

CONTRACT NO. XX-TIP-XXXX
ADVANCE FUNDING AGREEMENT
BETWEEN
[ENTER PROponent NAME]
AND
U.S. DEPARTMENT OF ENERGY
WESTERN AREA POWER ADMINISTRATION
TRANSMISSION INFRASTRUCTURE PROGRAM
FOR
[ENTER PROJECT NAME]

This Advance Funding Agreement (“AFA”) is entered into this ___ day of [ENTER MONTH/YEAR] by and between the Western Area Power Administration (“Western”), 12155 West Alameda Parkway, Lakewood, CO 80228 and [ENTER PROponent NAME] (“Proponent”), [ENTER PROponent ADDRESS], (each a “Party” and collectively the “Parties”).

RECITALS

WHEREAS, Western and Proponent have executed a Memorandum of Understanding (“MOU”) dated [ENTER DATE OF MOU] (Exhibit XX), in which the Parties set forth their mutual intent to have Western conduct a detailed review and evaluation of the [ENTER NAME OF PROPOSED PROJECT] (the “Project”); and

WHEREAS, consistent with the MOU, the Parties have had preliminary discussions about the Project and are now at a stage where additional discussions, meetings, and drafting of project documents such as budgets and schedules are necessary to further define and develop the Project; and

WHEREAS, Western, in accordance with principles of prudent financial management and the need to effectively manage the resources of the Transmission Infrastructure Program, must receive adequate advance funding from the Proponent to cover its labor, travel, and other costs associated with its Project-related efforts; and

WHEREAS, the Parties desire to establish the manner in which they will: (1) cooperate on National Environmental Policy Act (“NEPA”) planning as it pertains to the Project; (2) facilitate the acquisition of a project rating in accordance with the Western Electricity Coordinating Council (“WECC”) path rating process; (3) facilitate Western’s performance of due diligence activities; (4) identify specific developmental support and technical services to be provided by Western; (5) determine the principal terms (if any) related to Western’s potential ownership of Project real property, facilities and capacity and other principal terms to be included in Project development documents; (6) cooperate on the submittal and processing of interconnection agreements, as necessary, to include Large Generator Interconnection Agreements, and (7) take other appropriate actions to expedite development of the Project; and

WHEREAS, the Parties wish to set forth in this AFA the manner in which the Proponent will provide advance funding to enable Western to devote or obtain needed resources including, but not

limited to, third-party consultants, contractors, and outside counsel to further Project development efforts;

NOW THEREFORE, in consideration of the mutual advantages to be derived hereby, the Parties agree as follows:

1. Authority.

- a) The authority for Western to enter into this AFA includes, but is not limited to: § 302 and § 641 of the DOE Organization Act (42 U.S.C. §§ 7152, 7251) as amended; § 402 of the American Recovery and Reinvestment Act of 2009 (42 U.S.C. § 16421a), which amended the Hoover Power Plant Act of 1984 (Public Law 98–381) by adding § 301 (“Western Area Power Administration Borrowing Authority”); the DOE Energy and Water Appropriations Act of 1993 (42 U.S.C. § 7278); and the Contributed Funds Act (43 U.S.C. § 395).
- b) Proponent is a limited liability company, duly organized, validly existing and in good standing under the laws of the **[INSERT PROPONENT’S STATE OF INCORPORATION]** and is duly qualified to carry on its business in each state where so required. Proponent has all requisite power and authority to enter into this AFA.

2. Term of this AFA. This AFA shall be in effect from the date hereof until development activity as mutually agreed upon is complete, unless earlier terminated by either Party, such termination to be effective upon prior written notice of at least thirty (30) calendar days to the other Party, subject to any remaining obligations under Sections 8 and 9 of this AFA. Either Party may terminate this AFA at any time, for any reason, or no reason at all.

3. No Binding Obligation. The Parties acknowledge and agree that Western’s execution of this AFA, participation in Project-related development activities set forth in this AFA, or participation in any other Project-related activity shall in no way whatsoever obligate Western to continue to participate in the Project. Moreover, neither Party shall be liable to the other Party for any detrimental reliance, lost opportunities, or any damages to the other Party whatsoever that may result from the termination of this AFA.

