") designed to maximize the value of the Purchased Assets for the benefit of Seller and its Affiliates' creditors, shareholders and bankruptcy estate.

The Parties recognize that the actions, duties, conditions, and obligations required or contemplated in this Article 11 have been substantially completed, satisfied, or waived prior to the effectiveness of this Agreement. Accordingly, while the provisions of this Article 11 have been conformed to the extent necessary to not materially deviate from those contained in the Bidding Procedures Order which governed the actual Bidding and Auction procedures leading to the selection of Purchaser as the Successful Bidder and the execution of this Agreement, such provisions are retained in this Agreement primarily for context and informational purposes only. For purposes of this Article 11 only, the term Purchaser shall be deemed to refer to Kelson as context requires.

**Section 11.2 Due Diligence.** Seller shall afford each interested party reasonable due diligence access to the Purchased Assets and the Business, not to exceed seventy five (75) days after receipt of the Bidding Procedures Order; provided that, prior to being afforded such access, each interested party shall enter into a confidentiality agreement with Seller that is substantially similar in all material respects to the Confidentiality Agreement. Due diligence access may include management presentations as may be scheduled by Seller, access to data rooms, on-site inspections and such other matters which an interested party may request and as to which Seller, in its sole discretion, may agree to. Seller shall designate an employee or other representative to coordinate all reasonable requests for additional information and due diligence access from interested parties. Notwithstanding anything herein to the contrary, no additional due diligence shall continue after the Bid Deadline. Seller may, in its discretion, coordinate diligence efforts such that multiple interested parties have simultaneous access to due diligence materials and/or simultaneous attendance at management presentations or site inspections. Neither Seller nor any of its Affiliates (or any of their respective representatives) shall be obligated to furnish any information relating to Purchased Assets and the Business to any Person other than to interested parties who make an acceptable preliminary proposal.

**Section 11.3 Bid Deadline.** An interested party that desires to make a bid shall deliver the Required Bid Documents to: Southaven Power, LLC, c/o Cogentrix Energy, Inc., 9405 Arrowpoint Boulevard, Charlotte, North Carolina 28273, Attention: John W. O'Connor and Douglas Miller, Esq., with copies to: (i) Seller's counsel, Latham & Watkins, LLP, 885 Third Avenue, New York, New York

10024, Attention: Mark Broude, Esq. and Taurie Zeitzer, Esq.; (ii) Seller's financial advisor, Houlihan, Lokey, Howard & Zukin, 245 Park Avenue, New York, New York 10022, Attention: William H. Hardie, III; and (iii) counsel for the agent under Seller's pre-petition credit facility and counsel for the agent under Seller's post-petition credit facility, Covington & Burling, LLP, 620 Eighth Avenue, New York Times Building, New York, New York 10018, Attention: Michael Hopkins and Charles Jeanfreau; so as to be received not later than 11:00 A.M. (EST) on March 19, 2008 (the "*Bid Deadline*").

**Section 11.4 Bid Requirements.** All bids must include the following documents (the "*Required Bid Documents*"):

(a) Current audited financial statements of the Person making such bid (a "*Potential Bidder*"), or, if the Potential Bidder is an entity formed for the purpose of acquiring the Purchased Assets and the Business, current audited financial statements of the equity holders of the Potential Bidder who shall guarantee the obligations of the Potential Bidder, or such other form of financial disclosure and credit-quality support or enhancement acceptable to Seller and its financial advisors;

(b) An executed copy of this Agreement, together with all schedules, marked (a "*Marked Agreement*") to show those amendments and modifications to this Agreement and schedules that the Potential Bidder proposes, including (i) the applicable purchase price; (ii) any assets and/or equity interests expected to be excluded; (iii) the structure and financing of the transaction (including written evidence of a commitment for financing or other evidence of ability to consummate the proposed transaction satisfactory to Seller and its advisors); (iv) any anticipated regulatory approvals required to close the transaction, the anticipated time frame and any anticipated impediments for obtaining such approvals; and (v) any conditions to closing that it may wish to impose in addition to those set forth in this Agreement; and

(c) A good faith deposit (the "*Good Faith Deposit*") in the form of a certified bank check from a U.S. bank or by wire transfer (or other form acceptable to Seller in its sole discretion) payable to the order of Seller (or such other party as Seller may determine) in an amount equal to 10% of such bidder's gross (pre-adjustment) Purchase Price (rounded to the nearest \$100,000).

