

**SAN JUAN PROJECT EXTENDER RIGHTS TRANSFER AGREEMENT**

**BETWEEN**

**CITY OF FARMINGTON, NEW MEXICO**

**(“SELLER”),**

**ENCHANT ENERGY LLC**

**(“ENCHANT LLC”)**

**AND**

**ENCHANT ENERGY CORPORATION**

**(“ENCHANT CORPORATION”)**

**(ENCHANT LLC AND ENCHANT CORPORATION TOGETHER, “BUYER”)**

**DATED AUGUST 16, 2019**

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## SAN JUAN PROJECT EXTENDER RIGHTS TRANSFER AGREEMENT

THIS SAN JUAN PROJECT EXTENDER RIGHTS TRANSFER AGREEMENT (this “**Agreement**”), dated as of August 16, 2019 (“**Effective Date**”), is entered into by and among **CITY OF FARMINGTON, NEW MEXICO**, an incorporated municipality and a body politic and corporate, existing as a political subdivision under the constitution and laws of the State of New Mexico (“**Seller**”), and **ENCHANT ENERGY LLC**, a Delaware limited liability company (“**Enchant LLC**”), and **ENCHANT ENERGY CORPORATION**, a New Mexico corporation (“**Enchant Corporation**”, and together with Enchant LLC, the “**Buyer**”), each a “**Party**” and jointly “**Seller and Buyer**” or the “**Parties.**” Each capitalized term used herein but not defined herein will have the meaning ascribed to such term in the Participation Agreement, as defined herein.

### RECITALS

WHEREAS, the San Juan Project, also known as the San Juan Generating Station, is an electric generation plant located in San Juan County, New Mexico, near Farmington, New Mexico (the “**San Juan Project**”) that is supplied coal by the adjacent San Juan Mine; and

WHEREAS, the Amended and Restated San Juan Project Participation Agreement, dated March 23, 2006, as amended, governs the ownership and operation of the San Juan Project; and

WHEREAS, on September 1, 2017, Seller, **PUBLIC SERVICE COMPANY OF NEW MEXICO**, a New Mexico corporation (“**PNM**”); **TUCSON ELECTRIC POWER COMPANY**, an Arizona corporation (“**TEP**”); **THE INCORPORATED COUNTY OF LOS ALAMOS, NEW MEXICO**, a body politic and corporate, existing as a political subdivision under the constitution and laws of the State of New Mexico (“**Los Alamos**”); and **UTAH ASSOCIATED MUNICIPAL POWER SYSTEMS**, a political subdivision of the State of Utah (“**UAMPS**”, and collectively with Seller, PNM, TEP and Los Alamos, the “**Participants**”) entered into that certain New Exit Date Amendment Amending and Restating the Amended and Restated San Juan Project Participation Agreement (the “**Participation Agreement**”) to effectuate the restructuring of the ownership of the San Juan Project and to accommodate the intent of certain Participants to exit from ownership and involvement in the operation of the San Juan Project; and

WHEREAS, Seller owns a 5.076 percent undivided interest (“**Ownership Interest**”) in the San Juan Project under the Participation Agreement and elected to retain its Ownership Interest; and

WHEREAS, under the terms of the Participation Agreement, Seller elected to be the sole Extender, as defined therein, to continue operation of the San Juan Project after June 30, 2022, as set forth in that certain letter from Seller to PNM dated June 14, 2018, and all other Participants elected to be Non-Extenders, as defined in the Participation Agreement, as set forth in that certain letter from Los Alamos to PNM dated June 15, 2018, that certain letter from TEP to PNM dated May 22, 2018, that certain letter from UAMPS to PNM dated July 26, 2018, and that certain letter from PNM to Seller, TEP, Los Alamos and UAMPS dated June 29, 2018; and

WHEREAS, pursuant to Section 40B.3 of the Participation Agreement, because no third party or Extender agreed to purchase the Non-Extenders’ Interests in the San Juan Project by

November 30, 2018, the Non-Extenders are required to negotiate in good faith with Seller as the sole Extender to convey the 94.924 percent Non-Extenders' rights, titles and interests in the San Juan Project (the "**Non-Extenders' Interests**") to Seller for zero acquisition price in a manner that is consistent with the Participation Agreement and assures the continued successful and proper operation and maintenance of the San Juan Project; and

WHEREAS, on February 21, 2019, Acme Equities LLC ("**Acme**") and Seller entered into a Letter of Intent, as amended by that certain First Amendment to Letter of Intent dated March 21, 2019 among Enchant Energy Corporation, Acme and Seller, related to the acquisition and continued operation of the San Juan Project by Buyer after June 30, 2022 in a cost effective and environmentally responsible manner utilizing carbon capture technology that will benefit the San Juan Region and the State of New Mexico by preserving jobs and maintaining tax revenues ("**Restructured San Juan Project**"); and

WHEREAS, Seller wants to assign and transfer its rights under the Participation Agreement to acquire, receive conveyance of, and own the Non-Extenders' Interests ("**Extender Rights**") to Buyer, and Buyer wants to acquire the Extender Rights from Seller, so that Buyer may negotiate in good faith with the Non-Extenders to convey the Non-Extenders' Interests in the San Juan Project to Buyer ("**Extender Rights Transfer**"); and

WHEREAS, Seller and Buyer intend that the Non-Extenders will transfer all of the Non-Extenders' Interests to Buyer, as assignee of the Extender Rights from Seller, according to the terms and conditions of the Participation Agreement and as set forth in the Non-Extender Transfer Agreements, as defined herein; and

WHEREAS, Seller intends to retain its Ownership Interest in the Restructured San Juan Project in the public interest of the Farmington Electric Utility System ("**FEUS**") ratepayers and will enter into the Restructured Participation Agreement, as defined herein, with Buyer that sets forth the ownership and participation rights and interests of the Parties and will benefit the San Juan Region and the State of New Mexico by preserving jobs, maintaining tax revenues and serving the interests of FEUS ratepayers by providing a continuing source of efficient and economic baseload; and

WHEREAS, in connection with the Extender Rights Transfer, certain Transaction Agreements, as defined herein, will be required to govern the Restructured San Juan Project and the remaining obligations and liabilities of Buyer, the Participants and certain other parties, and there will be post-Closing conditions required in connection with the acquisition by Buyer of the Extender Rights; and

WHEREAS, in addition, each Party will have a reversionary right to the Extender Rights under certain circumstances pursuant to Section 6.14.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## **ARTICLE I DEFINITIONS**

The following terms have the meanings specified or referred to in this ARTICLE I:

“**Acme**” has the meaning set forth in the recitals.

“**Affiliate**” of a Person means any other Person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person. The term “control” (including the terms “controlled by” and “under common control with”) means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise.

“**Agreement**” has the meaning set forth in the preamble to this Agreement.

“**Amended and Restated Decommissioning Agreement**” means that certain Amended and Restated San Juan Decommissioning and Trust Funds Agreement among Buyer, the Participants and the Exited Participants.

“**Assumed Liabilities**” has the meaning set forth in Section 2.02.

“**Business Day**” means any day except Saturday, Sunday or any other day on which commercial banks located in Farmington, New Mexico and New York, New York are authorized or required by Law to be closed for business.

“**Buyer**” has the meaning set forth in the preamble.

“**Carbon Capture Equipment**” means the advanced carbon dioxide (“CO<sub>2</sub>”) sequestration equipment, systems and associated CO<sub>2</sub> transportation pipeline infrastructure and the other carbon sequestration equipment (including all components, subsystems and software) that Buyer will install and operate at the San Juan Generation Station as part of the Restructured San Juan Project.

“**CERCLA**” means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq.

“**Closing**” has the meaning set forth in Section 3.01.

“**Code**” means the Internal Revenue Code of 1986, as amended.

“**Contracts**” means all legally binding written contracts, leases, mortgages, licenses, instruments, notes, commitments, undertakings, indentures and other agreements.

“**Cost Cap**” has the meaning set forth in Section 6.13.

“**Decommissioning Agreement**” has the meaning set forth in Section 6.07.

“**Deductible**” has the meaning set forth in Section 8.04.

“**Direct Claim**” has the meaning set forth in Section 8.05(c).

“**Dispute**” has the meaning set forth in Section 9.10.

“**Dollars**” or “**\$**” means the lawful currency of the United States of America.

“**Effective Date**” has the meaning set forth in the preamble.

“**Employees**” means those Persons who are employees of the San Juan Generating Station immediately prior to the Closing.

