

**CONTRACT NO. X-TIP-X
ADVANCE FUNDING AGREEMENT
BETWEEN
[PROPONENT]
AND
U.S. DEPARTMENT OF ENERGY
WESTERN AREA POWER ADMINISTRATION
TRANSMISSION INFRASTRUCTURE PROGRAM
FOR
[PROJECT NAME]**

This Advance Funding Agreement (“AFA”) is entered into this [DATE] by and between the Western Area Power Administration (“WAPA”), 12155 West Alameda Parkway, Lakewood, CO 80228 and [PROPONENT NAME AND ADDRESS] (each a “Party” and collectively the “Parties”).

RECITALS

WHEREAS, WAPA and Project Sponsor have executed a Memorandum of Understanding (“MOU”) dated X (Exhibit 1), in which the Parties set forth their mutual intent to have WAPA conduct a detailed review and evaluation of the Project, [PROJECT DESCRIPTION] (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, WAPA, 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 Project Sponsor 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, as applicable: (1) review and comment on National Environmental Policy Act (“NEPA”) documents prepared by the Bureau of Land Management as it pertains to the Project; (2) facilitate the completion of a Western Electricity Coordinating Council (“WECC”) Comprehensive Progress Report; (3) facilitate WAPA’s performance of due diligence activities; (4) identify specific developmental support and technical services to be provided by WAPA; (5) determine the principal terms (if any) related to WAPA’s potential ownership of Project real property, facilities and capacity and other principal terms; and (6) 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 Project Sponsor will provide advance funding to enable WAPA 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 WAPA 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) Project Sponsor is a [LEGAL DESCRIPTION OF PROPONENT]. Project Sponsor has all requisite power and authority to enter into this AFA.

2. **Term of this AFA.** This AFA shall be in effect as of the date the last of the Parties executes it until development activity as described herein or as otherwise mutually agreed upon is complete, a superseding agreement has been executed by the Parties or this AFA is earlier terminated by either Party as provided herein. Either Party may terminate this AFA at any time, for any reason, or no reason at all, effective upon prior written notice of at least fifteen (15) business days to the other Party, subject to any remaining obligations under Sections 7 and 8 of this AFA and provided that the Parties’ rights and obligations under Sections 4(b) and 6 of this AFA shall survive any such termination for a period ending on the fifth (5th) anniversary of the date hereof.

3. **No Binding Obligation.** The Parties acknowledge and agree that WAPA’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 WAPA 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. **Project Sponsor Project Documents.**

- a) Project Sponsor shall make available to WAPA, during normal business hours, records in its possession or available from its contractors or consultants related to Project lands, permitting, environmental, and design and construction aspects of the Project that are necessary for WAPA to perform its obligations under this AFA, including but not limited to, interconnection requests and associated 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 WAPA may reasonably request access to for purposes of fulfilling its obligations under this AFA.

- b) Each Party shall 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 in accordance with Sections 6 and 7 of the Parties' executed MOU (without regard to any termination of such MOU).
- 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) Project Sponsor is the overall Project Manager of the Project with WAPA 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) 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. Project Sponsor 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.
- c) Upon execution of this AFA, Parties shall initiate discussions on the Project schedule, budget, and other Project-related activities, and discuss assignments and tasks (see Exhibit 2).

6. **Communications.** The Parties agree to act jointly and with mutual agreement on all Project-related news releases and public statements as described in the Parties' executed MOU. Notwithstanding the foregoing, WAPA agrees that Project Sponsor may, from time to time during the term of this AFA, issue press releases and make public statements regarding aspects of the Project which are unrelated to, and make no mention of, WAPA's role in the Project without WAPA's consent or participation.

7. **Funding.**

- a) The Parties agree that Project Sponsor shall advance funds to WAPA to cover the reasonable and documented internal and external costs WAPA incurs in performing its obligations under this AFA, as more specifically set out in this Section 7. If there are any unused funds remaining from the funds paid by Project Sponsor to WAPA at the time the Project Sponsor submitted its Project Proposal and Business Plan Proposal, WAPA shall exhaust those funds first before using funds advanced by Project Sponsor under this AFA. WAPA shall provide a detailed accounting of all such remaining funds to the Project

Sponsor prior to Project Sponsor's advancement of funds under this AFA. Project Sponsor shall be responsible for paying its consultants, contractors, attorneys, staff, and any other expenses it incurs in connection with the development of the Project. WAPA shall consult with Project Sponsor in advance of appointing any third party consultants, contractors or outside counsel, as permitted by Federal law.