A Potential Bidder that delivers the documents described in the previous subparagraphs above and whose financial information and credit-quality demonstrate the financial capability of the Potential Bidder to consummate the Sale if selected as a successful bidder, and that Seller determines in its sole discretion is likely (based on availability of financing, experience and other considerations) to be able to consummate the Sale within the time frame provided by this Agreement shall be deemed a "*Qualified Bidder*." Notwithstanding the foregoing, each of TVA and Kelson shall be deemed a Qualified Bidder for purposes of the Bidding Process.

**Section 11.5 Qualified Bids.** A bid will be considered only if the bid:

(a) Is on terms and conditions (other than the amount of the consideration and the particular liabilities being assumed) that are substantially similar to, and are not materially more burdensome or conditional to Seller than, those contained in this Agreement;

(b) Is not conditioned on obtaining financing or on the outcome of due diligence by the bidder, and is not otherwise conditional or revocable;

(c) Proposes a transaction that Seller determines, in the good faith opinion of its senior management, after consultation with its financial advisors, is not materially more burdensome or conditional than the terms of this Agreement and has a value, either individually or, when evaluated in

conjunction with any other Qualified Bid, greater than or equal to the sum of the Purchase Price, plus the termination fee payable pursuant to the O&M Termination Agreement, plus \$1,000,000;

(d) Is not conditioned upon any bid protections, such as a break-up fee, termination fee, expense reimbursement or similar type of payment;

(e) Contains an acknowledgement and representation that the bidder: (i) has had an opportunity to conduct any and all due diligence regarding the Purchased Assets prior to making its offer; (ii) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the Purchased Assets in making its bid; and (iii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express, implied, by operation of law or otherwise, regarding the Purchased Assets, or the completeness of any information provided in connection therewith or the Auction, except as expressly stated in this Agreement or the Marked Agreement;

(f) Includes a commitment to consummate the purchase of the Purchased Assets (including the receipt of any required governmental or regulatory approvals) within not more than fifteen (15) days after entry of an order by the Bankruptcy Court approving such purchase, subject to the receipt of any governmental or regulatory approvals which must be obtained within sixty (60) days after entry of such order;

(g) Includes a commitment that such bid shall remain open for thirty (30) Business Days after the Sale Hearing if such bid shall be deemed an Alternate Bid in accordance with Section 11.9, and otherwise shall remain open for two days after the Sale Hearing; and

(h) Is received by the Bid Deadline (with the exception of Subsequent Bids at the Auction); provided, however, that Seller shall have the right to extend the Bid Deadline up to a maximum of five (5) Business Days in its sole and absolute discretion, but Seller is not obligated to do so. If Seller extends the Bid Deadline, it will promptly inform all of the Qualified Bidders of such extension.

A bid received from a Qualified Bidder will constitute a "*Qualified Bid*" only if it includes all of the Required Bid Documents and meets all of the above requirements; provided, however, Seller will have the right, in its sole discretion, to entertain bids for the Purchased Assets that do not conform to one or more of the requirements specified herein and deem such bids to be Qualified Bids. Seller shall send copies of any Qualified Bids to Purchaser within forty-eight (48) hours of receipt of such bids by Seller. Notwithstanding the foregoing, Purchaser shall be deemed a Qualified Bidder, and the Kelson Asset Purchase Agreement shall be deemed a Qualified Bid, for all purposes in connection with the bidding process, the Auction and the Sale. A Qualified Bid will be valued based upon factors such as the net value provided by such bid and the likelihood and timing of consummating such transaction, which will be determined by Seller in its sole and absolute discretion. Each Qualified Bid other than that of Purchaser pursuant to the Kelson Asset Purchase Agreement is referred to as a "*Subsequent Bid*." If Seller does not receive any Qualified Bids other than the Kelson Asset Purchase Agreement, Seller will report the same to the Bankruptcy Court and will proceed with the Sale pursuant to the terms of the Kelson Asset Purchase Agreement, subject to the Sale Approval Order.