“**Encumbrance**” means any lien, pledge, mortgage, deed of trust, security interest, charge, claim, easement, encroachment or other limitation or restriction.

“**Environmental Claim**” means any Governmental Order, action, suit, claim, investigation or other legal proceeding by any Person alleging liability of whatever kind or nature (including liability or responsibility for the costs of enforcement proceedings, investigations, cleanup, governmental response, removal or remediation, natural resources damages, property damages, personal injuries, medical monitoring, penalties, contribution, indemnification and injunctive relief) arising out of, based on or resulting from a) the presence, Release of, or exposure to, any Hazardous Materials; or (b) any actual or alleged non-compliance with any Environmental Law or term or condition of any Environmental Permit.

“**Environmental Law**” means any applicable Law, and any Governmental Order or binding agreement with any Governmental Authority (a) relating to pollution or the cleanup thereof or the protection of natural resources, endangered or threatened species, human health or safety (to the extent relating to exposure to Hazardous Materials) or the environment (including ambient air, soil, surface water or groundwater, or subsurface strata); or (b) concerning the presence of, exposure to, or the management, manufacture, use, containment, storage, recycling, reclamation, reuse, treatment, generation, discharge, transportation, processing, production, disposal or remediation of any Hazardous Materials. The term “Environmental Law” includes, without limitation, the following (including their implementing regulations and any state analogs): CERCLA; the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. §§ 6901 et seq.; the Federal Water Pollution Control Act of 1972, as amended by the Clean Water Act of 1977, 33 U.S.C. §§ 1251 et seq.; the Toxic Substances Control Act of 1976, as amended, 15 U.S.C. §§ 2601 et seq.; the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001 et seq.; the Clean Air Act of 1966, as amended by the Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401 et seq.; and the Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. §§ 651 et seq..

“**Environmental Permit**” means any Permit pursuant to Environmental Law.

“**Excluded Liabilities**” means all obligations and liabilities arising from, related to or caused by any action, omission, condition or circumstance at the San Juan Project that existed, occurred or accrued on or before the Transfer Date.



**“Exited Participants”** means M-S-R Public Power Agency, Southern California Public Power Authority, City of Anaheim, California and Tri-State Generation and Transmission Association, Inc. that exited from the San Juan Project pursuant to the San Juan Restructuring Agreement among PNM, TEP, Seller, the Exited Participants and PNMR Development and Management Corporation dated July 31, 2015.

**“Extender Rights”** means the rights of Seller as the sole Extender pursuant to Section 40B.0 of the Participation Agreement.

**“Extender Rights Transfer”** means the purchase by Buyer from Seller of the Extender Rights, subject to the terms and conditions set forth herein.

**“FEUS”** means the Farmington Electric Utility System.

**“Force Majeure”** means with respect to any obligation, any event that wholly or partly prevents or delays the performance of such obligation by the affected Party and that is outside the control of such party, including the following: condemnation; expropriation; invasion; plague; drought; landslide; hurricane; tornado; unusually severe and unpredictable weather; tsunami; flood; earthquake; fire; explosion; epidemic; quarantine; war (declared or undeclared), terrorism or other armed conflict; strikes and other labor disputes; riot or similar civil disturbance or commotion; other acts of God; acts of the public enemy; blockade; insurrection, riot or revolution; sabotage or vandalism; embargoes; actions or inactions of a Governmental Authority (other than with respect to Seller, actions or inactions of Seller or any instrumentality or agency thereof), including a shutdown of any Governmental Authority that is required to issue a Governmental Order or otherwise having jurisdiction with respect to a Party or the Restructured San Juan Project or an actual or proposed change in Law that has a material impact on the development of the Restructured San Juan Project.

**“GenCo Assets”** means all assets primarily used in connection with the generation of electric power by the San Juan Project.

**“Governmental Authority”** means any federal, state, local or foreign government or political subdivision thereof, or any agency or instrumentality of such government or political subdivision or any self-regulated organization or other non-governmental regulatory authority or quasi-governmental authority to the extent that the rules, regulations or orders of such organization or authority have the force of Law, or any arbitrator, court or tribunal of competent jurisdiction.

**“Governmental Order”** means any order, writ, judgment, injunction, decree, stipulation, determination or award entered by or with any Governmental Authority.

**“Hazardous Materials”** means: (a) any material, substance, chemical, waste, product, derivative, compound, mixture, solid, liquid, mineral or gas, in each case, whether naturally occurring or man-made, that is defined or classified as hazardous, acutely hazardous, toxic, or words of similar import or regulatory effect under Environmental Laws; and (b) any petroleum or petroleum-derived products, radon, radioactive materials or wastes, asbestos in any form, lead or lead-containing materials, urea formaldehyde foam insulation and polychlorinated biphenyls.

**“Indemnified Party”** has the meaning set forth in Section 8.04.

**“Indemnifying Party”** has the meaning set forth in Section 8.04.

**“Law”** means any federal, state or local statute, law, ordinance, regulation, rule, code, order, constitution, treaty, common law, judgment, decree, other requirement or rule of law of any Governmental Authority.

**“Los Alamos”** means The Incorporated County of Los Alamos, New Mexico, a body politic and corporate, existing as a political subdivision under the constitution and laws of the State of New Mexico.

**“Losses”** means actual out-of-pocket losses, damages, liabilities, costs or expenses including, without limitation, costs of investigation and reasonable attorneys’ fees.

**“Material Adverse Effect”** means any event, occurrence, fact, condition or change that prohibits or materially impairs or delays the ability of a Party to consummate the transactions contemplated hereby; provided, however, that “Material Adverse Effect” will not include any event, occurrence, fact, condition or change, directly or indirectly, arising out of or attributable to: (i) general economic or political conditions; (ii) conditions generally affecting utilities; (iii) any changes in financial, banking or securities markets in general, including any disruption thereof and any decline in the price of any security or any market index or any change in prevailing interest rates; (iv) acts of war (whether or not declared), armed hostilities or terrorism, or the escalation or worsening thereof; (v) any action required or permitted by this Agreement or any action taken (or omitted to be taken) with the written consent of or at the written request of the other Party; (vi) any changes in applicable Laws or accounting rules unless such change has a disproportionate effect on the San Juan Project or the Restructured San Juan Project; or (viii) the announcement, pendency or completion of the transactions contemplated by this Agreement.

**“Mediation Rules”** has the meaning set forth in Section 9.10.

**“Mine Reclamation Agreement”** has the meaning set forth in Section 6.08.

**“MWh”** means megawatt hour.

**“New Coal Combustion Residual Disposal Agreement”** means a coal combustion residual disposal agreement between Buyer and Westmoreland Coal Company that will contain mutually acceptable terms that Buyer will use its commercially reasonable efforts to enter into.

**“New Coal Supply Agreement”** means that certain coal supply agreement for the sale and supply of coal from the San Juan Mine between Buyer and Westmoreland Coal Company that will contain mutually acceptable terms that Buyer will use its commercially reasonable efforts to enter into.

**“New Mexico Tort Claims Act”** has the meaning set forth in Section 8.02.

**“Non-Extenders”** means PNM, TEP, The Incorporated County of Los Alamos, New Mexico and Utah Associated Municipal Power Systems.

**“Non-Extenders’ Interests”** means the 94.924 percent rights, titles and interests in the San Juan Project transferred from the Non-Extenders to Buyer as assignee of Seller’s rights as the sole Extender hereunder in accordance with the Participation Agreement and as set forth in the Non-Extender Transfer Agreements.

**“Non-Extender Transfer Agreements”** means the one or more transfer and transition agreements (i) whereby the Non-Extenders will transfer to Buyer as the assignee of the Seller’s Extender Rights in accordance with the Participation Agreement effective as of the Transfer Date all their ownership interests and other rights, title and interests in the San Juan Project but none of the Excluded Liabilities, and (ii) that will provide for, among other rights, rights of entry and use of the San Juan Project by Buyer and Seller before the Transfer Date.

**“Ownership Interest”** means the 5.076 percent ownership interest of Seller in the San Juan Project under the Participation Agreement and the Restructured Participation Agreement.

**“Participants”** has the meaning set forth in the recitals.

**“Participation Agreement”** has the meaning set forth in the recitals.

**“Permits”** means all permits, licenses, franchises, approvals, authorizations and consents required to be obtained from Governmental Authorities including, without limitation, Environmental Permits.