4. Proponent Project Documents.

- a) Proponent shall make available to Western, during normal business hours, records in its possession or in the possession of its contractors or consultants related to Project lands, permitting, environmental, and design and construction aspects of the Project, including but not limited to, the WECC Phase 1 studies, line route engineering, construction and operational analyses, preliminary mechanical designs and structure evaluations, construction cost estimates, one-line diagrams and general arrangements, rights-of-way applications, development plans and other technical, engineering and Project design documents, and any other Project-related documents and data that Western may reasonably request access to for purposes of fulfilling its obligations under this AFA.

- b) Each Party shall, to the extent allowable by law, maintain the confidentiality of all the documents, data, and any other information provided to it by the other Party that contains confidential, proprietary, or market sensitive information. The Parties shall appropriately and conspicuously mark any documents, data, and information that it considers confidential, proprietary or market sensitive. Disclosure by Western of any documents or information provided by Proponent shall be handled in accordance with applicable laws and regulations and legal requirements, including laws and regulations concerning compliance with the Freedom of Information Act (5 U.S.C. § 552; 10 CFR part 1004). Neither Party is required to maintain the confidentiality of information provided to it by the other Party if the receiving party is required by law to disclose such information, or the information is already in the public domain by means other than release by the receiving party.
- c) Reports, records of key decisions and signed documentation will be included in the Project records, which both Parties shall independently maintain.

5. Project Management.

- a) Proponent is the overall Project Manager of the Project until the termination of this AFA, with Western contributing its management and technical expertise as described herein and as further mutually agreed to by the Parties. This AFA, a business plan, and other supporting documentation as may be determined necessary, shall guide the Parties' management of the Project during the Project development phase.
- b) Management of the Project during the term of this AFA shall be accomplished by a Management Committee consisting of representatives from both Proponent and Western. The Management Committee is to be formed immediately upon the execution of this AFA.
- c) Both Parties will exercise a concerted level of effort to resolve disputes at the appropriate staff level, and when those disputes cannot be resolved, the Parties will each have the opportunity to present viewpoints and recommendations to the next highest staff level for resolution. If a dispute remains unresolved, it shall be referred to the Management Committee for resolution. Proponent shall continue funding all costs incurred by third-party contactors and any sub-contractors under the terms of the applicable contract during any dispute period.

6. Management Committee and Other Committees.

- a) The Management Committee will provide general oversight for the Project and any other committee that may be formed, including but not limited to, overseeing, reviewing, and coordinating the Project scope, schedule, and budget.
- b) Western and Proponent will each appoint one member to the Management Committee who will serve as co-chairs of the committee (see Exhibit **XX**). Each member's vote on the committee will be equally weighted. Final decisions of the Management Committee will

require the unanimous vote of the members. In the absence or unavailability of a Management Committee member, the Party that appointed such member may designate an alternate to act for such absent or unavailable member upon reasonable notice to the other Party. Each member will represent and have the power and authority to bind the Party that has appointed such member.

- c) Deadlocks of the Management Committee shall be addressed by the Parties' senior management. Proponent may request in writing that Western stop all work being performed under this AFA and mitigate any additional costs to Proponent during the deadlock.
- d) The Management Committee will meet as necessary or appropriate but, unless the Parties mutually agree otherwise, no less frequently than quarterly while this AFA remains in effect. Either Party may demand a meeting of the Management Committee at any time by giving reasonable advance notice to the other Party.
- e) Upon execution of this AFA, the Management Committee shall initiate discussions on the Project schedule, budget, and other Project-related activities, and discuss assignments and tasks.
- f) The Management Committee will direct the formation of subcommittees to work on regulatory, operations and maintenance, power marketing, procurement, ownership, contract preparation, and capital structure and financing, as necessary, during the development phase of the Project. The subcommittees will report directly to the Management Committee. The Management Committee may form additional committees if needed.

7. Communications. Western and Proponent shall consult with each other prior to all public announcements to be issued during the term of this AFA, except as may be otherwise required by applicable law, in which case the Party required by law shall give prompt notice of the public announcement to the other Party.

