

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

Optim Energy, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No. 14-10262 (BLS)

(Jointly Administered)

RE: D.I. 359, 423

**NOTICE OF FILING OF STALKING HORSE ASSET PURCHASE
AND SALE AGREEMENT**

PLEASE TAKE NOTICE that on June 17, 2014, the above-captioned debtors and debtors in possession (collectively, the “Debtors”), filed the *Debtors’ Motion for Orders: (A)(I) Approving Sale Procedures and Proposed Purchaser Payments in Connection with the Sale of Certain Assets of Optim Energy Twin Oaks, LP, (II) Scheduling an Auction and Hearing to Consider Approval of the Sale, (III) Approving Notice Relating to the Sale, and (IV) Granting Related Relief; and (B)(I) Authorizing and Approving Optim Energy Twin Oaks, LP to Sell Substantially All of Its Property Free and Clear of All Liens, Claims, and Encumbrances, (II) Authorizing Optim Energy Twin Oaks, LP to Assume and Assign Certain Executory Contracts and Unexpired Leases, and (III) Granting Related Relief* (D.I. 359) (the “Sale Motion”).

PLEASE TAKE FURTHER NOTICE that attached as Exhibit 1 to Exhibit B to the Sale Motion was a proposed stalking horse asset purchase and sale agreement (the “PSA”).

¹ The Debtors in these chapter 11 cases are: Optim Energy, LLC; OEM 1, LLC; Optim Energy Cedar Bayou 4, LLC; Optim Energy Altura Cogen, LLC; Optim Energy Marketing, LLC; Optim Energy Generation, LLC; Optim Energy Twin Oaks GP, LLC; and Optim Energy Twin Oaks, LP. The Debtors’ main corporate and mailing address for purposes of these chapter 11 cases is: c/o Competitive Power Ventures, Inc., 8403 Colesville Road, Suite 915, Silver Spring, MD 20910.

PLEASE TAKE FURTHER NOTICE that on July 3, 2014, the Court entered the *Order (I) Approving Sale Procedures and Proposed Purchaser Payments in Connection with the Sale of Certain Assets of Optim Energy Twin Oaks, LP, (II) Scheduling an Auction and Hearing to Consider Approval of the Sale, (III) Approving Notice Relating to the Sale, and (IV) Granting Related Relief* (D.I. 423) (the “Sale Procedures Order”).

PLEASE TAKE FURTHER NOTICE that attached hereto as **Exhibit A** is a modified PSA, which now serves as the PSA for purposes of the Auction and Sale Hearing (as described in the Sale Procedures Order).

[Remainder of Page Intentionally Blank]

Dated: July 3, 2014
Wilmington, Delaware

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ William M. Alleman, Jr.

Robert J. Dehney (No. 3578)
William M. Alleman, Jr. (No. 5449)
Christopher M. Hayes (No. 5902)
1201 North Market Street, 16th Floor
P.O. Box 1347
Wilmington, DE 19899
Telephone: (302) 658-9200
Facsimile: (302) 658-3989

-and-

BRACEWELL & GIULIANI LLP

Kurt Mayr (*admitted pro hac vice*)
Mark E. Dendinger (*admitted pro hac vice*)
Goodwin Square
225 Asylum Street, Suite 2600
Hartford, CT 06103
Telephone: (860) 947-9000
Facsimile: (860) 246-3201

-and-

Robert G. Burns (*admitted pro hac vice*)
Joseph A. Pack (*admitted pro hac vice*)
1251 Avenue of the Americas, 49th Floor
New York, NY 10020-1104
Telephone: (212) 508-6100
Facsimile: (800) 404-3970

*Counsel for the Debtors and
Debtors in Possession*

8364985.2

EXHIBIT A

[PSA]

EXECUTION VERSION

ASSET PURCHASE AND SALE AGREEMENT
BY AND BETWEEN
OPTIM ENERGY TWIN OAKS, LP
AND
TWIN OAKS POWER, LLC
AND, SOLELY FOR PURPOSES OF SECTION 4.6,
OPTIM ENERGY, LLC,
OPTIM ENERGY MARKETING, LLC,
OEM 1, LLC,
OPTIM ENERGY GENERATION, LLC,
OPTIM ENERGY CEDAR BAYOU 4, LLC,
OPTIM ENERGY ALTURA COGEN, LLC
AND
OPTIM ENERGY TWIN OAKS GP, LLC

Dated as of July 3, 2014

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F	Sale Order

ASSET PURCHASE AND SALE AGREEMENT

This ASSET PURCHASE AND SALE AGREEMENT, dated as of July 3, 2014 (this "Agreement"), is made and entered into by and between Optim Energy Twin Oaks, LP, a Texas limited partnership ("Seller"), and Twin Oaks Power, LLC, a Delaware limited liability company ("Buyer") and, solely for purposes of Section 4.6, Optim Energy, LLC, a Delaware limited liability company ("Optim"), Optim Energy Marketing, LLC, a Delaware limited liability company ("Optim Marketing"), OEM 1, LLC, a Delaware limited liability company ("OEM"), Optim Energy Generation, LLC, a Delaware limited liability company ("Optim Generation"), Optim Energy Cedar Bayou 4, LLC, , a Delaware limited liability company ("Optim Cedar"), Optim Energy Altura Cogen, LLC, a Delaware limited liability company ("Optim Altura") and Optim Energy Twin Oaks GP, LLC, a Delaware limited liability company ("Optim GP" and, together with Seller, Optim, Optim Marketing, OEM, Optim Generation, Optim Cedar and Optim Altura, the "Optim Parties"). Seller and Buyer are sometimes herein referred to collectively as the "Parties" and individually as a "Party."

WITNESSETH:

WHEREAS, on February 12, 2014 (the "Petition Date"), Optim Energy, LLC and its debtor Affiliates including Seller commenced voluntary cases under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 et seq. (as amended, the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), which cases are currently pending before the Honorable Brendan L. Shannon and jointly administered for procedural purposes only under Case No. 14-10262 (collectively, the "Chapter 11 Cases");

WHEREAS, Seller continues to operate its Business (as defined below) as a debtor-in-possession under sections 1107(a) and 1108 of the Bankruptcy Code;

WHEREAS, Seller is currently engaged in the Business and owns the two-unit lignite-fired electric generating plant known as the Twin Oaks Power Station, located in Robertson County, Texas (the "Facility");

WHEREAS, Seller has agreed to sell, transfer and assign to Buyer, and Buyer has agreed to purchase and assume from Seller, pursuant to sections 363 and 365 of the Bankruptcy Code, the Purchased Assets and the Assumed Liabilities (each as defined below) from Seller, upon the terms and conditions set forth hereinafter;

WHEREAS, on the terms and subject to the conditions hereinafter set forth and pursuant to a Sale Order (as defined below) and sections 105, 363 and 365 of the Bankruptcy Code, the Parties desire to enter into this Agreement;

WHEREAS, Seller has determined, in the exercise of its business judgment, that it is advisable and in the best interest of the estate and the beneficiaries of the estate to consummate the Transactions (as defined below) provided for herein pursuant to the Sale Procedures Order and the Sale Order and, in furtherance thereof, the board of directors of the Seller has approved this Agreement; and

WHEREAS, the transactions contemplated by this Agreement are subject to the approval of the Bankruptcy Court of this Agreement and will be consummated only pursuant to the Sale Order to be entered in the Chapter 11 Cases.

NOW, THEREFORE, in consideration of the premises hereof and of the mutual covenants, representations, warranties and agreements herein contained, and intending to be legally bound hereby, the Parties hereby agree as follows:

ARTICLE I

DEFINITIONS

Section 1.1. Certain Definitions.

For purposes of this Agreement, the following terms shall have the meanings specified in this Section 1.1:

“Accounts Receivable” means all accounts receivable, notes and other rights to payment from any Person, including customers and Affiliates, whether or not in the Ordinary Course of Business, together with any unpaid financing charges thereon.

“Action” means any action, suit, claim, cause of action, inquiry, complaint, proceeding or investigation by or before any Governmental Body of any nature, civil, criminal, regulatory or otherwise, in law or in equity, or any arbitration.

“Affiliate” (and, with a correlative meaning “affiliated”) means, with respect to any Person, any direct or indirect subsidiary of such Person, and any other Person that directly, or indirectly through one or more intermediaries, controls or is controlled by or is under common control with such first Person. As used in this definition, “control” (including with correlative meanings, “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 or policies of such Person (whether through ownership of securities or partnership or other ownership interests, by Contract or otherwise); provided that this definition shall exclude the Pre-Petition Secured Parties and their affiliates (except to the extent such term is used in (i) the context of defining Excluded Liabilities, (ii) Section 5.18 and (iii) the definition of Transaction CAs), other than Optim Energy, LLC or any of its subsidiaries (including Seller).

“Asset Manager” means Competitive Power Ventures, Inc.