**“Person”** means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association or other entity.

**“PNM”** has the meaning set forth in the recitals.

**“Power Amount”** has the meaning set forth in Section 6.13.

**“Project Improvements”** has the meaning set forth in Section 6.11.

**“Prudent Utility Practices”** mean the practices, methods, equipment, specifications, and standards of care, skill, safety and diligence, as the same may change from time to time, but applied in light of the facts known at the time, as are generally applied or utilized under comparable circumstances by experienced and prudent professionals in respect of the operation of coal-fired generating facilities of comparable type and complexity to the GenCo Assets. “Prudent Utility Practices” does not necessarily mean the best practice, method, or standard of care, skill, safety and diligence in all cases but is instead intended to encompass a range of acceptable practices, methods and standards.

**“Purchase Price”** has the meaning set forth in Section 2.03.

**“Real Property”** means owned or leased real property, easements, uses, rights-of-way, licenses or other exclusive or non-exclusive rights to use real property.

“**Release**” means any release, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, abandonment, disposing or allowing to escape or migrate into or through the environment.

“**Representative**” means, with respect to any Person, any and all directors, officers, employees, consultants, financial advisors, counsel, accountants and other agents of such Person.

“**Restructured Participation Agreement**” means the amendment and restatement of the Participation Agreement between Buyer and Seller and that may include other parties, which agreement will contain mutually acceptable terms including, without limitation, compliance with health, safety and environmental matters, and which the parties thereto will use their commercially reasonable efforts to enter into.

“**Restructured San Juan Project**” means the coal-fired generating station incorporating Units 1 and 4 of the San Juan Project (with a current net generation of 847 megawatts) and utilizing carbon sequestration technology to limit CO<sub>2</sub> emissions.

“**San Juan Project**” has the meaning set forth in the Participation Agreement.

“**Second Amended and Restated Mine Reclamation Agreement**” means that certain Second Amended and Restated Mine Reclamation and Trust Funds Agreement among the Buyer, the Participants and the Exited Participants, which agreement will contain mutually acceptable terms, and which the parties thereto will use their commercially reasonable efforts to enter into.

“**Seller**” has the meaning set forth in the preamble to this Agreement.

“**Survival Period**” has the meaning set forth in Section 8.01.

“**Taxes**” means all federal, state, local, foreign and other income, gross receipts, sales, use, production, ad valorem, transfer, franchise, registration, profits, license, lease, service, service use, withholding, payroll, employment, unemployment, estimated, excise, severance, environmental, stamp, occupation, premium, property (real or personal), real property gains, windfall profits, customs, duties or other taxes, fees, assessments or charges of any kind whatsoever, together with any interest, additions or penalties with respect thereto and any interest in respect of such additions or penalties.

“**Tax Return**” means any return, declaration, report, claim for refund, information return or statement or other document required to be filed with respect to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

“**TEP**” has the meaning set forth in the recitals.

“**Term**” has the meaning set forth in Section 6.13.

“**Third Party Claim**” has the meaning set forth in Section 8.05(a).

“**Transaction Agreements**” means the Non-Extender Transfer Agreements, Restructured Participation Agreement, Amended and Restated Decommissioning Agreement, Second Amended

and Restated Mine Reclamation Agreement, New Coal Supply Agreement, New Coal Combustion Residual Disposal Agreement, Transition Operating Agreement and the other agreements, instruments and documents required to be delivered post-Closing including, any other agreements with the Non-Extenders and the Exited Participants that may be required to effectuate the San Juan Project restructuring contemplated herein.

“**Transfer Date**” means June 30, 2022, as the same may be extended by Buyer and the Participants.

“**Transition Operating Agreement**” means that certain agreement among Seller, Buyer and the Participants that will govern the operation and maintenance of the San Juan Project prior to the effective date of the Restructured Participation Agreement, and which Seller and Buyer will use commercially reasonable efforts to enter into.

“**UAMPS**” means Utah Associated Municipal Power Systems, a political subdivision of the State of Utah.

## **ARTICLE II PURCHASE AND SALE**

Section 2.01 Purchase and Sale Transaction. Subject to the terms and conditions set forth herein, on the Effective Date, Seller will sell, assign, transfer, convey and deliver to Buyer free and clear of all Encumbrances, and Buyer will purchase from Seller, the Extender Rights.

Section 2.02 Assumed Liabilities.

(a) Subject to the terms and conditions of this Agreement, commencing on the Transfer Date Buyer will assume and pay, perform and discharge when due its Non-Extenders’ Interests proportionate share of liabilities and obligations arising out of or relating to the Restructured San Juan Project and occurring after the Transfer Date (collectively, the “**Assumed Liabilities**”). Buyer will have no obligation with respect to any Excluded Liability.

(b) Subject to the terms and conditions of this Agreement commencing on the Transfer Date, Seller will assume and pay, perform and discharge when due its Ownership Interest proportionate percentage of Assumed Liabilities. Nothing herein will limit Seller’s obligations with respect to the Excluded Liabilities.

Section 2.03 Consideration for Extender Rights. The purchase price paid by Buyer to Seller for the Extender Rights will be One Dollar (\$1.00) U.S. currency (the “**Purchase Price**”).

In addition to the Purchase Price, Seller is entering into this transaction because Seller is receiving other good and valuable consideration including, but not limited to, the benefits to the Seller, the San Juan Region and the State of New Mexico resulting from the continued operation of the San Juan Project after the Transfer Date, which include the preservation of jobs, the maintenance of tax revenues, the cost avoidance of securing a replacement power source, and the public purpose benefits set forth in Section 2.04 herein.

Section 2.04 Public Purpose Benefits. Seller and Buyer acknowledge and agree that the public purpose benefits of the Restructured San Juan Project include the acquisition and continuing operation of the San Juan Project by Buyer after the Transfer Date in a cost effective and environmentally responsible manner pursuant to applicable Law utilizing Carbon Capture Equipment that will benefit the San Juan Region and the State of New Mexico by preserving employment for Employees and maintaining tax revenues arising from and related to the Restructured San Juan Project and serving the interests of FEUS ratepayers by providing a continuing source of efficient and economic baseload. Seller and Buyer further acknowledge and agree that the transfer of Extender Rights hereunder from Seller to Buyer and the joint ownership of the Restructured San Juan Project by the Parties under the Restructured Participation Agreement are intended to help ensure the commercial viability of the Restructured San Juan Project.

### **ARTICLE III CLOSING**

Section 3.01 Closing. Subject to the terms and conditions of this Agreement, the closing of the Extender Rights Transfer (the “**Closing**”) will take place on the Effective Date upon execution of this Agreement by the Parties.

Section 3.02 Deliverables.

- (a) On the Effective Date, Seller will deliver to Buyer the following:
  - (i) this Agreement;
  - (ii) such other customary instruments of transfer, assumption, filings or documents, in form and substance reasonably satisfactory to Buyer, as may be required to give effect to this Agreement.
- (b) On the Effective Date, Buyer will deliver to Seller the following:
  - (i) this Agreement;
  - (ii) such other customary instruments of transfer, assumption, filings or documents, in form and substance reasonably satisfactory to Seller, as may be required to give effect to this Agreement.

### **ARTICLE IV REPRESENTATIONS AND WARRANTIES OF SELLER**

Seller represents and warrants to Buyer that the statements in this ARTICLE IV are true and correct as of the Effective Date.

Section 4.01 Organization and Qualification of Seller. Seller is an incorporated municipality and a body politic and corporate, existing as a political subdivision under the constitution and laws of the State of New Mexico validly existing and in good standing and has all necessary power and authority to own, operate or lease the properties and assets now owned, operated or leased by Seller.

Section 4.02 Authority of Seller. Seller has all necessary power and authority to enter into this Agreement, to perform its obligations hereunder and to consummate the transactions contemplated hereby. The execution and delivery by Seller of this Agreement, the performance by Seller of its obligations hereunder, and the consummation by Seller of the transactions contemplated hereby have been duly authorized by all requisite action on the part of Seller. This Agreement has been duly executed and delivered by Seller and, assuming due authorization, execution and delivery by Buyer, constitutes a legal, valid and binding obligation of Seller, enforceable against Seller in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting creditors' rights generally and by general principles of equity regardless of whether enforcement is sought in a proceeding at law or in equity.