- b) Upon receiving an updated project schedule from Project Sponsor, WAPA will provide an initial estimate of hours and costs to fulfill its obligations under this AFA. Project Sponsor acknowledges that WAPA's estimate will be based solely on Project Sponsor's schedule and Project Sponsor is therefore responsible for promptly notifying WAPA of any modifications. WAPA staff assigned to the Project shall keep accurate records of their time and provide monthly summaries to Project Sponsor 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 WAPA. WAPA shall provide these monthly summaries to Project Sponsor on a mutually agreed day of each month for the duration of this AFA. WAPA agrees to keep records of and account for its costs incurred pursuant to this AFA under an accounting procedure in customary usage for accounting of Federal project expenses. Project Sponsor shall have the right to conduct, at its own expense, reasonable audits of the books, records, and documents of WAPA relating to the items on any particular monthly summary provided by WAPA.
- c) Upon receipt of the first Staff Estimate from WAPA, Project Sponsor shall tender to WAPA a mutually agreed upon sum as advance payment to pay for staff time and the cost of work to be performed by external WAPA resources for the first three (3) consecutive months ("First Quarterly Advance") of this AFA development phase. Thereafter, WAPA will provide Project Sponsor with quarterly advance requests and associated invoices and Project Sponsor shall tender to WAPA an amount to be determined by WAPA as advance payment for work to be performed during such quarter. WAPA will use best efforts to determine the amount of such advance no later than 15 days prior to the first day of the applicable quarter. Any unused funds remaining at the end of a quarter will be applied toward work WAPA will perform in subsequent quarter(s).
- d) WAPA shall at all times use reasonable efforts to align staff hours and costs with the Staff Estimates and shall promptly notify the Project Sponsor if it believes it will exceed any line item of the Staff Estimate or need additional funding to cover the costs associated with a Staff Estimate. If the historical monthly summary prepared by WAPA for a given month indicates that staff time or costs in the succeeding month may exceed the cumulative total of staff time or costs listed in the First Quarterly Advance or any subsequent quarterly advance for such month, as the case may be, WAPA shall notify the Project Sponsor 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 Project Sponsor will determine whether to make a supplemental or revised advance payment.

- e) WAPA shall monitor the work performed under this AFA and the costs incurred. If the balance of Project Sponsor's advance funding drops below \$50,000, or if WAPA determines there are insufficient funds remaining for the next quarter's planned expenses, WAPA will request the Project Sponsor advance additional funds to cover the planned work no later than fifteen (15) calendar days in advance of depleting available funds. If the Project Sponsor agrees with WAPA's request for additional advanced funds, Project Sponsor will provide the funds within fifteen (15) calendar days of receipt of the invoice. If the Project Sponsor disagrees with the proposed amount, WAPA may suspend Project-related work until the matter is resolved. **WAPA must receive adequate funding from Project Sponsor prior to performance of any Project-related work.**
 - f) Upon written notice by either Party of the termination of this AFA, WAPA shall immediately stop all work and take reasonable steps, as necessary, to prevent the incursion of any additional costs that the Project Sponsor is obligated to pay under this AFA. Upon termination of this AFA, WAPA 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 Project Sponsor under this Section 7 has exceeded WAPA's expenses under this AFA, WAPA shall promptly refund to Project Sponsor the excess amount.
 - g) WAPA is under no obligation to repay to Project Sponsor funds advanced pursuant to this AFA except for the obligation to refund any excess advanced funds as set forth in Section 7(f).
8. **Intellectual Property.** All data, documents, studies, information and other tangible intellectual property produced by WAPA under this AFA ("Project IP") shall be assigned to and owned by Project Sponsor to the full extent permitted by applicable law. Upon termination of this AFA, WAPA 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 Project Sponsor. Upon request of Project Sponsor, WAPA shall execute an agreement whereby it assigns to the Project Sponsor all rights and interest in Project IP.
9. **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 WAPA to receive and expend funds advanced from Project Sponsor for purposes of performing its services under this AFA. In case such authorization is not received, Project Sponsor hereby releases WAPA from its contractual obligations and from all liability due to the lack of such authorization *except* for WAPA's obligations to return any excess funds to Project Sponsor pursuant to Section 7(f).

- c) Project Sponsor 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 WAPA to pay any such fees. For breach or violation of this warranty WAPA shall have the right to terminate this AFA under Section 2 hereof or, in its discretion, have Project Sponsor pay WAPA'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 Project Sponsor 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) Project Sponsor 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 amendment 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, or enter into any agreements which could in any way affect the same without the consent of the other Party, provided that, Project Sponsor may assign its rights, interest and obligations to an affiliate of Project Sponsor or a related entity over which Project Sponsor 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. Project Sponsor's partners, members, and shareholders, and the respective directors, employees, officers, agents and shareholders of any of the foregoing, shall not be personally liable under this AFA, and WAPA hereby agrees to look solely to Project Sponsor's property, real, personal or otherwise, tangible or intangible, for payment of any claim hereunder.
- 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. If Federal law is inapplicable, the laws of the State of Delaware would govern, without giving effect to any conflict of laws rules.
- 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 at the address or confirmed at the facsimile number or e-mail of the receiving party shown below. Notice given by mail shall be deemed received forty-eight (48) hours after being mailed (postage prepaid) to the address of the receiving party shown below. A Party's address may be changed by written notice to the other Party, effective upon actual receipt of such notice.

To Project Sponsor: [Proponent Contact Name]
 c/o [Proponent Name/Address]
 Phone:
 Fax:
 Email:

To WAPA: Tracey LeBeau, Senior Vice President
 Western Area Power Administration
 Transmission Infrastructure Program
 P.O. Box 281213
 Lakewood, CO 80228-2802
 Phone: (720) 962-7710
 Fax: (720) 962-7700
 Attn: TIP Manager
 Email: lebeau@wapa.gov

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

WAPA AREA POWER ADMINISTRATION

By: Mark A. Gabriel
Title: Administrator
Date: _____

PROJECT SPONSOR

[PROPONENT]

By:
Title:
Date: _____

Exhibit 1- Copy of MOU

[ATTACHED]