“Auction” means that certain auction if any conducted pursuant to the terms of the Sale Procedures Order.

“Budget” means the capital expenditure forecast relating to the operation of the Facility between the date hereof and the Closing Date attached hereto as Exhibit C, as may be amended or modified from time to time with the prior written approval of Buyer, which shall not be unreasonably withheld, conditioned or delayed.

“Business” means the ownership of the Purchased Assets and the operation of the Facility as currently conducted by Seller.

“Business Day” means a day other than a Saturday, Sunday or other day on which commercial banks in New York City are authorized or required by Law to close. Any event the scheduled occurrence of which would fall on a day that is not a Business Day shall be deferred until the next succeeding Business Day.

“Capital Expenditures” means all capital expenditures actually paid by Seller with respect to the Facility during the specified period. Whether an expenditure counts as a Capital Expenditure will be determined consistent with the methodologies used to calculate the estimated capital expenditures reflected in the Budget, and in accordance with the methodologies utilized in the preparation of the Financial Statements.

“Claim” has the meaning set forth in section 101(5) of the Bankruptcy Code.

“Coal Value” means \$2.35 per Dth for Seller’s Coal inventory either located at the Facility or paid for by Seller and not yet delivered to the Facility.

“COBRA” means the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended.

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

“Consent” means any consent, waiver, approval, order or authorization of, or registration, declaration or filing with or notice to, any Governmental Body or other Person.

“Contract” means (whether written or oral) any contract, indenture, note, bond, loan, instrument, lease, license, commitment or other agreement, and any amendments, modifications or supplements thereto.

“Cure Costs” means any and all amounts, costs or expenses that must be paid or actions that must be performed pursuant to sections 365(b) and (f) of the Bankruptcy Code in connection with the assumption and/or assignment of any Assumed Contract, as ultimately determined by the Bankruptcy Court.

“Data Site” means the electronic data room hosted by CapLinked, Inc. containing information regarding Seller and the Purchased Assets to which Buyer has had access prior to the date hereof.

“Deposit Escrow Agent” means Wells Fargo Bank, N.A.

“Determined Cure Costs” means, in the aggregate, all Cure Costs payable in respect of the Assumed Contracts as determined pursuant to the Sale Order.

“DIP Credit Agreement” means the Senior Secured Debtor in Possession Credit, Security and Guaranty Agreement dated as of February 12, 2014, by and among the lenders from time to time party thereto, Wells Fargo Bank, National Association, Optim Energy, LLC and its debtor

Affiliates, as may be amended, restated, supplemented or otherwise modified from time to time in accordance with the terms thereof and the DIP Orders.

“DIP Orders” mean the interim and final Orders of the Bankruptcy Court approving Optim Energy, LLC and its debtor Affiliates’ entry into the DIP Credit Agreement, and any amendment, modification or supplement of such Orders in form and substance acceptable to the Majority Lenders (as defined in the DIP Credit Agreement).

“Documents” means all files, documents, instruments, papers, books, reports, records, tapes, microfilms, photographs, letters, budgets, forecasts, ledgers, journals, title policies, customer lists, regulatory filings (including, for the avoidance of doubt, (i) all North American Electric Reliability Corporation (and any applicable regional authorities thereof) compliance and other historical and ongoing operational and regulatory compliance records and (ii) all records relating to environmental matters, include with respect to the Facility’s compliance with Environmental Laws and Environmental Permits), equipment logs, operating data and plans, technical documentation (design specifications, functional requirements, operating instructions, logic manuals, flow charts, etc.), maintenance records, user documentation (installation guides, user manuals, training materials, release notes, working papers, etc.), marketing documentation (sales brochures, flyers pamphlets, Web pages, etc.), cost or pricing information, business plans, quality control records and procedures, blue prints, financial accounting files and other financial information, customer files and other customer related documents (including credit information), supplier lists, records, literature and correspondence, including materials relating to Inventories, services, marketing, advertising, promotional materials, documents related to Intellectual Property, and other similar materials, in each case to the extent used in or held for use in, or that relate primarily to, the Business or the Purchased Assets, whether or not in electronic form and whether or not physically located at the Facility, but excluding any such materials that relate primarily to Excluded Assets.

“Environmental Law” means any Law relating to pollution, remediation of contamination, protection of human or worker health and the environment, protection of natural resources, including the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. § 9601 et seq.), the Solid Waste Disposal Act and Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), the Clean Water Act (33 U.S.C. § 1251 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.), the Occupational Safety and Health Act (29 U.S.C. § 1251 et seq.), and the Hazardous Materials Transportation Act (49 U.S.C. § 5101 et seq.), as each has been amended and the regulations promulgated thereto, and all analogous, related, or supplemental state or local laws.

“Environmental Permit” means any Permit required by Environmental Laws for the ownership or operation of the Facility or Purchased Assets or the operation of the Business.

“Equity Financing” means the equity financing to be provided pursuant to the Equity Commitment Letter.

“Equity Financing Source” means ArcLight Energy Partners Fund V, L.P.

“ERCOT” means the Electric Reliability Council of Texas, Inc., a Texas non-profit corporation, or its successor, as applicable.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended.

“Excluded Contracts” means the Contracts that are not Assumed Contracts and any other Contracts explicitly designated as Excluded Contracts by Buyer pursuant to the terms of this Agreement.

“Excluded Matter” means any one or more of the following: (i) the effect of any change in the United States or foreign economies or securities or financial markets in general, except to the extent such changes have a disproportionate effect on Seller relative to other participants in the industry in which Seller operates; (ii) the effect of any change that generally affects any industry in which Seller operates, except to the extent such changes have a disproportionate effect on Seller relative to other participants in the industry in which Seller operates; (iii) the effect of any change arising in connection with earthquakes, hostilities, acts of war, sabotage or terrorism or military actions or any escalation or material worsening of any such hostilities, acts of war, sabotage or terrorism or military actions existing or underway as of the date hereof, except to the extent such changes have a disproportionate effect on Seller relative to other participants in the industry in which Seller operates; (iv) the effect of any action taken by Buyer or its Affiliates with respect to the Transactions or with respect to Seller (including the non-assumption of any Contract); (v) the effect of any changes in applicable Laws or accounting rules, except to the extent such changes have a disproportionate effect on Seller relative to other participants in the coal-fired electric power generation industry; or (vi) any effect, including any effect arising from any Action by a counterparty to a Contract with Seller that is directly attributable to this Agreement, resulting from the public announcement of this Agreement in accordance with the terms of this Agreement that is directly attributable to such disclosure, other than with respect to Section 5.3; (vii) the effect of any Action by a counterparty of any Contract that is not a Designated Contract, to the extent related to such contract, that is not a result of any tort or post-petition breach of contract by Optim or any of its Affiliates or (viii) any effect resulting from the filing of the Chapter 11 Cases.

“Excluded Permit” means those permits listed on Schedule 2.2(g).

“Expense Reimbursement” means all reasonable and documented costs and expenses of Buyer incurred in connection with the due diligence, preparation, execution and performance of the Transaction Documents and the consummation of the transactions contemplated thereby (including, without limitation, reasonable and documented expenses of counsel and other outside consultants and advisors) in an amount not to exceed the lesser of such actual costs and expenses and \$400,000.

“Facility Employees” means employees of Operator who are actively at work at the Facility.

“Final Order” means an Order which has not been stayed and as to which the time to file an appeal, a motion for rehearing or reconsideration or a petition for writ of certiorari has expired and no such appeal, motion or petition is pending.

“Furniture and Equipment” shall mean all equipment, machinery, fixtures, spare parts, furniture and other tangible property owned or leased by Seller or any of its Affiliates and located at the Facility or otherwise designated or intended to be used in the operation of the Business, including all attachments, appliances, fittings, gas and oil burners, lighting fixtures, signs, doors, cabinets, partitions, mantels, motors, pumps, screens, plumbing, heating, air conditioning, refrigerators, freezers, refrigerating and cooling systems, racks, ovens, stoves, carpets, floor coverings, wall coverings, office equipment, kitchen appliances, Hardware, registers, safes, trash containers, meters and scales, combinations, codes and keys, and any other furniture, fixtures, equipment and Improvements related to or useful in Business, irrespective of where title is held as of the date of this Agreement.

“GAAP” means generally accepted accounting principles in the United States as of the date hereof, consistently applied.

“Governmental Body” means any entity or other body exercising any executive, legislative, judicial, regulatory or administrative functions of or pertaining to any United States or foreign, multi-national, federal, state, county or local government, any governmental authority, agency, department, board, commission or instrumentality or any political subdivision thereof, and any tribunal or court or arbitrator(s) of competent jurisdiction, and shall include the Bankruptcy Court and any quasi-governmental or non-governmental body administering, regulating or having general oversight over electricity, power or other markets (including ERCOT, North American Electric Reliability Corporation and any applicable regional authorities thereof).