Section 4.03 No Conflicts; Consents. The execution, delivery and performance by Seller of this Agreement, and the consummation of the transactions contemplated hereby, do not and will not: (a) result in a violation or breach of any provision of the governing documents of Seller; (b) result in a violation or breach of any provision of any Law or Governmental Order applicable to Seller, the San Juan Project or the Extender Rights; or (c) require the consent, notice or other action by any Person under, conflict with, result in a violation or breach of, constitute a default under or result in the acceleration of, any Material Contract; except in the cases of clauses (b) and (c), where the violation, breach, conflict, default, acceleration or failure to give notice would not have a Material Adverse Effect. No consent, approval, Permit, Governmental Order, declaration or filing with, or notice to, any Governmental Authority is required by or with respect to Seller in connection with the execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, and except for such consents, approvals, Permits, Governmental Orders, declarations, filings or notices that, in the aggregate, would not have a Material Adverse Effect.

Section 4.04 Representations and Warranties. Seller represents and warrants to Buyer that Seller is the sole Extender under the Participation Agreement and pursuant to the Participation Agreement has the right and ability to assign to Buyer all Extender Rights with respect to the Non-Extenders' Interests, free and clear of all Encumbrances. Except as expressly set forth otherwise in this Agreement, Seller is transferring the Extender Rights to Buyer in "AS IS, WHERE IS" condition and "WITH ALL FAULTS" as of the Effective Date. Except as expressly set forth otherwise in this Agreement, Seller is making no representations or warranties to Buyer with respect to the San Juan Project, the Extender Rights or the Non-Extenders' Interests, and no responsibility has been or is assumed by Seller with respect to (i) the condition or state of the San Juan Project; (ii) the compliance of the San Juan Project with any applicable laws or regulations; (iii) the value, expense of operation or income potential of the San Juan Project; or (iv) any other fact or condition that has or may affect the San Juan Project or the condition, state of repair, compliance, value, expense of operation or income potential of the San Juan Project. Except for the representations and warranties in this ARTICLE IV, neither Seller nor any other Person has made or makes, and expressly disclaims, any other express or implied representation or warranty, either written or verbal, on behalf of Seller, including any representation or warranty as to the accuracy or completeness of any information regarding the San Juan Project furnished or made available to Buyer and its Representatives or as to the future revenue, profitability or success of the San Juan Project, or any representation or warranty arising from statute or otherwise in law.

Section 4.05 Legal Proceedings. As of the Effective Date, there are no actions, suits, claims, investigations or other legal proceedings pending or, to Seller's knowledge, threatened against or by Seller or any Affiliate of Seller that challenge or seek to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement.

Section 4.06 San Juan Project. To Seller's knowledge, the San Juan Project has all assets necessary to operate the GenCo Assets as they have been historically operated pursuant to the Participation Agreement, and there are no plans to sell, transfer, assign any such assets (other than assets that will be replaced with assets of equal utility) or to fail to maintain the GenCo Assets in accordance with Prudent Utility Practices and the Participation Agreement.

## **ARTICLE V REPRESENTATIONS AND WARRANTIES OF BUYER**

Buyer represents and warrants to Seller that the statements in this ARTICLE V are true and correct as of the Effective Date.

Section 5.01 Organization and Authority of Buyer. Buyer is validly existing and in good standing under the Laws of the State of New Mexico.

Section 5.02 Authority of Buyer. Buyer has all necessary corporate power and authority to enter into this Agreement, to perform its obligations hereunder, and to consummate the transactions contemplated hereby. The execution and delivery by Buyer of this Agreement, the performance by Buyer of its obligations hereunder and the consummation by Buyer of the transactions contemplated hereby have been duly authorized by all requisite corporate action on the part of Buyer. This Agreement has been duly executed and delivered by Buyer and, assuming due authorization, execution and delivery by Seller, constitutes a legal, valid and binding obligation of Buyer enforceable against Buyer in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar Laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity).

Section 5.03 No Conflicts; Consents. The execution, delivery and performance by Buyer of this Agreement and the other Transaction Documents to which Buyer is a party, and the consummation of the transactions contemplated hereby and thereby, do not and will not: (a) result in a violation or breach of any provision of the certificates of formation of Buyer; (b) result in a violation or breach of any provision of any Law or Governmental Order applicable to Buyer; or (c) require the consent, notice or other action by any Person under, conflict with, result in a violation or breach of, constitute a default under or result in the acceleration of any agreement to which Buyer is a party, except in the cases of clauses (b) and (c), where the violation, breach, conflict, default, acceleration or failure to give notice would not have a Material Adverse Effect on Buyer's ability to consummate the transactions contemplated hereby. No consent, approval, Permit, Governmental Order, declaration or filing with, or notice to, any Governmental Authority is required by or with respect to Buyer in connection with the execution and delivery of this Agreement and the other Transaction Documents and the consummation of the transactions contemplated hereby and thereby, except for such consents, approvals, Permits, Governmental



Orders, declarations, filings or notices that would not have a Material Adverse Effect on Buyer's ability to consummate the transactions contemplated hereby and thereby.

Section 5.04 Solvency. Immediately after giving effect to the transactions contemplated hereby, Buyer will be solvent and will: (a) be able to pay its debts as they become due; (b) own property that has a fair saleable value greater than the amounts required to pay its debts (including a reasonable estimate of the amount of all contingent liabilities); and (c) have adequate capital to carry on its business. No transfer of property is being made and no obligation is being incurred in connection with the transactions contemplated hereby with the intent to hinder, delay or defraud either present or future creditors of Buyer or Seller. In connection with the transactions contemplated hereby, Buyer has not incurred, nor plans to incur, debts beyond its ability to pay as they become absolute and matured.

Section 5.05 Authorizations and Approvals. To the extent not previously obtained, Buyer will use its commercially reasonable efforts to obtain all approvals, consents and authorizations, and to consummate the transactions contemplated hereby, in accordance with this Agreement.

Section 5.06 Legal Proceedings. As of the Effective Date, there are no actions, suits, claims, investigations or other legal proceedings pending or, to Buyer's knowledge, threatened against or by Buyer or any Affiliate of Buyer that challenge or seek to prevent, enjoin or otherwise delay the transactions contemplated by this Agreement.

Section 5.07 Independent Due Diligence. Buyer has conducted its own independent due diligence review, evaluation and assessment of the San Juan Project and its financial and operational viability and the public purpose objectives for the Restructured San Juan Project and acknowledges that Buyer has been provided adequate access to the personnel, properties, assets, premises, documents and data of the San Juan Project for such purpose. Buyer acknowledges and agrees that: (a) in making its decision to enter into this Agreement and to consummate the transactions contemplated hereby for purposes and objectives of the Restructured San Juan Project, Buyer has relied solely upon its own investigation and the express representations and warranties of Seller set forth in this Agreement; and (b) neither Seller nor any other Person has made any representation or warranty as to Seller, the San Juan Project, or this Agreement, except as expressly set forth in this Agreement.

## **ARTICLE VI COVENANTS**

Section 6.01 Governmental Approvals and Consents. Each Party will use commercially reasonable efforts to obtain, or cause to be obtained, all consents, authorizations, orders and approvals from all Governmental Authorities that may be or become necessary for its execution and delivery of this Agreement and the performance of its obligations pursuant to this Agreement and the other Transaction Documents pursuant to applicable Law. Each Party will cooperate fully with the other Party and its Affiliates in promptly seeking to obtain all such consents, authorizations, orders and approvals. Neither Party will intentionally take any action that intends to delay, impair or impede the receipt of any required consents, authorizations, orders and approvals.

Section 6.02 Public Relations. Unless otherwise required by applicable Law or in connection with any administrative, regulatory or judicial proceeding, the Parties will collaborate and coordinate with respect to any public announcements, public statements, press releases or other official communications with respect to this Agreement and the transactions contemplated hereby. Neither Party will make any public announcement unless required by applicable Law without the consent of the other Party, which consent will not be unreasonably withheld.

Section 6.03 Employment and Tax Base. Buyer acknowledges and agrees that preserving employment for Employees of the San Juan Project at a target level mutually agreed with Seller that is consistent with operation of Unit 1 and Unit 4 as of the Effective Date and maintaining the tax base arising from the San Juan Project are public purpose benefits of the Restructured San Juan Project.

Section 6.04 Transfer Taxes. All transfer, documentary, sales, use, stamp, registration, value added and other such Taxes and fees (including any penalties and interest) incurred in connection with this Agreement and the other Transaction Documents (including any real property transfer Tax and any other similar Tax) will be borne and paid by Seller when due. Buyer will, at its own expense, timely file any Tax Return or other document with respect to such Taxes or fees, and Seller will cooperate with respect thereto as necessary.