#### **Section 11.6 Intentionally Omitted.**

**Section 11.7 Auction Bidding Increments and Bids Remaining Open.** If Seller receives one (1) or more Subsequent Bids in addition to this Agreement, Seller will conduct an auction (the "*Auction*") of the Purchased Assets and the Business upon notice to all Qualified Bidders who have submitted Qualified Bids at the offices of Latham & Watkins, LLP, 885 Third Avenue, New York, New

York 10024, (at Seller's election) or such other place as Seller shall notify all Qualified Bidders who have submitted Qualified Bids, starting at 9:00 a.m. (prevailing Eastern time) on March 31, 2008, in accordance with the following procedures:

(a) Only Seller, Purchaser, any representative of each of Seller's pre-petition and post-petition credit facilities and any Qualified Bidder (and the legal and financial advisers to each of the foregoing) who has timely submitted a Qualified Bid shall be entitled to attend the Auction, and only Purchaser and Qualified Bidders will be entitled to make any subsequent Qualified Bids at the Auction.

(b) At least two (2) Business Days prior to the Auction, each Qualified Bidder who has timely submitted a Qualified Bid must inform Seller in writing whether it intends to participate in the Auction and at least one (1) Business Day prior to the Auction, Seller shall identify the Qualified Bid or combination of Qualified Bids which Seller believes is the highest or otherwise best offer to all Qualified

Purchased Assets to Purchaser following entry of the Sale Order. If Seller does receive additional Qualified Bids, then, at the Sale Hearing, Seller shall seek approval of the Successful Bid, and, at Seller's election, one or more next highest or best Qualified Bid (the "*Alternate Bid*" and such bidder, the "*Alternate Bidder*"). Seller's presentation to the Bankruptcy Court of the Successful Bid and Alternate Bid shall not constitute Seller's acceptance of either or any such bid, which acceptance shall only occur upon approval of such bid by the Bankruptcy Court at the Sale Hearing. Following approval of the sale to the Successful Bidder, if the Successful Bidder fails to consummate the sale, then the Alternate Bid shall be deemed to be the Successful Bid and Seller shall effectuate a sale to the Alternate Bidder subject to the terms of the Alternate Bid of such Alternate Bidder without further order of the Bankruptcy Court.

**Section 11.10 Return of Good Faith Deposit.** Good Faith Deposits of all Qualified Bidders (except for the Successful Bidder and the Alternate Bidder) shall be held in an interest-bearing escrow account and all Qualified Bids shall remain open (notwithstanding Bankruptcy Court approval of a sale pursuant to the terms of one or more Successful Bids by one or more Qualified Bidders), until two (2) Business Days following the Sale Hearing (the "*Return Date*"). The Good Faith Deposit of the Alternate Bidder shall be held in an interest-bearing escrow account and the Alternate Bid shall remain open (notwithstanding Bankruptcy Court approval of a sale pursuant to the terms of one or more Successful Bids by one or more Qualified Bidders), until thirty (30) Business Days following the Sale Hearing (the "*Alternate Return Date*"). Notwithstanding the foregoing, the Good Faith Deposit, if any, submitted by the Successful Bidder, together with interest thereon, shall be applied against the payment of the Purchase Price upon closing of the Sale to the Successful Bidder. If a Successful Bidder fails to consummate an approved sale because of a breach or failure to perform on the part of such Successful Bidder, such Successful Bidder will forfeit its Good Faith Deposit, and such Good Faith Deposit shall irrevocably become property of Seller in full and final satisfaction of any and all liabilities of defaulting Successful Bidder to Seller with respect to the Sale. On the Return Date, Seller shall return the Good Faith Deposits of all other Qualified Bidders (except for the Alternate Bidder), together with the accrued interest thereon, and on the Alternate Return Date, Seller shall return the Good Faith Deposits of the Alternate Bidder, together with the accrued interest thereon.

**Section 11.11 Modifications.** Seller, after consultation with the agents for the Senior Lenders: (i) may determine which Qualified Bid, if any, is the highest or otherwise best offer; and (ii) may reject at any time, any bid (other than Purchaser's initial bid) that is: (a) inadequate or insufficient; (b) not in conformity with the requirements of the Bankruptcy Code, the Bidding Procedures or the terms and conditions of the Sale; or (c) contrary to the best interests of Seller, its estate and creditors as determined by Seller in its sole discretion.

## ARTICLE 12

### GENERAL PROVISIONS

**Section 12.1 Entire Document; Amendments.** This Agreement (including the Exhibits and Schedules to this Agreement), the Ancillary Agreements, and the Confidentiality Agreement contain the entire agreement between the Parties with respect to the Transactions, and supersede all negotiations, representations, warranties, commitments, offers, contracts and writings (except for the Confidentiality Agreement and any Ancillary Agreements executed prior to the Effective Date) prior to the Effective Date, written or oral. No modification or amendment of any provision of this Agreement shall be effective unless made in writing and duly signed by the Parties referring specifically to this Agreement.