“Hardware” means any and all computer and computer-related hardware, including, but not limited to, computers, file servers, facsimile servers, scanners, color printers, laser printers and networks.

“Hazardous Material” means any substance, material or waste that is regulated pursuant to any Environmental Law, or that can be the subject of enforcement, investigation, or liability pursuant to any Environmental Law, whether or not recycled or beneficially used, including coal, coal combustion products, residues, or emissions, fly ash, bottom ash, flue gas desulfurization material, petroleum and its by-products, asbestos, polychlorinated biphenyls, radon, mold or other fungi, and urea formaldehyde insulation.

“Improvements” shall mean buildings, structures, systems, fixtures and facilities located on, and easements, rights-of-way, privileges, improvements, licenses, hereditaments, appurtenances, roads, sidewalks, parking lots, infrastructure improvements and all other rights and benefits belonging, or in any way related, to the Owned Real Property.

“Indebtedness” means, with respect to any Person, without duplication, (i) all amounts owing, including principal and premium (if any), interest, overdraft fees, costs, expenses, penalties, indemnities and breakage costs in respect of (A) indebtedness of such Person for money borrowed and (B) indebtedness evidenced by notes, debentures, bonds, drafts, extensions of credit or other similar instruments for the payment of which such Person is responsible or liable; (ii) all obligations of such Person issued or assumed with respect to the posting of collateral and similar obligations or as the deferred purchase price of property (including “earn

out” payments), all conditional sale obligations of such Person and all obligations of such Person under any title retention agreement (but excluding trade accounts payable and other accrued current liabilities arising in the Ordinary Course of Business); (iii) all obligations of such Person under leases required to be capitalized in accordance with GAAP; (iv) all obligations of such Person for the reimbursement of any obligor on any letter of credit, banker’s acceptance or similar credit transaction; (v) obligations under any interest rate, currency or other hedging arrangement or derivatives transaction; (vi) all obligations of the type referred to in clauses (i) through (v) of any Persons for the payment of which such Person is responsible or liable, directly or indirectly, as obligor, guarantor, surety or otherwise, including guarantees of such obligations, “keep well” agreements, agreements to maintain or contribute cash or capital to any Person or other similar agreements or arrangements; (vii) all obligations of the type referred to in clauses (i) through (vi) of other Persons secured by any Lien on any property or asset of such Person (whether or not such obligation is assumed by such Person) and (viii) any change of control payments or prepayment premiums, penalties, charges or equivalents thereof with respect to any obligations of the type referred to in clauses (i) through (vii) that are required to be paid at the time of, or the payment of which would become due and payable solely as a result of, the execution of the Transaction Documents or the consummation of the Transactions.

“Intellectual Property” means all worldwide intellectual property and rights wholly or jointly owned, assigned or registered to Seller arising from or in respect of the following: all (i) inventions, discoveries, industrial designs, business methods, patents and patent applications (including provisional and Patent Cooperation Treaty applications), including continuations, divisionals, continuations-in-part, reexaminations and reissues, extensions, renewals and any patents that may be issued with respect to the foregoing; (ii) trademarks, service marks, certification marks, collective marks, trade names, business names, assumed names, d/b/a’s, fictitious names, brand names, trade dress, logos, slogans, symbols, Internet domain names and corporate names, and general intangibles of a like nature, whether registered, unregistered or arising under Law, and all applications, registrations, and renewals for any of the foregoing, together with the goodwill associated with and symbolized by each of the foregoing; (iii) published and unpublished works of authorship in any medium, whether copyrightable or not (including databases and other compilations of information, Software, and other similar materials and Internet website content), copyrights and moral rights therein and thereto, and registrations and applications therefor, and all issuances, renewals, extensions, restorations and reversions thereof; and (iv) confidential and proprietary information, trade secrets, and know-how, including methods, processes, business plans, schematics, concepts, Software, formulae, drawings, prototypes, models, designs, devices, technology, research and development and customer information and lists.

“Intercompany Loan” means any intercompany Indebtedness between Seller and any Affiliate of Seller, whether or not evidenced by promissory notes and/or recorded in the books and records of Seller.

“IRS” means the United States Internal Revenue Service.

“Law” means any law (including common law), statute, code, ordinance, judicial or administrative order, rule, license, permit or regulation or other requirement enacted, promulgated, issued or entered by a Governmental Body.

“Liability” means any and all debts, losses, liabilities, claims (including “Claims” as defined in section 101(5) of the Bankruptcy Code), damages, expenses, Taxes, fines, Indebtedness or other penalties, costs, royalties, proceedings, deficiencies or obligations (including those arising out of any action, such as any settlement or compromise thereof or judgment or award therein), of any nature, whether known or unknown, absolute, contingent, accrued or unaccrued, liquidated or unliquidated, or otherwise and whether due or to become due, and whether in contract, tort, strict liability or otherwise, and whether or not resulting from third party claims.

“Lien” means any lien, encumbrance, pledge, mortgage, deed of trust, security interest, claim, lease, charge, option, restriction, purchase agreement, right of first refusal, right of first offer, easement, servitude, proxy, voting trust or agreement, right to use, transfer restriction or other similar encumbrance.

“Material Adverse Effect” means any change, effect, fact, event, occurrence, condition, circumstance or development that, individually or in the aggregate, (i) is, or is reasonably likely to have, a material adverse effect on the Business or the business, assets, Assumed Liabilities, condition (financial or otherwise), results of operations or properties of Seller (taken as a whole) or (ii) would reasonably be expected to prevent or materially restrict or delay the ability of Seller to consummate the Transactions or perform its obligations under this Agreement or the other Transaction Documents to which it is a party, in each case other than any change, effect, fact, event, occurrence, condition, circumstance or development resulting from an Excluded Matter.

“O&M Agreement” means the Amended and Restated O&M Services Agreement dated as of October 19, 2012 between Seller and Operator, as amended, relating to the Facility.

“Operator” means NAES Corporation.

“Order” means any order, injunction, judgment, decree, award, ruling, writ, assessment or arbitration award of a Governmental Body.

“Ordinary Course of Business” means the ordinary and usual course of normal day-to-day operations of the Business consistent with past practice.

“Organizational Documents” means, with respect to any Person (other than an individual), (a) the certificate or articles of incorporation or organization and any joint venture, limited liability company, operating or partnership agreement and other similar documents adopted or filed in connection with the creation, formation or organization of such Person and (b) all bylaws and similar documents, instruments or agreements relating to the organization or governance of such Person, in each case, as amended or supplemented.

“Permits” means any approvals, authorizations, consents, licenses, permits, variances, registrations, certificates of, issued, granted by or obtained from, a Governmental Body.

“Permitted Exceptions” means (i) all title exceptions, restrictions, easements, restrictive covenants, rights-of-way, servitudes, permits, surface leases and other rights with respect to surface operations, to the extent the same are disclosed in policies of title insurance which have been made available by Seller to Buyer with respect to the Owned Real Property as of the date

hereof, (ii) all rights reserved to or vested in any Governmental Body to control or regulate the Purchased Assets and all obligations and duties under all applicable Laws or under any permit issued by any Governmental Body, (iii) statutory Liens for current real and personal property Taxes, assessments or governmental charges not yet due or delinquent, (iv) mechanics', carriers', workers', repairers' and similar Liens arising or incurred in the Ordinary Course of Business, (v) Liens securing debt as disclosed in the Financial Statements, which Liens will be released at or prior to Closing, (vi) title of a lessor under the capital and operating leases set forth on Schedule 1.1, (vii) the rights of third parties under the Assumed Contracts and (viii) any other easements, leases, rights-of-way, restrictions, covenants, licenses or other Liens, whether or not of record, or any encroachments or other survey defects which would be disclosed by a current accurate survey or physical inspection of the respective property, to the extent not otherwise included in clauses (i) through (vi), but which, individually and in the aggregate (but without including any other Liens otherwise included as Permitted Exceptions pursuant to any other clauses of this definition), do not interfere materially with the current use of such property (assuming its continued use in the manner in which it is currently used).

“Person” means and includes natural persons, corporations, limited partnerships, limited liability companies, general partnerships, joint stock companies, joint ventures, associations, companies, trusts, banks, trust companies, land trusts, business trusts or other organizations, whether or not legal entities, and all Governmental Bodies.

“Post-Closing Tax Period” means any Tax period (or portion thereof) beginning after the Closing Date.

“Pre-Closing Tax Period” means any Tax period (or portion thereof) ending on or before the Closing Date.

“Pre-Petition Secured Parties” means Cascade Investment, L.L.C. and ECJV Holdings, LLC, and any successor-in-interest to either of the foregoing.

“Purchased Intellectual Property” means all Owned Intellectual Property, Seller’s right to the Licensed Intellectual Property and all other Intellectual Property rights (whether or not registered) that relate to the Business or which are manufactured, used, offered for sale, sold, published, performed or exploited in the operation of the Business, other than Intellectual Property associated exclusively with the Excluded Assets.