Section 6.05 Further Assurances. Each Party will work in good faith to perform its respective obligations under this Agreement in order to give effect to the transactions contemplated by this Agreement and the other Transaction Documents and will execute and deliver such additional documents, instruments, conveyances and assurances and take such further actions as may be reasonably required.

Section 6.06 Restructured Participation Agreement. In connection with Buyer's acquisition of the Extender Rights and the Non-Extenders' Interests, Buyer acknowledges and agrees that Buyer will enter into a Restructured Participation Agreement with Seller and potentially other parties to be determined in which Seller will retain its Ownership Interest that is structured in compliance with applicable Law including, without limitation, New Mexico Statutes Annotated Section 3-24-15, and will implement an ownership and operations structure for the Restructured San Juan Project based upon the Participation Agreement. The Restructured Participation Agreement will provide Seller with certain rights and interests with respect to management and operation of the GenCo Assets to be agreed upon by the Parties. The Parties agree that the following terms with respect to the operation, management and maintenance of the Restructured San Juan Project will be included in the Restructured Participation Agreement (in each case, subject to agreed upon limitations and exceptions):

(a) Seller will share the liability and costs of San Juan Mine reclamation and water rights under the Restructured Participation Agreement consistent with Seller's obligations under the Participation Agreement.

(b) The San Juan Project will provide ancillary services to Seller under the Restructured Participation Agreement as are provided on the Effective Date under the Participation Agreement including, without limitation, flexibility for Seller to adjust load

corresponding to the Ownership Interest of Seller, and Buyer will manage the San Juan Project after the Transfer Date in accordance with Prudent Utility Practices.

(c) Each Party will be responsible for its pro rata portion of all costs and expenses for Permits and regulatory approvals required to continue operating the San Juan Project after the Transfer Date. Notwithstanding the foregoing, Buyer will be responsible for all costs and expenses for installation, operation, maintenance and repairs and performance of the Carbon Capture Equipment, whether arising on, before or after the Transfer Date.

(d) Buyer will be responsible for all costs, expenses, claims and liability related to securing the necessary property rights to enable installation of an interconnection pipeline between the San Juan Project and the CO<sub>2</sub> transmission pipeline for shipments of CO<sub>2</sub> from the San Juan Project to end-user customers. Seller will reasonably assist Buyer to secure those property rights including, without limitation, coordinating and cooperating with all applicable Governmental Authorities to obtain such property rights.

(e) Seller will not share in any revenues or be responsible for any liabilities related to the Carbon Capture Equipment or the generation, sale, transmission, distribution and use of CO<sub>2</sub> arising from the Carbon Capture Equipment. Notwithstanding the foregoing, Seller will have the option, exercisable on not less than one hundred and twenty (120) days' notice to Buyer (which notice will be irrevocable and will be fully funded pursuant to escrow arrangements acceptable to the Parties), to acquire an interest in the Carbon Capture Equipment under the same terms as and concurrent with other tax equity investors in the Carbon Capture Equipment, in which case Seller will be entitled to share in such revenues and will be responsible for such liabilities on a prorated basis corresponding to its acquired interest.

(f) Buyer will use its commercially reasonable efforts to maintain jobs and wages at the San Juan Project consistent with Prudent Utility Practices in order to help preserve tax revenues and other economic benefits of the San Juan Project to Seller and the San Juan Region during the Term.

(g) Upon the Carbon Capture Equipment achieving commercial operation (as defined in any CO<sub>2</sub> offtake agreement entered into by Buyer or any of its Affiliates), Buyer will be obligated to reimburse Seller for its reasonable legal fees and other transaction related costs and expenses up to an amount not to exceed \$4 million, which reimbursement will be paid in agreed upon installments over an agreed upon period.

(h) Buyer is responsible for costs, claims, expenses and liability arising from and related to transmission of power produced by the GenCo Assets to Persons (other than Seller and any of its Affiliates) including, without limitation, power purchase agreements with end use customers in proportion to its percentage ownership interest in the San Juan Project under the Restructured Participation Agreement. Seller is responsible for costs, claims, expenses and liability arising from and related to transmission of power produced by the GenCo Assets to Seller and any of its Affiliates.

Section 6.07 Environmental and Decommissioning Obligations. In connection with Buyer's acquisition of the Extender Rights and the Non-Extenders' Interests and Buyer's assumption and undertaking of ownership and operation of the Restructured San Juan Project pursuant to the Restructured Participation Agreement, Buyer acknowledges and agrees that Buyer will assume, undertake, be responsible for and accept its respective share of obligations, payments, expenses and liability (i) for compliance with Environmental Laws and any Environmental Claims arising out of or resulting from the ownership and operation of the Restructured San Juan Project after the Transfer Date including, without limitation, obtaining and maintaining any required Environmental Permits; and (ii) under that certain San Juan Decommissioning and Trust Funds Agreement among Seller, the Non-Extenders and the Exited Participants dated July 31, 2015 (the "**Decommissioning Agreement**"), which provides the methodology for planning, approving and funding required in connection with the closure or retirement of the San Juan Project, and the new decommissioning funding requirements determined May 23, 2019, as restated and reaffirmed in the Amended and Restated Decommissioning Agreement among Buyer and the parties to the Decommissioning Agreement.

Section 6.08 Mine Reclamation Obligations. In connection with Buyer's acquisition of the Extender Rights and the Non-Extenders' Interests and Buyer's assumption and undertaking of ownership and operations of the Restructured San Juan Project pursuant to the Restructured Participation Agreement, Buyer acknowledges and agrees, subject to the next sentence, that Buyer will assume its respective share of obligations, payments and expenses under that certain existing Amended and Restated Mine Reclamation and Trust Funds Agreement among Seller, the Non-Extenders and the Exited Participants dated July 31, 2015 (the "**Mine Reclamation Agreement**"), which sets forth the San Juan Mine reclamation obligations of Seller, the Non-Extenders and the Exited Participants in connection with the San Juan Project. The obligations and liabilities that Buyer will assume, undertake, be responsible for and accept will be limited to the funding of its respective share of certain reclamation trusts as restated and reaffirmed in the Second Amended and Mine Reclamation Agreement among Buyer and the parties to the Mine Reclamation Agreement with respect to the San Juan Mine reclamation obligations and liabilities in each case, solely to the extent such obligations relate to operations on or after the Transfer Date.

Section 6.09 Non-Extender Transfer Agreements. In connection with Buyer's acquisition of the Non-Extenders' Interests pursuant to the Restructured Participation Agreement, the Parties acknowledge and agree that Buyer will use commercially reasonable efforts to enter into one or more Non-Extender Transfer Agreements with each of the Non-Extenders that sets forth the rights, requirements and obligations of the respective parties. Seller agrees that in the event any Non-Extender assigns its ownership interest to Seller or any of its Affiliates, upon request by Buyer, Seller will transfer such ownership interest to Buyer without any additional consideration.

Section 6.10 New Coal Supply Agreement and New Coal Combustion Residual Disposal Agreement. Buyer will use its commercially reasonable efforts to enter into a New Coal Supply Agreement and a New Coal Combustion Residual Disposal Agreement that will set forth the rights, requirements and obligations of Buyer regarding the supply of coal to the Restructured San Juan Project and the disposal of ash after expiration of the existing Coal Supply Agreement and the Coal Combustion Residual Disposal Agreement by and between Westmoreland Coal Company and PNM.

Section 6.11 Operations, Capital Projects and Improvements. Seller and Buyer acknowledge and agree that Buyer's assumption and undertaking of ownership and operations of the Restructured San Juan Project pursuant to the Restructured Participation Agreement will involve certain capital projects, Permits, improvements and updates and the installation of the Carbon Capture Equipment and other physical infrastructure changes at the San Juan Project (the "**Project Improvements**"), and, subject to Section 6.06, (a) such operations and Project Improvements as they relate to the Carbon Capture Equipment will be at the sole cost and expense of Buyer, and (b) any liabilities and/or other obligations related to such operations and Project Improvements will be the sole responsibility of Buyer.

Section 6.12 Cooperation on Transmission. Buyer and Seller acknowledge and agree that Buyer's assumption and undertaking of ownership and operations of the Restructured San Juan Project will involve matters related to the transmission of electricity generated by the Restructured San Juan Project including, without limitation, authorizations, approvals, and contractual and other rights and privileges related to such transmission including, without limitation, Buyer obtaining transmission rights and access to customers for the electricity generated by the Restructured San Juan Project as set forth in the Restructured Participation Agreement and other applicable agreements. Seller will reasonably cooperate with Buyer in obtaining any such authorizations, approvals and privileges.