**Section 12.2 Schedules.** Seller may, from time to time prior to the Closing, notify Purchaser of any changes or additions to any of the Schedules to this Agreement prepared by Seller and Purchaser may, from time to time prior to the Closing, notify Seller of any changes or additions to any of the Schedules to this Agreement prepared by Purchaser by the delivery of amendments or supplements thereto, if any, as of a reasonably current date prior to the Closing, but each Party shall in any event at least once, not earlier than ten (10) Business Days or later than three (3) Business Days prior thereto, so notify the other Party. Such notification, change, addition, amendment or supplement by Seller shall have no effect for purposes of determining whether Purchaser's conditions to Closing set forth in Article 8 have been fulfilled and such notification, change, addition, amendment or supplement by Purchaser shall have no effect for purposes of determining whether Seller's conditions to Closing set forth in Article 9 have been fulfilled. If the Closing occurs, all matters disclosed by either Party pursuant to any such notification, change, addition, amendment or supplement made prior to the Closing shall be deemed to be included in the Schedules as of the Closing and shall be deemed to have cured any breach or inaccuracy of any representation or warranty in this Agreement (it being understood that the consummation of the Closing will be deemed to constitute a waiver of such breach).

**Section 12.3 Counterparts, Signatures, and Originals.** This Agreement may be executed in one or more counterparts, each of which is an original, but all of which together constitute one and the same instrument. The Parties agree that this Agreement, any Ancillary Agreement and any other document issued pursuant to this Agreement, or document referenced by the foregoing, will be considered signed when the signature of a party is delivered by facsimile transmission. Such facsimile signature shall be treated in all respects as having the same effect as an original signature. Any original of this Agreement, any Ancillary Agreement or any other document issued pursuant to this Agreement, or document referenced by the foregoing, may be photocopied and stored on computer tapes and disks (the "Imaged Document"). The Imaged Document, if introduced in printed format in its original form in any judicial, arbitral, mediation, regulatory, or administrative proceeding, will be admissible as between the Parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither Party shall object to the admissibility of the Imaged Document (or photocopies of the Imaged Document) on the basis that it was not originated or maintained in documentary form, under a hearsay rule, a best evidence rule or other evidentiary rule.

**Section 12.4 Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be valid, binding and enforceable under applicable Law, but if any provision of this Agreement is held to be invalid, illegal, void (or voidable) or unenforceable under applicable Law, such provision shall be ineffective and shall be severed only to the extent held to be invalid, illegal, void (or voidable) or unenforceable, without affecting the remainder of such provision or the remaining provisions of this Agreement and the remaining terms and provisions shall nevertheless remain in full force and effect except where the manifest purposes of this Agreement would be materially impaired or prevented thereby. To the extent permitted by Law, the Parties waive any provision of Law that renders any provision hereof prohibited or unenforceable in any respect.

**Section 12.5 Assignment.** The rights under this Agreement shall not be assignable or transferable, nor the duties delegable, by either Party without the prior written consent of the other Party, which consent may be granted or withheld in such other Party's sole discretion. Notwithstanding the foregoing, Purchaser may freely (i) grant to its lenders a security interest in its rights under this Agreement and the power to assign the same in connection with an exercise of such lenders' remedies provided that neither the grant of any such interest, nor the foreclosure of any such interest, shall in any way release, reduce or diminish the obligations of Purchaser to Seller hereunder, (ii) assign (to take effect on or after the Closing) or cause to be transferred its rights and obligations hereunder in whole or in part, to a proposed generating company or other entity, group or organization ("Genco") to be established by Purchaser's distributor-members of the Tennessee Valley Public Power Association, such that (a) Genco

would take and receive an ownership share of the Purchased Assets at Closing or (b) Purchaser would take and receive full ownership of the Purchased Assets at the Closing subject to an option or similar right to be taken and received by Genco to purchase or otherwise receive an ownership share subsequent to the Closing (or other comparable arrangements that may be negotiated between Genco and Purchaser to facilitate an ownership interest in the Purchased Assets by Genco, as to which Seller shall reasonably cooperate with Purchaser; provided that no additional liability or cost shall be incurred by Seller in connection with any such arrangements or the negotiation of any such arrangements); provided, further that no such assignment, transfer or similar arrangement shall in any way release, reduce or diminish the obligations of Purchaser to Seller hereunder or cause any delay of Closing. Any assignment effected in accordance with this Section 12.5 shall not relieve the assigning Party of its obligations and liabilities under this Agreement and the Ancillary Agreements. Any purported assignment or delegation not effected in accordance with this Section 12.5 shall be deemed void.