“Release” means any actual or threatened release, spill, emission, leaking, pumping, injection, deposit, disposal, treatment, storage, discharge, dispersal, escaping, pouring, emptying, dumping or leaching into the indoor or outdoor environment, or into, on, within, under, or out of any property.

“Released Liens” means (i) any Lien that, pursuant to section 363(f) of the Bankruptcy Code, will be released from the Purchased Assets upon entry of the Sale Order; and (ii) other Liens that will be released on or prior to Closing at no cost or expense to Buyer.

“Remedial Action” means all actions to (i) investigate, respond to, clean up, remove, remediate, or otherwise mitigate or address any Hazardous Material in the indoor or outdoor environment including post-remedial monitoring and care; (ii) prevent the Release or threatened

Release or minimize the further Release of any Hazardous Material; or (iii) correct a condition of noncompliance with Environmental Laws.

“Representatives” means, with respect to any Person, its Affiliates and its and their respective officers, directors, managers, employees, members, stockholders, partners, capital providers, attorneys, investment bankers, accountants, consultants and other agents, advisors and representatives.

“Sale Hearing” means the hearing to consider the entry of the Sale Order.

“Sale Motion” means the motion or motions in form and substance reasonably acceptable to Buyer and Seller, filed by Seller pursuant to, *inter alia*, sections 363 and 365 of the Bankruptcy Code, seeking approval and entry of the Sale Procedures Order and the Sale Order.

“Sale Order” means an Order or Orders of the Bankruptcy Court, in form and substance substantially in the form of Exhibit F, pursuant to, *inter alia*, sections 105, 363 and 365 of the Bankruptcy Code, approving this Agreement and all of the terms and conditions hereof, and approving and authorizing Seller to consummate the transactions contemplated hereby.

“Sale Procedures” means the procedures attached as Exhibit 1 to the Sale Procedures Order and incorporated therein by reference.

“Sale Procedures Order” means an Order of the Bankruptcy Court, in form and substance substantially in the form of Exhibit E, which, among other things, approves the Sale Procedures. For the avoidance of doubt, the term “Sale Procedures Order” as used herein includes the “Sale Procedures.”

“Seller’s Knowledge” means the actual knowledge, after reasonable inquiry, of the individuals identified on Schedule 1.1(b).

“Software” means any and all (i) computer programs, including any and all software implementations of algorithms, models and methodologies, whether in source code or object code, (ii) databases and compilations, including any and all data and collections of data, whether machine readable or otherwise, (iii) descriptions, schematics, flow charts and other work product used to design, plan, organize and develop any of the foregoing and (iv) all documentation, user manuals and training materials, relating to any of the foregoing, owned or used by the Seller in the conduct of the Business.

“Solvent” when used with respect to any Person, means that, as of any date of determination, (a) the amount of the “fair saleable value” of the assets of such Person will, as of such date, exceed the sum of (i) the value of all “liabilities of such Person, including contingent and other liabilities,” as of such date, as such quoted terms are generally determined in accordance with applicable laws governing determinations of the insolvency of debtors, and (ii) the amount that will be required to pay the probable liabilities of such Person, as of such date, on its existing debts (including contingent and other liabilities) as such debts become absolute and mature, (b) such Person will not have, as of such date, an unreasonably small amount of capital for the operation of the businesses in which it is engaged or proposed to be engaged following such date, and (c) such Person will be able to pay its liabilities, as of such date, including

contingent and other liabilities, as they mature. For purposes of this definition, “not have an unreasonably small amount of capital for the operation of the businesses in which it is engaged or proposed to be engaged” and “able to pay its liabilities, as of such date, including contingent and other liabilities, as they mature” means that such Person will be able to generate enough cash from operations, asset dispositions or refinancing, or a combination thereof, to meet its obligations as they become due.

“Straddle Period” means any Tax period beginning on or before, and ending after, the Closing Date.

“Subsidiary” or “subsidiary” means, with respect to any Person, any corporation, limited liability company, joint venture or partnership of which such Person (a) beneficially owns, either directly or indirectly, more than fifty percent (50%) of (i) the total combined voting power of all classes of voting securities of such entity entitled, under ordinary circumstances, to vote in the election of directors or other governing body of such Person, (ii) the total combined equity interests, or (iii) the capital or profit interests, in the case of a partnership; or (b) otherwise has the power to vote or to direct the voting of sufficient securities to elect a majority of the board of directors or similar governing body of such Person.

“Tax” means all federal, state, provincial, territorial, municipal, local or foreign taxes of any kind whatsoever, including, without limitation, income, profits, franchise, gross receipts, environmental (including taxes under Section 59A of the Code), alternative or add on minimum, customs, duties, net worth, sales, use, goods and services, withholding, value added, ad valorem, employment, social security, escheat, disability, occupation, pension, real property, personal property (tangible and intangible), stamp, transfer, conveyance, severance, production, excise and other taxes (including payments in lieu of taxes), withholdings, duties, levies, imposts, fees and other similar charges and assessments (including any and all interest, fines, penalties and additions attributable to, or otherwise imposed on or with respect to, any such taxes, withholdings, duties, levies, imposts, fees and other similar charges and assessments) imposed by or on behalf of any Tax Authority, including any obligation to indemnify or otherwise to assume or succeed to the Tax liability of any other Person.

“Tax Authority” means any Governmental Body charged with the determination, assessment, regulation, collection or administration of any Tax or of Law relating to Taxes.

“Tax Return” means all returns, declarations, reports, estimates, information returns, elections, claims for refund, statements or other documents filed or required to be filed in respect of any Taxes or supplied to any Tax Authority, including all attachments and schedules thereto and amendments thereof.

“Transaction CAs” means each confidentiality agreement between Optim Energy, LLC or any of its Affiliates, on the one hand, and a prospective purchaser of the Purchased Assets, on the other hand, in relation to the Transactions.

“Transaction Documents” means this Agreement, the Deposit Escrow Agreement, the Bill of Sale, the Assignment and Assumption Agreement, the Transition Services Agreement (if entered into pursuant to Section 8.8) and the Equity Commitment Letter.

“Transactions” means the transactions contemplated by this Agreement and the other Transaction Documents.

“Transmission and Interconnection Facilities” means, except for those facilities owned by Texas-New Mexico Power Company, Emerson Process Management - Power & Water Supply Solutions, ETC Marketing, Ltd., and AmStar Surface Technology, the electric transmission and distribution, substation and communication facilities located on the Seller Real Property and related Purchased Assets that are used solely in connection with the operation of the Facility, together with all related interconnection rights, rights-of-way and corridor easements related to such facilities.

“WARN Act” means the federal Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq. (1988) and any similar state or local “mass layoff” or “plant closing” laws.

Section 1.2. Terms Defined Elsewhere in this Agreement.

For purposes of this Agreement, the following terms have meanings set forth in the sections indicated:

Term	Section
Adjustments	Section 3.2(b)
Agreement	Preamble
Alternative Transaction	Section 4.4(1)
Assignment and Assumption Agreement	Section 4.2(a)(iii)
Assumed Contracts	Section 2.5
Assumed Liabilities	Section 2.3
Assumption Notice	Section 7.3(a)
Balance Sheet	Section 5.4
Balance Sheet Date	Section 5.4
Bankruptcy Code	Recitals
Bankruptcy Court	Recitals
Base Price	Section 3.1(a)
Bill of Sale	Section 4.2(a)
Breakup Fee	Section 4.6(b)
Buyer Documents	Section 6.2
Cash Consideration	Section 3.1(a)
Chapter 11 Cases	Recitals
Closing	Section 4.1
Closing Date	Section 4.1
Coal	Section 2.1(c)(iv)
Condemnation	Section 8.9(a)
Condemnation Proceeds	Section 8.9(c)
Confidentiality Agreement	Section 8.5(a)
Cure Schedule	Section 2.5
Deposit	Section 3.2(a)
Deposit Escrow Agreement	Section 3.2(a)