Section 6.13 Power Rights. During the thirteen (13) year period beginning on the Transfer Date (the "**Term**") (or such longer period as the Parties may agree), Seller will receive electrical power generated by the GenCo Assets in a manner consistent with the Participation Agreement and in an amount not to exceed Seller's proportional Ownership Interest in the GenCo Assets (the "**Power Amount**"). To help protect FEUS customers from rate increases, Seller will receive the Power Amount at a cost per MWh equal to the lesser of (a) the actual all-in cost of such power calculated on a monthly dollar per MWh basis including, without limitation, operation and maintenance (O&M), fuel and capital expenses and debt service, and (b) eighty percent (80%) of the average power production cost of the San Juan Project calculated on an average annual dollar per MWh production cost basis during the six (6) year period from 2013 to 2018 (the "**Cost Cap**"). The foregoing Cost Cap is intended to reduce the cost of power received by FEUS compared to market prices for electricity. Seller will share the liability, and incur costs for expenses required for continuing and proper operation of the GenCo Assets, at a percentage ratio that is proportional to its Ownership Interest in the GenCo Assets. Seller and Buyer agree that the GenCo Assets are intended to run as base load units for the duration of the Term.

Section 6.14 Reversionary Right to Extender Rights. (a) Buyer and Seller acknowledge and agree that Seller has reversionary rights to the Extender Rights, Seller will automatically receive back from Buyer the Extender Rights transferred hereunder and any rights transferred to Buyer in connection with the restructuring of the San Juan Project contemplated hereunder for no additional cost to Seller (except that each Party is responsible for its respective transaction costs including, without limitation, legal fees) in the event either (i) Buyer does not obtain financing that is sufficient to undertake the capital projects, changes, improvements and updates required to operate the San Juan Project utilizing the Carbon Capture Equipment by June 30, 2021, subject to extension by mutual agreement of Seller and Buyer; or (ii) all of the Transaction Agreements and the other documents and actions required in connection with the Restructured San Juan Project are not negotiated, finalized, executed and/or completed by June 30, 2021; provided that the foregoing

deadlines will be extended day-for-day for Force Majeure. Such transfer will occur upon the occurrence of any event stated above, and Buyer's failure to cure within sixty (60) days after notice; provided that such period will extend by mutual agreement to one hundred and twenty (120) days if Buyer is diligently proceeding with such cure. If such transfer occurs, this Agreement will become null and void and have no further force and effect. If any evidence of such transfer back to Seller is deemed necessary by Seller, Buyer will use commercially reasonable efforts to enter into and execute any such documents to evidence the transfer. In addition, if one or more Non-Extender Transfer Agreements have been executed and delivered as of the date of such inability or failure described in subsection (i) or (ii) above, such Non-Extender Transfer Agreements will become null and void and will include a provision to this effect.

(b) Buyer and Seller acknowledge and agree that Buyer has reversionary rights to the Extender Rights, Seller will automatically receive back from Buyer the Extender Rights transferred hereunder, and any rights transferred to Buyer in connection with the restructuring of the San Juan Project contemplated hereunder, for no additional cost to Buyer except that each Party is responsible for its respective transaction costs including, without limitation, legal fees. In such event this Agreement will be null and void and will have no further force and effect. If any evidence of such transfer back to Seller is deemed necessary by Buyer, Buyer and Seller will use commercially reasonable efforts to enter into and execute any such documents to evidence the transfer. In addition, if one or more Non-Extender Transfer Agreements have been executed and delivered as of the date of such inability or failure described in subsection (i) or (ii) above, such Non-Extender Transfer Agreements will become null and void and will include a provision to this effect.

Section 6.15 San Juan Project Agreements. Seller agrees that it will not agree to amend, modify or waive any provision of or any of its rights under the Participation Agreement, the Decommissioning Agreement, the San Juan Project Restructuring Agreement, the Mine Reclamation Agreement, or any other material agreement relating to the San Juan Project (including, without limitation, any material supply agreements, water agreements or decommissioning arrangements) if such amendment, modification or waiver could reasonably be expected to adversely affect Buyer.

## **ARTICLE VII POST-CLOSING OBLIGATIONS**

Section 7.01 Post-Closing Obligations.

Seller and Buyer acknowledge and agree that certain actions are required after the Extender Rights Transfer at Closing in order to undertake and complete the transfer of ownership of the San Juan Project and to restructure the San Juan Project as contemplated under this Agreement. Seller and Buyer will use commercially reasonable efforts to work together cooperatively in order to seek to accomplish the actions.

(a) Buyer will use commercially reasonable efforts to negotiate, finalize and execute all Transaction Agreements including, without limitation:

(i) the Restructured Participation Agreement;

- (ii) the Transition Operating Agreement;
  - (iii) the Amended and Restated Decommissioning Agreement;
  - (iv) the Second Amended and Restated Mine Reclamation Agreement;
  - (v) the Non-Extender Transfer Agreements with all Participants classified as Non-Extenders under the Participation Agreement pursuant to which all such Non-Extenders have transferred and conveyed all of their respective rights, titles and interests in the San Juan Project to the Buyer in accordance with the Participation Agreement;
  - (vi) the New Coal Supply Agreement between Buyer and Westmoreland Coal Company;
  - (vii) the New Coal Combustion Residual Disposal Agreement between Buyer and Westmoreland Coal Company; and
  - (viii) any other agreements with the Non-Extenders and the Exited Participants that may be required to effectuate the San Juan Project restructuring contemplated herein, provided that nothing herein will require Buyer to accept or adopt any term, condition or provision in any of the foregoing agreements.
- (b) Buyer will use its commercially reasonable efforts to complete the following actions post-Closing:
- (i) issue the final Sargent and Lundy Report with respect to the financial and engineering viability of the Carbon Capture Equipment and associated transportation pipeline infrastructure and will provide Seller a commercially reasonable opportunity to review and comment on the findings;
  - (ii) prepare market feasibility estimates and financial projections for the Restructured San Juan Project and will provide Seller a commercially reasonable opportunity to review and comment on the findings;
  - (iii) complete any environmental studies required by the Transaction Agreements; and
  - (iv) complete the transfer of any parcels of Real Property or easements or rights-of-way required by Buyer for operation of the San Juan Project.

## **ARTICLE VIII INDEMNIFICATION**

Section 8.01 Survival of Representations and Warranties. Subject to the limitations and other provisions of this Agreement, the representations and warranties herein will survive the Closing and will remain in full force and effect until the date that is thirty-six (36) months after the Effective

Date (the “**Survival Period**”). Any claim for breach of any representation or warranty of Seller or Buyer will be brought, if at all, within the Survival Period or thereafter be barred.

Section 8.02 Indemnification By Seller. Subject to the other terms and conditions of this ARTICLE VIII, Seller will indemnify Buyer against, and will hold Buyer harmless from and against, any and all tort claims imposed upon Buyer resulting from the actions or omissions of Seller subject to the limitations of liability pursuant to Sections 41-4-1 through 41-4-30 of the New Mexico Statutes Annotated (the “**New Mexico Tort Claims Act**”). Any liability or indemnity for tort claims assumed by Seller in this Agreement will be limited by the provisions of the New Mexico Tort Claims Act and in no event will any obligation of Seller for such tort claims under this Agreement be considered an obligation against the general faith and credit or general taxing power of Seller.

Section 8.03 Indemnification By Buyer. Subject to the other terms and conditions of this ARTICLE VIII, Buyer will indemnify Seller against, and will hold Seller harmless from and against, any and all Losses incurred or sustained by, or imposed upon, Seller based upon, arising out of, with respect to or by reason of:

- (a) any inaccuracy in or breach of any of the representations or warranties of Buyer contained in this Agreement; and
- (b) any breach or non-fulfillment of any covenant, agreement or obligation to be performed by Buyer pursuant to this Agreement;

Section 8.04 Certain Limitations. The Party making a claim under this ARTICLE VIII is referred to as the “**Indemnified Party**”, and the Party against which such claims are asserted under this ARTICLE VIII is referred to as the “**Indemnifying Party**”. The indemnification provided for in Section 8.02 and Section 8.03 will be subject to the following limitations: The Indemnifying Party will not be liable to the Indemnified Party for indemnification under Section 8.02 or Section 8.03, as the case may be, until the aggregate amount of all Losses in respect of indemnification under Section 8.02 or Section 8.03 exceeds \$50,000 per occurrence (the “**Deductible**”), in which event the Indemnifying Party will only be required to pay or be liable for Losses in excess of the Deductible. With respect to any claim as to which the Indemnified Party may be entitled to indemnification under Section 8.02 or Section 8.03, as the case may be, the Indemnifying Party will not be liable for any individual or series of related Losses which do not exceed \$50,000, which Losses will not be counted toward the Deductible. If Seller is the Indemnifying Party, Seller’s liability for all Losses hereunder for tort claims will be the maximum amount permitted under the New Mexico Tort Claims Act. If Buyer is the Indemnifying Party, Buyer’s liability for all Losses hereunder will be equal to the amount that would be paid by Seller if it were the Indemnifying Party and such claim were subject to the New Mexico Tort Claims Act. Any claims related to claims related to tax obligations, Excluded Liabilities and Assumed Liabilities will not be subject to the Deductible.