8. Funding.

- a) The Parties agree that Proponent shall advance funds to Western to cover the internal and external costs Western incurs in performing its obligations under this AFA, as more specifically set out in this Section 8. If there are any unused funds remaining from the funds paid by Proponent to Western at the time the Proponent submitted its Project Proposal and Business Plan Proposal, Western shall exhaust those funds first before using funds advanced by Proponent under this AFA. Western shall provide a detailed accounting of all such remaining funds to the Proponent prior to Proponent's advancement of funds under this AFA. Proponent shall be responsible for paying its consultants, contractors, attorneys, staff, and any other expenses it incurs in connection with the development of the Project.

- b) Western will provide Proponent an estimate of hours and costs to fulfill its obligations under this AFA as set forth in Exhibit **XX** (“Staff Estimates”). Western staff assigned to the Project shall keep accurate records of their time and provide monthly summaries to Proponent detailing the time expended and the tasks performed during the preceding month, together with cumulative totals of staff time devoted to the Project and all costs of external resources (e.g., third party consultants, contractors and outside counsel) reasonably required by Western. Western shall provide these monthly summaries to Proponent on a mutually agreed day of each month for the duration of this AFA.
- c) Upon receipt of the first Staff Estimate from Western, Proponent shall tender to Western a mutually agreed upon sum as advance payment to pay for staff time and the cost of work to be performed by external Western resources for the first three (3) consecutive months (“First Quarterly Advance”) of this AFA development phase. Thereafter, on the first business day of each quarter, Proponent shall tender to Western an amount to be determined by the Management Committee as advance payment for work to be performed during such quarter. The Management Committee shall determine the amount of such advance no later than 30 days prior to the first day of the applicable quarter.
- d) Western shall at all times use reasonable efforts to align staff hours with the Staff Estimates and shall promptly notify the Proponent if it believes it will materially exceed a Staff Estimate or need additional funding to cover the costs associated with a Staff Estimate. If the historical monthly summary prepared by Western for a given month indicates that staff time in the succeeding month may exceed the cumulative total of staff time listed in the First Quarterly Advance or any subsequent quarterly advance, as the case may be, Western shall notify the Proponent and the Parties shall consult on the Staff Estimate compiled for the quarter covered by the advance. The Parties will consult on the proper course of action and the Proponent will determine whether to make a supplemental or revised advance payment.
- e) Western shall monitor the work performed under this AFA and the costs incurred. If the balance of Proponent’s advance funding drops below \$25,000, or if Western determines there are insufficient funds remaining for the next month’s planned expenses, Western will request the Proponent advance additional funds to cover the planned work. If the Proponent agrees with Western’s request for additional advanced funds, Proponent will provide the funds within fifteen (15) calendar days of receipt of the request. If the Proponent disagrees with the proposed amount, the matter will be forwarded to the Management Committee for resolution. **Western must receive adequate funding from Proponent prior to performance of any Project-related work.**
- f) Upon written notice by either Party of the termination of this AFA, Western shall immediately stop all work and take reasonable steps, as necessary, to prevent the incursion of any additional costs that the Proponent is obligated to pay under this AFA. Upon termination, Western will account for all staff time spent on performance of work under this AFA, and related expenses, on and prior to the date the notice of termination was received. If, upon termination of this AFA, it is determined that payment by Proponent

under this Section 8 has exceeded Western's expenses under this AFA, Western shall promptly refund to Proponent the excess amount.

- g) The allocation of the costs incurred and addressed pursuant to this Section 8 shall be included in this AFA. Western is under no obligation to repay to Proponent funds advanced pursuant to this AFA except for the obligation to refund any excess advanced funds as set forth in Section 8.f).

9. Intellectual Property. All data, documents, studies, information and other tangible intellectual property produced by Western under this AFA ("Project IP") shall be assigned to and owned by Proponent to the full extent permitted by applicable law. Upon termination of this AFA, Western shall arrange for the orderly transfer of all such Project IP and shall not use any Project IP for its own uses without the express written consent of Proponent. Upon request of Proponent, Western shall execute an agreement whereby it assigns to the Proponent all rights and interest in Project IP.