Designated Contract	Section 7.3(c)
Destruction	Section 8.9
Dispute Notice	Section 3.2(f)
Disputed Items	Section 3.2(f)
Easements	Section 2.1(b)(iii)
Employee Benefit Plans	Section 5.13(a)
Equity Commitment Letter	Section 6.6(a)
ERISA Affiliate	Section 5.11(b)
Estimated Closing Adjustment Amount	Section 3.4(b)
Estimated Purchase Price	Section 3.2(c)
Excluded Assets	Section 2.2
Excluded Liabilities	Section 2.4
Excluded Permits	Section 7.3(a)
Facility	Recitals
Final Closing Adjustment Amount	Section 3.2(i)
Financial Statements	Section 5.4
Income Taxes	Section 5.7
Independent Auditor	Section 3.2(f)
Insurance Contract	Section 5.17
Intellectual Property Licenses	Section 4.2(b)
Licensed Intellectual Property	Section 5.9(a)
Material Contract	Section 5.12(a)
Non-Income Tax Returns	Section 9.3(c)
Non-Recourse Parties	Section 12.3
Occurrence Based Policy	Section 8.13
OEM	Preamble
Optim	Preamble
Optim Altura	Preamble
Optim Cedar	Preamble
Optim Generation	Preamble
Optim GP	Preamble
Optim Marks	Section 8.11
Optim Marketing	Preamble
Optim Parties	Preamble
Owned Intellectual Property	Section 5.11(a)
Owned Real Property	Section 2.1(b)(ii)
Party	Preamble
Petition Date	Recitals
Purchase Price	Section 3.1(c)
Purchased Assets	Section 2.1(b)
Preliminary Closing Adjustment Schedule	Section 3.2(d)
Qualifying Bids	Section 7.1
Related Party	Section 5.18(a)
Review Period	Section 3.2(e)

Required Consents	Section 2.7(a)
Resolution Period	Section 3.2(f)
Sale Notice	Section 7.2(d)
Seller	Preamble
Seller Documents	Section 5.1(a)
Seller Real Property	Section 2.1(b)(iii)
Tax Proceeding	Section 9.3(d)
Termination Date	Section 4.4(a)
Title IV Plans	Section 5.11(b)
Transfer	Section 2.7(a)
Transfer Taxes	Section 9.3(a)
Transition Services Agreement	Section 8.8
Unresolved Items	Section 3.2(g)
Wells Fargo	Section 4.6(d)

Section 1.3. Other Definitional and Interpretive Matters.

Unless otherwise expressly provided, for purposes of this Agreement, the following rules of interpretation shall apply:

(a) Calculation of Time Period. When calculating the period of time before which, within which or following which any act is to be done or step taken pursuant to this Agreement, the date that is the referenced end date shall be excluded in calculating such period. If the last day of such period is a non-Business Day, the period in question shall end on the next succeeding Business Day; provided, however, that all calculations shall be made regardless of whether any given day is a Business Day and whether or not any given period ends on a Business Day.

(b) Dollars. Any reference in this Agreement to \$ shall mean U.S. dollars.

(c) Exhibits/Schedules. The Exhibits and Schedules to this Agreement are hereby incorporated and made a part hereof and are an integral part of this Agreement. All Exhibits and Schedules annexed hereto or referred to herein are hereby incorporated in and made a part of this Agreement as if set forth in full herein. Notwithstanding anything to the contrary provided herein, in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this Agreement, the terms of this Agreement shall take precedence. Any matter or item disclosed on one Schedule shall be deemed to have been disclosed on each other Schedule to the extent that the relevance of any such information to such other Schedule is readily apparent from the text of such disclosure and without independent examination of documents referred to therein; provided, that, notwithstanding anything to the contrary contained herein, nothing in the Schedules shall be deemed to qualify Section 5.6(b)(i) unless set forth on Schedule 5.6(b)(i). Any capitalized terms used in any Schedule or Exhibit but not otherwise defined therein shall be defined as set forth in this Agreement.

(d) Gender and Number. Any reference to a gender shall include all genders, and words imparting the singular number only shall include the plural and vice versa.

(e) Headings. The provision of a Table of Contents, the division of this Agreement into Articles, Sections and other subdivisions and the insertion of headings are for convenience of reference only and shall not affect or be utilized in construing or interpreting this Agreement. All references in this Agreement to any “Section” are to the corresponding Section of this Agreement unless otherwise specified.

(f) Herein. The words such as “herein,” “hereinafter,” “hereof” and “hereunder” refer to this Agreement as a whole and not merely to a subdivision in which such words appear unless the context otherwise requires.

(g) Including. The word “including” or any variation thereof means “including, without limitation” and shall not be construed to limit any general statement that it follows to the specific or similar items or matters immediately following it.

(h) Amendments and Successors. Any agreement, instrument or statute defined or referred to herein or in any agreement or instrument that is referred to herein means such agreement, instrument or statute as from time to time amended, modified or supplemented including (in the case of agreements or instruments) by waiver or consent and (in the case of statutes) by succession of comparable successor statutes and references to all attachments thereto and instruments incorporated therein. References to a Person are also to the Person’s successors and permitted assigns, as applicable.

(i) Jointly Drafted. This Agreement is the product of negotiations among the Parties, each of which is represented by legal counsel, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement. Rules of construction relating to interpretation against the drafter of an agreement shall not apply to this Agreement and are expressly waived by each Party. The Parties acknowledge and agree that prior drafts of this Agreement and the other agreements and documents contemplated hereby will not be deemed to provide any evidence as to the meaning of any provision hereof or the intent of the Parties with respect hereto and that such drafts will be deemed to be the joint work product of the parties hereto..

ARTICLE II

PURCHASE AND SALE OF ASSETS; ASSUMPTION OF LIABILITIES

Section 2.1. Purchase and Sale of Assets.

(a) On the terms and subject to the conditions set forth in this Agreement, and subject to Section 7.3, at the Closing, Seller shall sell, transfer, assign, convey and deliver to Buyer, and Buyer shall purchase, acquire and accept from Seller, free and clear of any and all Liens (other than Liens created by Buyer and Permitted Exceptions), all of Seller’s and its Affiliates’ right, title and interest in, to and under, the Purchased Assets (as defined below).

(b) The term “Purchased Assets” shall mean solely the following assets of Seller and, to the extent such assets are owned by and principally held for use in the Business by Affiliates of Seller, such Affiliates (but shall specifically exclude the Excluded Assets):

(i) the assets comprising the Facility and the Transmission and Interconnection Facilities;

(ii) all rights, title and interest of Seller in each parcel of real property listed on Schedule 5.8(a), together with all Improvements located thereon (collectively, the “Owned Real Property”);

(iii) all easements encumbering or benefiting the Facility that run with the Owned Real Property (collectively, the “Easements” and, together with the Owned Real Property, the “Seller Real Properties”) (for the avoidance of doubt, the transfer of such Easements shall not result in the assumption under section 365 of the Bankruptcy Code of any other agreements or liabilities thereunder);

(iv) all inventory of lignite, coal, limestone and other raw materials owned by Seller located at the Facility (or owned by Seller at the sites surrounding the Facility), or which has been paid for by or on behalf of Seller but has not yet been delivered to the Facility as of the Closing (the “Coal”);

(v) all deposits (including security deposits for rent, electricity, telephone or otherwise and environmental-related deposits related to the Facility) and prepaid or deferred charges and expenses of Seller relating to any Assumed Contract or Permit that constitutes a Purchased Asset or any other Purchased Asset, including all prepaid rentals and unbilled charges, fees or deposits, other than deposits or prepaid charges and expenses to the extent paid in connection with or relating exclusively to any Excluded Asset;

(vi) any operating claims, refunds or adjustments related principally to the Purchased Assets or the Business;

(vii) all Accounts Receivable arising from the conduct of the Business from and after 11:59 p.m. Eastern Time on the day immediately preceding the Closing Date;

(viii) all rights, title and interest of Seller in and to any property subject to a personal property lease that is used in or held for use in the operation of the Business, to the extent any such personal property lease is an Assumed Contract;

(ix) all Furniture and Equipment (including, for the avoidance of doubt, spare parts);

(x) all right, title and interest of Seller in and to the Purchased Intellectual Property and all goodwill associated therewith;

(xi) to the extent transferable after giving effect to the Sale Order, all of the rights and benefits accruing under any of the Assumed Contracts, including each Easement, personal property lease or Intellectual Property License that is an Assumed Contract;

(xii) all Documents;

(xiii) to the extent assignable or transferrable to Buyer under applicable Law, all of the rights and benefits accruing under any Permits held, used or intended to be used by Seller in connection with the Business (including any pending applications therefor) and all deposits, prepayments and prepaid expenses held by third parties and/or Governmental Bodies in connection therewith, except any such Permit that constitutes an Excluded Permit;

(xiv) all rights of Seller under non-disclosure or confidentiality, non-compete, or non-solicitation agreements with employees and agents of Seller or any Affiliate thereof or with third parties, in each case, to the extent relating to the Business or the Purchased Assets (or any portion thereof);

(xv) any rights, demands, claims, counterclaims, defenses, causes of action (either at law or in equity, for past, present, or future infringement or unauthorized use or misappropriation), rights of recovery, credits, allowances, rebates, or rights of setoff or subrogation arising out of or relating to any of the Purchased Assets or Assumed Liabilities, including any rights against third parties under Assumed Contracts, other than (y) any avoidance actions or other causes of action under Chapter 5 of the Bankruptcy Code or (z) those that are not assignable by operation of Law;