- (a) Payments by an Indemnifying Party pursuant to Section 8.02 or Section 8.03 in respect of any Losses will be limited to the amount of any liability or damage that remains after deducting therefrom any insurance proceeds and any indemnity, contribution or other similar payment received or reasonably expected to be received by the Indemnified



Party in respect of any such claim. The Indemnified Party will use its commercially reasonable efforts to recover under insurance policies or indemnity, contribution or other similar agreements for any Losses prior to seeking indemnification under this Agreement.

(b) In no event will any Indemnifying Party be liable to any Indemnified Party for any punitive, incidental, consequential, special or indirect damages including, without limitation, loss of future revenue or income, loss of business reputation or opportunity related to the breach or alleged breach of this Agreement or diminution of value or any damages based on any type of multiple.

(c) Each Indemnified Party will take, and cause its Affiliates to take, all reasonable steps to mitigate any Losses upon becoming aware of any event or circumstance that would be reasonably expected to, or does, give rise thereto, including incurring costs only to the minimum extent necessary to remedy the breach that gives rise to such Losses.

(d) Seller will not be liable under this ARTICLE VIII for any Losses based upon or arising out of any inaccuracy in, or breach of, any of the representations or warranties of Seller in this Agreement if Buyer had knowledge of such inaccuracy or breach prior to the Closing.

#### Section 8.05 Indemnification Procedures.

(a) Third Party Claims. If any Indemnified Party receives notice of the assertion or commencement of any action, suit, claim or other legal proceeding made or brought by any Person that is not a Party to this Agreement or an Affiliate of a party to this Agreement or a Representative of the foregoing (a “**Third Party Claim**”) against such Indemnified Party with respect to which the Indemnifying Party is obligated to provide indemnification under this Agreement, the Indemnified Party will give the Indemnifying Party prompt written notice thereof. The failure to give such prompt written notice will not relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party is materially adversely affected by reason of such failure. Such notice by the Indemnified Party will describe the Third Party Claim in reasonable detail, will include copies of all material written evidence thereof, and will indicate the estimated amount, if reasonably practical, of the Losses that have been or may be sustained by the Indemnified Party. The Indemnifying Party will have the right to participate in, or by giving written notice to the Indemnified Party, to assume the defense of any Third Party Claim at the Indemnifying Party’s expense and by the Indemnifying Party’s own counsel, and the Indemnified Party will cooperate in good faith in such defense. In the event that the Indemnifying Party assumes the defense of any Third Party Claim, subject to Section 8.05(b), it will have the right to take such action as it deems necessary to avoid, dispute, defend, appeal or make counterclaims pertaining to any such Third Party Claim in the name and on behalf of the Indemnified Party. The Indemnified Party will have the right, at its own cost and expense, to participate in the defense of any Third Party Claim with counsel selected by it subject to the Indemnifying Party’s right to control the defense thereof. If the Indemnifying Party elects not to compromise or defend such Third Party Claim or fails to promptly notify the Indemnified Party in writing of its election to defend as provided in this Agreement, the Indemnified Party may, subject to

Section 8.05(b), pay, compromise, defend such Third Party Claim and seek indemnification for any and all Losses based upon, arising from or relating to such Third Party Claim. Seller and Buyer will cooperate with each other in all reasonable respects in connection with the defense of any Third Party Claim, including making available any records relating to such Third Party Claim and furnishing, without expense (other than reimbursement of actual out-of-pocket expenses) to the defending party, management employees of the non-defending party as may be reasonably necessary for the preparation of the defense of such Third Party Claim.

(b) Settlement of Third Party Claims. Notwithstanding any other provision of this Agreement, the Indemnifying Party will not enter into settlement of any Third Party Claim without the prior written consent of the Indemnified Party, which consent will not be unreasonably withheld or delayed, except as provided in this Section 8.05(b). If a firm offer is made to settle a Third Party Claim without leading to liability or the creation of a financial or other obligation on the part of the Indemnified Party and provides, in customary form, for the unconditional release of each Indemnified Party from all liabilities and obligations in connection with such Third Party Claim and the Indemnifying Party desires to accept and agree to such offer, the Indemnifying Party will give written notice to that effect to the Indemnified Party. If the Indemnified Party fails to consent to such firm offer within ten (10) days after its receipt of such notice, the Indemnified Party may continue to contest or defend such Third Party Claim and in such event, the maximum liability of the Indemnifying Party as to such Third Party Claim will not exceed the amount of such settlement offer. If the Indemnified Party fails to consent to such firm offer and also fails to assume defense of such Third Party Claim, the Indemnifying Party may settle the Third Party Claim upon the terms set forth in such firm offer to settle such Third Party Claim. If the Indemnified Party has assumed the defense pursuant to Section 8.05(a), it will not agree to any settlement without the written consent of the Indemnifying Party, which consent will not be unreasonably withheld or delayed.

(c) Direct Claims. Any claim by an Indemnified Party on account of a Loss which does not result from a Third Party Claim (a “**Direct Claim**”) will be asserted by the Indemnified Party giving the Indemnifying Party prompt written notice thereof. The failure to give such prompt written notice will not, however, relieve the Indemnifying Party of its indemnification obligations, except and only to the extent that the Indemnifying Party is materially adversely affected by reason of such failure. Such notice by the Indemnified Party will describe the Direct Claim in reasonable detail, will include copies of all material written evidence thereof and will indicate the estimated amount, if reasonably practicable, of the Loss that has been or may be sustained by the Indemnified Party. The Indemnifying Party will have thirty (30) days after its receipt of such notice to respond in writing to such Direct Claim. During such thirty (30) day period, the Indemnified Party will allow the Indemnifying Party and its professional advisors to investigate the matter or circumstance alleged to give rise to the Direct Claim, and whether and to what extent any amount is payable in respect of the Direct Claim and the Indemnified Party will assist the Indemnifying Party’s investigation by giving such information and assistance (including access to the Indemnified Party’s premises and personnel and the right to examine and copy any accounts, documents or records) as the Indemnifying Party or any of its professional advisors may reasonably request. If the Indemnifying Party does not so respond within

such thirty (30) day period, the Indemnifying Party will be deemed to have rejected such claim, in which case the Indemnified Party will be free to pursue such remedies as may be available to the Indemnified Party on the terms and subject to the provisions of this Agreement.

**Section 8.06 Exclusive Remedies.** The Parties acknowledge and agree that their sole and exclusive remedy with respect to any and all claims (other than claims arising from intentional fraud on the part of a Party in connection with the transactions contemplated by this Agreement) for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement, will be pursuant to the indemnification provisions set forth in this ARTICLE VIII. In furtherance of the foregoing, each Party hereby waives, to the fullest extent permitted under Law, any and all rights, claims and causes of action for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement it may have against the other Party and its Affiliates and each of their respective Representatives arising under or based upon any Law, except pursuant to the indemnification provisions set forth in this ARTICLE VIII. Nothing in this Section 8.06 will limit any Person's right to seek and obtain any equitable relief to which any Person will be entitled or to seek any remedy on account of any fraud by either Party.

## **ARTICLE IX GENERAL**

**Section 9.01 Expenses.** Except as otherwise expressly provided herein, all costs, fees and disbursements of counsel, financial and other advisors and accountants incurred in connection with this Agreement and the transactions contemplated hereby will be paid by the Party incurring such costs and expenses.