**Section 12.6 Governing Law; Jurisdiction and Venue.** As Purchaser is a corporate agency and instrumentality of the United States of America, the validity, interpretation and effect of this Agreement are governed by and shall be construed in accordance with the federal laws of the United States of America without regard to conflicts of law doctrines, except to the extent that (i) certain matters are governed by the law of the respective jurisdiction of incorporation or formation, as applicable, of the Parties; (ii) certain matters with respect to real property are governed by the law of the State of Mississippi where federal law requires adoption of state law for a rule of decision on real property matters; or (iii) certain matters other than with respect to real property or incorporation/formation matters are governed by the law of the State of New York where federal law requires adoption of state law for a rule of decision on matters other than with respect to real property matters. After Seller is no longer subject to the jurisdiction of the Bankruptcy Court, any action or proceeding arising under this Agreement shall be adjudicated in the U.S. District Court for the Western District of North Carolina seated in Asheville, North Carolina, and each Party waives any right to claim improper venue (to the maximum extent permitted by applicable Law) or to seek a new venue based on the doctrine of *forum non-conveniens* or similar defense and any other right to transfer venue from that specified herein and acknowledges the importance of this provision to the agreement of the Parties to enter into this Agreement.

**Section 12.7 Waiver of Jury Trial.** TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, EACH OF THE PARTIES EXPRESSLY AND IRREVOCABLY WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY LITIGATION, ACTION OR PROCEEDING ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT, THE ANCILLARY AGREEMENTS, OR ANY MATTER ARISING HEREUNDER OR THEREUNDER.

**Section 12.8 Notices.** Unless this Agreement specifically requires otherwise, any notice, Claim, demand, communication or request provided for in this Agreement, or served, given or made in connection with it, shall be in writing and shall be deemed properly served, given or made if delivered in person or sent by facsimile or sent by registered or certified mail, postage prepaid, or by a nationally recognized overnight courier service that provides a receipt of delivery, in each case, to the Parties at the addresses specified below:

If to Seller to:

Southaven Power, LLC  
9405 Arrowpoint Blvd.  
Charlotte, North Carolina 28273  
Attention: John W. O' Connor

Elizabeth Rippetoe, Esq.  
Fax: (704) 529-5313

with a copy to:

Latham & Watkins LLP  
885 Third Avenue  
New York, New York 10022  
Attention: Mark A. Broude, Esq.  
Taurie M. Zeitzer, Esq.  
Fax: (212) 751-4864

and

If to Purchaser to:

Tennessee Valley Authority  
1101 Market Street  
Chattanooga, Tennessee 37402  
Attention: General Manager, Combustion Turbines and Distributed  
Resources  
Fax: (423) 751-7926

with a copy to:

Tennessee Valley Authority  
400 West Summit Hill Drive  
Knoxville, Tennessee 37902  
Attention: Office of General Counsel  
Fax: (865) 632-4161

Any Party may from time to time change its address for the purpose of notices to that Party by a similar notice specifying a new address, but no such change is effective until it is actually received by the Party sought to be charged with its contents. Notice given by personal delivery, mail or overnight courier pursuant to this Section 12.8 shall be effective upon physical receipt. Notice given by facsimile pursuant to this Section 12.8 shall be effective as of the date of confirmed delivery if delivered before 5:00 p.m. Eastern Time on any Business Day or the next succeeding Business Day if confirmed delivery is after 5:00 p.m. Eastern Time on any Business Day or during any non-Business Day.

**Section 12.9 No Third Party Beneficiaries.** Except as may be specifically set forth in this Agreement, nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any Person other than the Parties, their respective permitted successors and assigns, and any Person benefiting from the indemnities provided herein, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third Persons to any Party, nor give any third Persons any right of subrogation or action against any Party.