(xvi) all rights of Seller under or pursuant to all warranties, representations and guarantees made by suppliers, manufacturers and contractors to the extent relating to the Business or any of the Purchased Assets (including, without limitation, Furniture and Equipment), or any services provided to Seller in connection with the Business or the Purchased Assets, or to the extent otherwise affecting any Purchased Assets, other than any warranties, representations and guarantees pertaining exclusively to any Excluded Assets;

(xvii) all third party property, casualty and liability insurance proceeds and all rights to third party property, casualty and liability insurance proceeds, in each case to the extent received or receivable in respect of the Purchased Assets or Assumed Liabilities (or to any portion thereof), except to the extent such proceeds relate exclusively to an Excluded Liability, or to the extent used for the replacement or repair of assets subject to a Casualty Loss or a Taking;

(xviii) all goodwill and other intangible assets associated with the Purchased Assets or the Business, including customer and supplier lists and the goodwill associated with the Purchased Intellectual Property;

(xix) all right, title and interest of Seller in and to the vehicles, rolling stock and equipment used or held for use in the Business, and all right, title and interest of Seller in, to and under all vehicle and equipment leases which constitute Assumed Contracts;

(xx) unapplied air emission allowances or credits and other environmental allowances and credits used or held for use in, or arising from, the conduct of the Business;

(xxi) all information technology used or held for use principally in the Business, including all data rights relating to the Purchased Assets or the Business, together with any Software or Hardware owned by Seller, in each case that pertain principally to the Business; and

(xxii) all of the right, title and interest of Seller and its Affiliates in and to all other property and assets used or held for use principally in, or that principally arise from, the conduct of the Business, including, without limitation, that which is moveable and immovable, real and personal, tangible or intangible, of every kind and description and wheresoever situated, including the full benefit of all representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and all security therefore received by Seller on the purchase or other acquisitions of any part of the Purchased Assets.

Section 2.2. Excluded Assets.

Nothing herein contained shall be deemed to sell, transfer, assign or convey the Excluded Assets to Buyer, and Seller shall retain all right, title and interest to, in and under the Excluded Assets. "Excluded Assets" shall mean the following assets:

- (a) all equity interests in Seller;
- (b) all cash, cash equivalents and marketable securities of Seller;
- (c) all Accounts Receivable arising from the conduct of the Business prior to 11:59 p.m. Eastern time on the day immediately preceding the Closing Date;
- (d) all Intercompany Loans owing to Seller and all promissory notes related thereto;
- (e) all of Seller's deposits or prepaid charges and expenses to the extent paid in connection with or relating exclusively to any Excluded Assets or Contracts not assumed and assigned to Buyer;
- (f) the Excluded Contracts, including any Accounts Receivable arising out of or in connection with any Excluded Contract;
- (g) the Excluded Permits, including all deposits and prepaid expenses held by third parties and/or Governmental Bodies in connection therewith;
- (h) any (i) personnel and medical records pertaining to current or former directors, managers, officers, consultants and employees of Seller; (ii) books and records that Seller is required by Law to retain or that relate exclusively to the Excluded Assets or the Excluded Liabilities, including Tax Returns, partnership ledgers and minute books, financial statements, and corporate or other entity filings; provided that Buyer shall have the right to make copies of any portions of such retained books and records that relate in any way to the Business or any of the Purchased Assets or Assumed Liabilities; (iii) Organizational Documents, qualifications to do business, taxpayer and other identification numbers, partnership seals, minute books, partnership ledgers, partnership certificates and any other documentation related to governance,

organization, maintenance or existence of Seller; provided that Seller shall provide to Buyer copies of any portions of such documents and records; and (iv) books, files and records prepared in connection with the Chapter 11 Cases, the Transactions, the Auction or any Qualifying Bids that were not prepared or intended for Buyer's use or review;

(i) other than Excluded Contracts and Excluded Permits (which are addressed in Section 7.3), any assets identified by Buyer, in its sole discretion, at any time prior to the Closing Date;

(j) any Permit which is not assignable or which is not permitted to be transferred to Buyer, in each case under applicable Law;

(k) all rights and claims of Seller under the Transaction Documents;

(l) all adequate assurance deposits authorized by the Bankruptcy Court in the Chapter 11 Cases and funded pursuant to section 366 of the Bankruptcy Code that are held by or for the benefit of utilities in connection with the Business;

(m) any deposits, holdbacks, or other amounts held by ERCOT, which were withheld or otherwise paid by or charged to Seller;

(n) any avoidance actions or other causes of action under Chapter 5 of the Bankruptcy Code, including any proceeds therefrom, or other causes of action under other applicable Laws that are not directly related to the Business, the Purchased Assets or the Assumed Liabilities;

(o) all Tax assets, credits, refunds or other attributes of Seller and all claims, rights and interest in any refund, rebate, abatement, credits, deposits, prepayments or other recovery for Taxes for the Pre-Closing Tax Period relating to the Purchased Assets or the Business;

(p) all rights and interests in Employee Benefit Plans or Title IV Plans; and

(q) all assets owned by the Asset Manager and the Operator.

Section 2.3. Assumption of Liabilities.

On the terms and subject to the conditions set forth in this Agreement, at the Closing, Buyer shall assume the Assumed Liabilities (as defined below) and shall agree to pay, discharge, perform and otherwise satisfy such Assumed Liabilities in accordance with their respective terms, subject to any defenses or claimed offsets asserted in good faith against the obligee to whom such Assumed Liabilities are owed. The term "Assumed Liabilities" shall mean only those Liabilities specifically and expressly set forth in subsections 2.3(a) and 2.3(b) below:

(a)

(i) (x) all obligations of Seller under the Assumed Contracts, in each case to the extent arising and relating solely to the period from and after the Closing, and (y)

with respect to the foregoing Assumed Contracts, subject to Section 2.5, all of the Determined Cure Costs with respect to such Assumed Contracts;

(ii) all Liabilities pursuant to Environmental Law with respect to the Business, the Purchased Assets and the Facility, including for Remedial Actions or otherwise maintaining environmental regulatory compliance at the Facility, irrespective of whether such Liabilities arose on, before or after Closing; and

(iii) air emissions allowance Liabilities arising from the operation of the Facility, irrespective of whether such Liabilities arose on, before or after Closing.

(b)

(i) all Liabilities relating exclusively to Buyer's ownership or operation of the Purchased Assets, to the extent arising from events, facts or circumstances that occur from and after the Closing, but excluding any Liabilities arising from ownership or operation of the Business or the Purchased Assets prior to the Closing or relating to any services that were sold or provided prior to the Closing other than Liabilities explicitly assumed hereunder; and

(ii) (y) all Liabilities for Taxes relating to the Purchased Assets or the Business for any Post-Closing Tax Period, including any Taxes for a Straddle Period allocated to Buyer pursuant to Section 9.3 (but excluding all income, franchise, or any other Taxes based on or measured by gross or net income or receipts of Seller or any Affiliate of Seller (or any member of any consolidated, combined or affiliated group of which Seller or any Affiliate thereof is a member, or of such consolidated, combined or affiliated group) and (z) that portion of any Liabilities for Transfer Taxes allocated to Buyer pursuant to Section 9.3.

Section 2.4. Excluded Liabilities.

Notwithstanding anything to the contrary in this Agreement or any other Transaction Document, the Parties expressly acknowledge and agree that Buyer shall not assume or in any manner whatsoever be liable or responsible for any Liabilities of Seller or any predecessor or Affiliate of Seller, of any nature whatsoever, whether presently in existence or arising hereafter, known or unknown, disputed or undisputed, contingent or non-contingent, liquidated or unliquidated or otherwise, existing before or on the Closing Date or arising thereafter, other than the Assumed Liabilities. All of the Liabilities of Seller or of any predecessor or Affiliate of Seller not specifically and expressly assumed by Buyer pursuant to Section 2.3 shall be referred to herein collectively as the "Excluded Liabilities." For the avoidance of doubt, and without limiting the foregoing, Buyer shall not be obligated to assume, and it does not assume, and hereby disclaims any and all of the following Liabilities of Seller or of any predecessor or Affiliate of Seller other than the Assumed Liabilities (and any such Liabilities shall be considered Excluded Liabilities for all purposes of this Agreement):

(a) Liabilities for accrued expenses and Accounts Payable incurred prior to the Closing Date;

(b) Liabilities of Seller or any Affiliate of Seller relating to legal services, accounting services, financial advisory services, investment banking services or any other professional services or other third party costs or expenses performed in connection with this Agreement or the other Transaction Documents, the Transactions or the Chapter 11 Cases;

(c) Liabilities arising, whether before or after the Closing, out of Excluded Assets, including any Contracts that do not constitute Assumed Contracts;

(d) Liabilities relating to any claims for infringement, dilution, misappropriation or any other violation of Intellectual Property rights arising from Seller's operation of the Business by the practice of the Purchased Intellectual Property or any third party's Intellectual Property prior to the Closing Date;

(e) Liabilities under, relating to or with respect to any Employee Benefit Plan or Title IV Plan previously maintained by Seller;