**Section 9.02 Notices.** All requests, consents, claims, demands, waivers and other notices under this Agreement will be in writing and will be deemed to have been given (a) when delivered by hand with written confirmation of receipt by the intended receiving Party; (b) when received by the intended receiving Party if sent by a national express delivery service with confirmation of receipt requested; (c) when received by the intended receiving Party with written acknowledgment of receipt if sent by email; or (d) on the seventh (7) Business Day after the date mailed by certified or registered United States Mail, return receipt requested, postage prepaid. Each notice will be sent to the respective receiving Party at the following address or at such other address for a Party as will be specified in a notice given in accordance with this Section 9.02:

If to Seller:

City of Farmington  
800 Municipal Drive  
Farmington, NM 87401-2663  
Attention: Jennifer Breakell, City Attorney  
Telephone: (505) 599-1122  
Email: [jbakeell@fmtn.org](mailto:jbakeell@fmtn.org)

Hank Adair, P.E.  
Director  
Farmington Electric Utility System  
101 N. Browning Parkway  
Telephone: (505) 599-1165  
Email: [hadair@fmtn.org](mailto:hadair@fmtn.org)

with a copy to:

Thompson Hine LLP  
Attention: Gregory D. Chafee  
Two Alliance Center  
3560 Lenox Road Suite 1600  
Atlanta, GA 30326-4266  
Telephone: (404) 407-3642  
Email: [greg.chafee@thompsonhine.com](mailto:greg.chafee@thompsonhine.com)

If to Buyer:

Enchant Energy LLC  
Enchant Energy Corporation  
745 Fifth Avenue  
6th Floor  
New York, New York 10151  
Attention: Lawrence A. Heller  
Telephone: (212) 457-1600  
Mobile (917) 691-4971  
Email: [lheller@acmeequities.com](mailto:lheller@acmeequities.com)

with a copy to:

Sidley Austin LLP  
Attention: Irving L. Rotter  
1000 Louisiana Street  
Suite 6000  
Houston, Texas 77002  
Telephone: (713) 495-7707  
Email: [irotter@sidley.com](mailto:irotter@sidley.com)

Section 9.03 Interpretation. For purposes of this Agreement (a) the words “include,” “includes” and “including” will be deemed to be followed by the words “without limitation”; (b) the word “or” is not exclusive; and (c) the words “herein,” “hereof,” “hereby,” “hereto” and “hereunder” refer to this Agreement as a whole. Unless the context otherwise requires, references herein: (x) to Articles, Sections and Exhibits mean the Articles and Sections of, and Exhibits attached to, this Agreement; (y) to an agreement, instrument or other document means such agreement, instrument or other document as amended, supplemented and modified from time to time to the extent

permitted by the provisions thereof and (z) to a statute means such statute as amended from time to time and includes any successor legislation thereto and any regulations promulgated thereunder. This Agreement will be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting an instrument or causing any instrument to be drafted. The Exhibits referred to herein will be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

Section 9.04 Headings. The Section headings in this Agreement are for reference only and will not affect the meaning or interpretation of this Agreement.

Section 9.05 Severability. If any term or condition of this Agreement is invalid, illegal or unenforceable in any jurisdiction, such invalidity, illegality or unenforceability will not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the Parties will negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

Section 9.06 Entire Agreement. This Agreement and the other Transaction Documents constitute the sole and entire agreement of the Parties with respect to the subject matter contained herein and therein and supersede all prior and contemporaneous representations, warranties, understandings and agreements, both written and verbal, with respect to such subject matter. In the event of any inconsistency between the statements in the body of this Agreement and those in the other Transaction Documents and Exhibits, the statements in the body of this Agreement will control.

Section 9.07 Successors and Assigns. This Agreement will be binding upon and will inure to the benefit of the Parties and their respective successors and permitted assigns. Neither Party may assign its rights or obligations hereunder without the prior written consent of the other Party, which consent will not be unreasonably withheld or delayed. No assignment will relieve the assigning Party of any of its obligations hereunder.

Section 9.08 No Third Party Beneficiaries. This Agreement is for the sole benefit of the Parties and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or will confer upon any other Person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

Section 9.09 Amendment and Modification; Waiver. This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each Party. No waiver by either Party of any of the provisions hereof will be effective unless explicitly set forth in writing and signed by the Party so waiving. No waiver by either Party will operate or be construed as a waiver in respect of any failure, breach or default not expressly identified by such written waiver, whether of a similar or different character, and whether occurring before or after that waiver. No failure to exercise, or delay in exercising, any right, remedy, power or privilege arising from this Agreement will operate or be construed as a waiver thereof; nor will any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege.

Section 9.10 Dispute Resolution. Following notice from either Party to the other Party setting forth a conflict, claim, issue or dispute (“**Dispute**”) arising from or relating to this Agreement, the Parties will use good faith efforts to meet and to negotiate a resolution to the Dispute without thirty (30) days thereafter. Any Dispute not resolved by the Parties during the aforesaid period will be submitted by the disputing Party to nonbinding mediation according to the then current JAMS International Mediation Rules (the “**Mediation Rules**”), except as modified herein. The mediation will be held in such location as the Parties mutually agree in writing. The Parties have twenty (20) days from receipt by a Party of a mediation request to agree on a mediator. If no mediator has been agreed to by the Parties within twenty (20) days of receipt by a Party of a mediation request, then a Party may request on written notice to the other Party that JAMS appoint a mediator according to the Mediation Rules. All mediation pursuant to this clause will be treated as compromise and settlement negotiations for purposes of applicable rules of evidence, and no oral or documentary representations made by the Parties during such mediation will be admissible for any purpose in any subsequent proceedings. The Parties may utilize the services of a mutually acceptable commercial mediator to facilitate resolution of the Dispute during the aforesaid period. The expenses of the mediator will be shared equally by the Parties. If the Parties are unable to resolve the Dispute within ninety (90) days following the first mediation meeting, then either Party or both Parties may pursue Dispute resolution pursuant to Section 9.11.

Section 9.11 Governing Law; Submission to Jurisdiction; Waiver of Jury Trial.

(a) This Agreement will be governed by and construed in accordance with the Laws of the State of New Mexico without giving effect to any choice or conflict of Law provision or rule (whether of the State of New Mexico or any other jurisdiction).

(b) ANY LEGAL SUIT, ACTION OR PROCEEDING ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY MAY BE INSTITUTED IN THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA OR THE COURTS OF THE STATE OF NEW MEXICO , IN EACH CASE LOCATED IN THE CITY OF FARMINGTON, COUNTY OF SAN JUAN, AND EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS IN ANY SUCH SUIT, ACTION OR PROCEEDING. SERVICE OF PROCESS, SUMMONS, NOTICE OR OTHER DOCUMENT BY MAIL TO SUCH PARTY’S ADDRESS SET FORTH HEREIN WILL BE EFFECTIVE SERVICE OF PROCESS FOR ANY SUIT, ACTION OR OTHER PROCEEDING BROUGHT IN ANY SUCH COURT. THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY OBJECTION TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR ANY PROCEEDING IN SUCH COURTS AND IRREVOCABLY WAIVE AND AGREE NOT TO PLEAD OR CLAIM IN ANY SUCH COURT THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.

(c) EACH PARTY ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT OR THE OTHER TRANSACTION DOCUMENTS IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES AND, THEREFORE, EACH SUCH PARTY

IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LEGAL ACTION ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY. EACH PARTY TO THIS AGREEMENT CERTIFIES AND ACKNOWLEDGES THAT (A) NO REPRESENTATIVE OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT SEEK TO ENFORCE THE FOREGOING WAIVER IN THE EVENT OF A LEGAL ACTION, (B) SUCH PARTY HAS CONSIDERED THE IMPLICATIONS OF THIS WAIVER, (C) SUCH PARTY MAKES THIS WAIVER VOLUNTARILY, AND (D) SUCH PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 9.11(c).

Section 9.12 Counterparts. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will be deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission will be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

Section 9.13 Survival. The provisions of this Agreement that by their nature should survive the Closing will remain in effect following the Closing. The provisions include, without limitation, Section 7.01 and Articles VIII and IX.

Section 9.14 Non-recourse. Anything to the contrary contained herein notwithstanding, the obligations of the Buyer under this Agreement and any other Transaction Documents entered into concurrent herewith or subsequent hereto are obligations solely of Buyer party thereto and Seller and its Affiliates expressly waive, release and disclaim any right or recourse against any officer, director, member, employee or agent of Buyer or any Affiliate of Buyer.

**[SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, Seller and Buyer have caused this Agreement to be executed as of the Effective Date by their duly authorized representatives intending to be legally bound.

Seller:

**CITY OF FARMINGTON, NEW MEXICO**

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

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

Buyer:

**ENCHANT ENERGY LLC**

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

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

**ENCHANT ENERGY CORPORATION**

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

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