**Section 12.10 No Joint Venture.** Nothing contained in this Agreement creates or is intended to create an association, trust, partnership or joint venture or impose a trust or partnership duty, obligation or liability on or with regard to any Party.

**Section 12.11 Waiver of Compliance; Remedies.** To the extent permitted by applicable Law, any failure to comply with any obligation, covenant, agreement or condition set forth herein or in any Ancillary Agreement, or any breach of any representation or warranty set forth herein or in any Ancillary Agreement, may be waived by the Party entitled to the benefit of such obligation, covenant, agreement, condition, representation or warranty only by a written instrument signed by such Party that expressly waives such failure or breach, but any such waiver shall not operate as a waiver of, or estoppel with respect to, any prior or subsequent failure to comply therewith or breach thereof. The failure of a Party to this Agreement to assert any of its rights under this Agreement or otherwise shall not constitute a waiver of such rights. A waiver by a Party of the performance of any covenant, condition, representation or warranty of the other Party shall not invalidate this Agreement, nor shall such waiver be construed as a waiver of any other covenant, condition, representation or warranty. A waiver by a Party of the time for performing any act shall not constitute a waiver of the time for performing any other act or the time for performing an identical act required to be performed at a later time. All remedies, either under this Agreement or as otherwise may be afforded by law or at equity, will be cumulative and not alternative. The covenants, obligations and agreements of a defaulting Party and the rights and remedies of a non-defaulting Party upon a default shall continue and remain in full force and effect with respect to any subsequent breach, act or omission.

**Section 12.12 Litigation Costs and Interest.** In any litigation or other proceeding between the Parties relating to this Agreement, the non-prevailing Party shall pay the prevailing party (i) all taxable court costs and (ii) pre- and post-judgment interest at the rate payable under the Prompt Payment Act, 31 U.S.C. Section 3901 et seq., from the date of the applicable breach until paid.

**Section 12.13 Fair Disclosure.** The Parties agree that any matter fairly disclosed in any Schedule to this Agreement shall be deemed an exception for all other representations and warranties contained in this Agreement reasonably related to such Schedule, whether or not such other representations or warranties contain a specific reference to such Schedule.

**Section 12.14 Limitation on Damages.** (a) **NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, IN NO EVENT SHALL ANY PARTY BE LIABLE TO THE OTHER PARTY FOR, OR BEAR ANY OBLIGATION IN RESPECT OF, ANY PUNITIVE, INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND OR CHARACTER OR ANY DAMAGES RELATING TO, OR ARISING OUT OF, DIMINUTION IN VALUE, LOST PROFITS OR CHANGES IN RESTRICTIONS ON BUSINESS PRACTICES.**

(b) The waivers and disclaimers of liability, releases from liability, and limitations on liability expressed in Section 12.14(a) shall survive termination or expiration of this Agreement, and shall apply whether in contract, equity, tort or otherwise, even in the event of the fault, negligence, strict liability, or breach of contract of the Party released or whose liabilities are limited, and shall extend to the partners, members, principals, shareholders, directors, officers, employees and agents of such Party and its Affiliates, but shall not act to restrict or limit recovery by either Party (i) against any other third party or (ii) of proceeds of any insurance coverage otherwise available to or for the benefit of such Party.

**Section 12.15 Required Federal Contracting Clauses.** No member or delegate of the United States Congress or resident commissioner or any officer, employee, special government employees, or agent of Purchaser shall be admitted to any share or part of this Agreement and the closing of the transactions contemplated hereby or to any benefit to arise therefrom unless the agreement be made with a corporation for general benefit, nor shall Southaven offer or give, directly or indirectly, to any officer, employee, special government employee or agent of Purchaser, any gift, gratuity, favor, entertainment,

loan or any other thing of monetary value, except as provided in 5 C.F.R Part 2635; any breach of this provision shall constitute a material breach of this Agreement.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the date first set forth above.

**SOUTHAVEN POWER, LLC,**  
a Delaware limited liability company

By   
Name:  
Title:

**TENNESSEE VALLEY AUTHORITY,**  
a corporate agency and instrumentality of the  
United States of America

By   
Name:  
Title:

*Indefinite Instructions:*

*Southwest Quarter (SW 1/4) of  
Section 15, Township 1 South,  
Range 8 West, De Soto County,  
Mississippi*

*and  
Southeast Quarter (SE 1/4) of  
Section 16, Township 1  
South, Range 8 West,  
De Soto County, Mississippi*