(f) Liabilities or claims arising out of, relating to or with respect to the Employee Benefit Plans or Title IV Plans, the employment or performance of services for, or termination of employment or services for, or potential employment or engagement for the performance of services for, Seller, or any Affiliate of Seller, or any predecessor thereof of any individual Person or any Person acting as a professional employer organization or employee leasing company, in each case, on or prior to the Closing (including as a result of the transactions contemplated by this Agreement), including Liabilities for workers' compensation, severance (including statutory severance), separation, termination, or notice pay or benefits (including under COBRA), discrimination, harassment, torts, occupational illness or injury, labor agreements, employment contracts, wrongful discharge, employment or compensation policies or practices, demotions, transfers, failure to hire, failure to promote, contributions to or modifications or terminations of benefit plans, claims under the WARN Act, or any other form of accrued or contingent compensation (including wages, remuneration, compensation, benefits, severance, vacation or other paid time off and leave entitlements) and all other employment related obligations, irrespective of whether such Liabilities or claims are paid or made, as applicable, on, before or after Closing;

(g) Liabilities for (i) Taxes relating to the Purchased Assets or the Business for any Pre-Closing Tax Period, including (A) any Taxes for a Straddle Period allocated to Seller or any Affiliate thereof pursuant to Section 9.3 and (B) any Taxes and related liabilities payable as a result of the pending Texas property Tax dispute relating to the Owned Real Property for the Pre-Closing Tax Period and (ii) income, franchise, or any other Taxes based on or measured by gross or net income or receipts of Seller or any Affiliate of Seller (or any member of any consolidated, combined or affiliated group of which Seller or any Affiliate thereof is a member) and (iii) that portion of any Liabilities for Transfer Taxes allocated to Seller pursuant to Section 9.3;

(h) Liability of Seller or any of its Affiliates arising out of or in connection with a violation of any Law prior to Closing;

(i) Liability of Seller or any of its Affiliates resulting from, caused by or arising out of, or which relate to, directly or indirectly, the ownership, lease or license of any properties or

assets prior to the Closing (including any amounts due or which may become due or owing under the Designated Contracts) or other actions or omissions of Seller or any of its Affiliates occurring prior to the Closing (other than the Determined Cure Costs relating to the Designated Contracts and any Liabilities expressly and specifically set forth on Schedule 2.3), including actions or omissions that constituted, may constitute or are alleged to constitute a tort, breach of contract or violation of any rule, regulation, treaty or other similar authority or that relate to any Action commenced against Seller, whether past, present, future, known or unknown, liquidated or unliquidated, accrued or unaccrued, pending or threatened;

(j) Liabilities arising under any Indebtedness of Seller or any of its Affiliates (including Intercompany Loans and Indebtedness under the DIP Credit Agreement) and all promissory notes related thereto;

(k) Liabilities with respect to outstanding checks or other instruments issued by Seller;

(l) Liabilities arising as a result of any Action initiated at any time, to the extent related to the Business or the Purchased Assets on or prior to the Closing Date, including any shareholder Actions, Actions for breach of contract, or any tort Actions;

(m) Liabilities arising from the operation of any successor or transferee liability Laws, including, without limitation, "bulk sales" statutes, to the extent that noncompliance therewith or the failure to obtain necessary clearances would subject Buyer or the Purchased Assets to the claims of any creditors of Seller, or would subject any of the Purchased Assets to any Liens or other restrictions (except for Permitted Exceptions);

(n) all Liabilities to third parties or a Governmental Body (including for fines and penalties) pursuant to Environmental Law, arising from the operation of the Business or the Facility or the ownership of the Purchased Assets or any other assets prior to the Closing Date, other than the Liabilities expressly assumed in Section 2.3(a) of this Agreement;

(o) Liabilities relating to amounts required to be paid by Seller hereunder or any other Liability of Seller under this Agreement, any Transaction Document or any other document executed in connection herewith;

(p) Liability related to, resulting from or arising out of acts or omissions of Seller or any of its Affiliates or their respective Representatives occurring after the Closing;

(q) Liability related to any Claim arising prior to the Petition Date and not expressly assumed pursuant to this Agreement;

(r) Liabilities of Seller related to the right to or issuance of any partnership interest of, or other equity interest in, Seller, including any options or warrants;

(s) Liability to any shareholder or other equity holder of Seller; and

(t) Liability of Seller or any Affiliate of Seller not expressly and specifically included among the Assumed Liabilities.

Section 2.5. Determined Cure Costs.

Schedule 2.5 sets forth a good faith estimate of all Cure Costs for each Designated Contract ("Cure Schedule"). Pursuant to Section 7.3(b), Buyer shall be entitled, in its sole discretion, to notify Seller in writing of any Designated Contract that it elects not to purchase or assume immediately prior to the commencement of the Closing, in which case such Contract shall be considered an Excluded Contract (and not included in the Purchased Assets) for all purposes of this Agreement and Buyer shall not have any obligation to satisfy or pay any Cure Costs or other Liabilities with respect to such Excluded Contract. Each Designated Contract listed by Seller on the Cure Schedule that Buyer does not elect to identify as an Excluded Contract pursuant to the preceding sentence shall be an "Assumed Contract". Buyer agrees to promptly satisfy all Determined Cure Costs in respect of each Assumed Contract as and when such Determined Cure Costs become due under the Sale Order and pursuant to Section 7.3 hereof, and Seller will have no liability for any such Determined Cure Costs.

Section 2.6. Further Conveyances and Assumptions.

(a) From time to time following the Closing, Seller and Buyer shall execute, acknowledge and deliver (or cause to be executed, acknowledged and delivered on their behalf) all such further conveyances, notices, assumptions, releases and acquaintances and such other instruments, and shall take such further actions, as may be reasonably necessary or appropriate to assure fully to Buyer and its successors or assigns, all of the properties, rights, title, interests, estates, remedies, powers and privileges intended to be conveyed to Buyer under this Agreement and the Transaction Documents and to otherwise make effective the Transactions.

(b) To the extent not obtained at or prior to Closing, Seller shall use its reasonable best efforts to obtain termination statements, lien releases, discharges, financing change statements or other documents, notices or other instruments as Buyer may reasonably deem necessary to release Liens (other than Permitted Exceptions) on the Purchased Assets, each in form and substance reasonably satisfactory to Buyer.

(c) Nothing in this Agreement nor the consummation of the Transactions shall be construed as an attempt or agreement to transfer or assign any Purchased Asset, including any Contract, Permit or other right, which (i) is not capable of being assigned pursuant to section 365 of the Bankruptcy Code or transferred pursuant to section 363 of the Bankruptcy Code to Buyer at the Closing, or (ii) the transfer or assignment of which would result in a violation of any applicable Law.

Section 2.7. Assignment of Contracts and Rights.

(a) To the extent that any Purchased Asset, including any Contract or Permit or other asset to be sold, transferred, conveyed or assigned (any such sale, transfer, conveyance or assignment, a "Transfer") to Buyer pursuant to the terms of Section 2.1 is not capable of being Transferred to Buyer (after giving effect to the Sale Order) without the Consent of a third Person or Governmental Body, or if such Transfer or attempted Transfer would constitute a breach thereof or a violation of any Law, nothing in this Agreement or in any document, agreement or instrument delivered pursuant to this Agreement will constitute a Transfer or an attempted

Transfer thereof prior to the time at which all Consents necessary for such Transfer (such Consents, “Required Consents”) have been obtained unless an Order of the Bankruptcy Court effects such Transfer without any such Required Consents.

(b) Subject to Section 10.1(d), to the extent that any Required Consent with respect to any Designated Contract is not obtained by the Closing, Seller will use its commercially reasonable efforts, and Buyer shall use commercially reasonable efforts to cooperate with Seller, to obtain such Required Consent, and Seller will, from and after the Closing and until the date on which such Required Consent is obtained, use commercially reasonable efforts during the term of such Contract to (i) provide to Buyer the benefits under such Contract, (ii) cooperate in any reasonable and lawful arrangement (including holding such Contract in trust for Buyer pending receipt of the Required Consent) designed to provide such benefits to Buyer, and (iii) enforce for the account of Buyer any rights of Seller under such Contract (including the right to elect to terminate such Contract in accordance with the terms thereof upon the direction of Buyer); provided, however, that no Party shall be obligated to provide any financial accommodation or other consideration of any nature to any Person to facilitate obtaining any Required Consent. Buyer will use its commercially reasonable efforts to cooperate with Seller in order to enable Seller to provide to Buyer hereunder the benefits contemplated by this Section 2.7(b) and, provided that such benefits are conferred upon Buyer, Buyer will reimburse Seller for any amount actually paid by Seller that Buyer would have been required to pay under any such Contract had the Contract been assigned (after obtaining all Required Consents) to Buyer at the Closing.

Section 2.8. Bulk Sales Laws.