10. Miscellaneous.

- a) This AFA is subject to, and the Parties shall act in conformance with, all applicable laws, rules and regulations.
- b) Congressional authorization may be required for Western to receive and expend funds advanced from Proponent for purposes of performing its providing services under this AFA. In case such authorization is not received, Proponent hereby releases Western from its contractual obligations and from all liability due to the lack of such authorization *except* for Western's obligations to return any excess funds to Proponent pursuant to Section 8.f.
- c) Proponent warrants that no person or selling agency has been employed or retained to solicit or secure this AFA upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee that would otherwise obligate Western to pay any such fees. For breach or violation of this warranty Western shall have the right to terminate this AFA without liability or, in its discretion, have Proponent pay Western's share under any such arrangement.
- d) This AFA, to the extent that it is of a character specified in Section 103 of the Contract Work Hours and Safety Standards Act, as amended or supplemented (40 U.S.C. § 3701), is subject to the provisions of, and to regulations promulgated by the Secretary of Labor pursuant to, the aforementioned act.
- e) Section 202 of Executive Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended by Executive Order No. 12086, 43 Fed. Reg. 46501 (1978), as amended or supplemented, which requires, among other things, that Proponent will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin, is incorporated herein by reference the same as if the specific language had been written into this AFA, except that Indian Tribes and tribal organizations may apply Indian preference to the extent permitted by Federal law.

- f) Proponent agrees not to employ any person undergoing sentence of imprisonment in performing this AFA except as provided by 18 U.S.C. § 3622(c), as amended or supplemented, and Executive Order No. 11755, 39 Fed. Reg. 779 (1973), as amended or supplemented.
- g) This AFA may not be amended, nor any rights hereunder waived, except by an instrument in writing signed by the Party to be charged with such amendment or waiver and delivered by such Party to the Party claiming the benefit of such benefit or waiver. Any waiver of rights under this AFA by a Party shall not be deemed a waiver with respect to any other matter. Failure by either Party to exercise any right or remedy shall not be deemed a waiver of such right or remedy.
- h) Neither Party may assign all or any portion of its respective rights or delegate all or any portion of its respective obligations under this AFA without the consent of the other Party, provided that, Proponent may assign its rights, interest and obligations to an affiliate or a related entity over which Proponent exercises majority control.
- i) This AFA may be executed by the Parties in any number of counterparts, each of which shall be deemed an original instrument, but all of which taken together shall constitute but one and the same document.
- j) Should any portion of this AFA be determined to be illegal or unenforceable, the remainder of the AFA will continue in full force and effect.
- k) Nothing in this AFA shall be deemed to create a joint venture, partnership or other fiduciary relationship between the Parties.
- l) Federal law shall control the obligations and procedures established by this AFA and the performance and enforcement thereof. The forum for litigation arising from this AFA shall exclusively be a Federal court of the United States, unless the Parties agree to pursue alternative dispute resolution.
- m) Notices shall be in writing given in person or by prepaid mail, express delivery, facsimile transmission or e-mail, and effective when received in person or at the address/facsimile number or e-mail of the receiving party shown below. Notice given by mail shall be deemed received 24 hours after being mailed (postage prepaid) to the address of the receiving party shown below.

To Proponent: **[INSERT NAME]**
 [INSERT STREET ADDRESS]

[INSERT CITY, STATE, ZIP]
Phone: [INSERT PHONE]
Fax: [INSERT FAX]
Attn: [INSERT NAME]
Email: [INSERT E-MAIL ADDRESS]

To Western: Western Area Power Administration
P.O. Box 281213
Lakewood, CO 80228-2802
Phone: (720) 962-7710
Fax: (720) 962-7700
Attn: TIP Manager

1. [REMAINDER OF PAGE IS BLANK]

IN WITNESS WHEREOF, the Parties have executed this AFA as of the date set forth above.

WESTERN AREA POWER ADMINISTRATION

By: **[NAME OF ADMINISTRATOR]**

Title: Administrator

PROPONENT

By: **[NAME OF CORPORATE OFFICIAL]**

Title: **[CORPORATE POSITION]**