Buyer hereby waives compliance by Seller with the requirements and provisions of any “bulk-transfer” Laws of any jurisdiction that may otherwise be applicable with respect to the transactions contemplated hereby.

Section 2.9. Receivables and Payables.

If Buyer shall receive payment in respect of Accounts Receivable arising from the conduct of the Business prior to 11:59 p.m. Eastern Time on the day immediately preceding the Closing Date, then Buyer shall hold such amounts in trust for Seller and shall promptly forward such payment to Seller. If Seller shall receive payment in respect of Accounts Receivable arising from the conduct of the Business from and after 11:59 p.m. Eastern Time on the day immediately preceding the Closing Date, then Seller shall hold such amounts in trust for Buyer and shall promptly forward such payment to Buyer. If Buyer shall receive any invoice or demand for payment in respect of any accrued expenses or trade accounts payable that are Excluded Liabilities pursuant to Section 2.4(a), then Buyer shall remit such invoice or demand to Seller and Seller shall promptly pay any amounts owed pursuant thereto.

Section 2.10. Relinquishment of Control.

At the Closing, Seller shall turn over actual possession and control of all of the Purchased Assets to Buyer by taking such action that may be required or reasonably requested by Buyer to effect such transfer of possession and control.

ARTICLE III

CONSIDERATION

Section 3.1. Consideration.

The aggregate consideration (the “Purchase Price”) for the sale, transfer, assignment, conveyance and delivery by Seller to Buyer of the Purchased Assets shall consist of:

(a) cash in an amount equal to eighty-two million dollars (\$82,000,000) (the “Base Price”); *plus*

(b) the Coal Value as of the Closing; *plus*

(c) the amount of Capital Expenditures of Seller for the period from July 1, 2014 to the Closing Date, solely to the extent such Capital Expenditures are incurred in accordance with Section 8.2(b)(v); *plus*

(d) the amount of all deposits of Seller relating to any Assumed Contract or Permit that constitutes a Purchased Asset or any other Purchased Asset, to the extent such deposits are assumed by Buyer and not refunded to Seller; *plus*

(e) the pro-rata portion of (i) any rent and other items under any Assumed Contract, (ii) any Permit or other fees, (iii) sewer rents and charges for water, telephone, electricity and other utilities and (iv) Taxes for which Buyer is responsible pursuant to Section 2.3(b)(ii) or Section 9.3, in each case paid by Seller on or prior to the Closing Date that are attributable to the Post-Closing Tax Period; *minus*

(f) the pro-rata portion of (i) any rent and other items under any Assumed Contract, (ii) any Permit or other fees, (iii) sewer rents and charges for water, telephone, electricity and other utilities and (iv) Taxes described in Section 9.3, in each case that are attributable to the pre-Closing period and which Seller has not paid as of the Closing; *plus*

(g) the assumption at the Closing by Buyer of the Assumed Liabilities from Seller, including the assumption of the obligation to pay to the applicable counterparties of the Assumed Contracts an amount equal to the Determined Cure Costs payable by Buyer under Section 7.3(c).

Section 3.2. Payment of Purchase Price; Closing Actions.

The Purchase Price shall be delivered to Seller as follows:

(a) Within two Business Days of the date hereof, Buyer shall, by wire transfer of immediately available funds, deposit 15% of the Base Price (the “Deposit”) with the Deposit Escrow Agent to be held in a segregated, interest-bearing account and disbursed pursuant to an escrow agreement substantially in the form of Exhibit D (the “Deposit Escrow Agreement”);

(b) At least four (4) Business Days prior to the scheduled Closing Date, Seller shall prepare and deliver to Buyer a statement setting forth Seller’s good faith estimate of the

amounts in Section 3.1(b)-(f) (the “Adjustments”) as of the Closing (the “Estimated Closing Adjustment Amount”), together with such supporting documentation as may be reasonably requested by Buyer. In the event that, no fewer than two (2) Business Days prior to the Closing Date, Buyer notifies Seller of any errors that Buyer believes are contained in Seller’s statement of the Estimated Closing Adjustment Amount, Seller shall in good faith consider Buyer’s comments relating to such errors and make amendments to such statement to the extent Seller agrees that there is in fact such an error.

(c) At the Closing, Buyer shall pay to Seller, by wire transfer of immediately available funds, the Base Price (less the Deposit), plus the Estimated Closing Adjustment Amount (which may be a positive or negative amount) (the “Estimated Purchase Price”).

(d) As promptly as practical, but in no event later than thirty (30) Business Days after the Closing Date, Buyer shall (at Buyer’s expense) prepare and deliver to Seller a statement setting forth Buyer’s good faith calculation of the actual amount of the Adjustments as of the Closing (the “Preliminary Closing Adjustment Schedule”), together with a reasonably detailed explanation of, and documentation sufficient to confirm the accuracy of the calculation of, such Adjustments.

(e) Within ten (10) Business Days following Seller’s receipt of the Preliminary Closing Adjustment Schedule (the “Review Period”), Seller shall review the Preliminary Closing Adjustment Schedule and, if applicable, deliver a Dispute Notice. Until determination of the Final Closing Adjustment Amount (as defined below), Seller and its Representatives shall be permitted (at Seller’s expense) to review all working papers, financial records and information of Buyer relating to the Preliminary Closing Adjustment Schedule and shall have such reasonable access to Buyer’s personnel as may be reasonably necessary to permit Seller to review in detail the manner in which the Preliminary Closing Adjustment Schedule was prepared by Buyer. Buyer shall use its commercially reasonable efforts to cooperate with Seller in facilitating such review. All items of the Preliminary Closing Adjustment Schedule which are accepted by Seller in writing or which are not objected to by Seller by the expiration of the Review Period shall be deemed agreed upon by the Parties and shall be deemed final and binding for purposes of the Final Closing Adjustment Amount.

(f) If Seller disputes any items of the Preliminary Closing Adjustment Schedule, then Seller shall, prior to the expiration of the Review Period, provide a written notice to Buyer (the “Dispute Notice”), specifying, in reasonable detail, the basis for such dispute, including specifying those items Seller disputes (the “Disputed Items”). If Seller delivers the Dispute Notice to Buyer prior to the expiration of the Review Period, the Parties shall cooperate in good faith to resolve any Disputed Items as promptly as practicable but in no event later than fifteen (15) days after Seller’s delivery of the Dispute Notice to Buyer (the “Resolution Period”). If the Parties cannot resolve the Disputed Items prior to the expiration of the Resolution Period, then, unless otherwise agreed to by the Parties, Seller and Buyer shall promptly (and in all events within five (5) Business Days following the expiration of the Resolution Period) submit such Disputed Items to Ernst & Young LLP (the “Independent Auditor”), or if such firm is not available or willing to serve, then a mutually acceptable expert in public accounting, which expert shall thereafter be deemed to be the “Independent Auditor”; provided that if the Parties are unable to agree on a replacement Independent Auditor within ten (10) days following the

expiration of the Resolution Period, either Party may request for the president of the American Arbitration Association to appoint a senior partner in a nationally recognized accounting firm to serve as the Independent Auditor. The Independent Auditor shall be jointly engaged by Buyer and Seller on customary terms.

(g) If any remaining Disputed Items (the “Unresolved Items”) are submitted to the Independent Auditor for resolution, each of Buyer and Seller shall submit to the Independent Auditor (with a copy delivered to the other Party on the same day), within ten (10) Business Days after the date of the engagement of the Independent Auditor, a memorandum (which may include supporting exhibits) setting forth their respective positions on the Unresolved Items. Each of Buyer and Seller may (but shall not be required to) submit to the Independent Auditor (with a copy delivered to the other Party on the same day), within twenty (20) Business Days after the date of the engagement of the Independent Auditor, a memorandum responding to the initial memorandum submitted to the Independent Auditor by the other Party. Unless requested by the Independent Auditor in writing, neither Party may present any additional information or arguments to the Independent Auditor, either orally or in writing.

(h) The Independent Auditor shall make a determination, based solely on the terms of this Agreement and the presentations by Seller and Purchaser, and not by independent review, only of the Unresolved Items and in the case of all other items shall use the amounts which are agreed upon by the Parties; provided, however, that to the extent the determination of value of any Unresolved Item affects any other item used in calculating the Final Closing Adjustment Amount, such effect may be taken into account by the Independent Auditor. The Independent Auditor’s determination of any Unresolved Item shall not be higher than the highest amount proposed by either Party or lower than the lowest amount proposed by either Party. The Independent Auditor shall be instructed to deliver to Seller and Buyer, as promptly as practicable, but in no event later than thirty (30) days after the date the Unresolved Items are submitted to the Independent Auditor, a report setting forth its resolution of the Unresolved Items, which report shall, absent manifest error, be final and binding upon the Parties with respect to the resolution of such Unresolved Items and enforceable by the Parties in accordance with Section 12.1. The fees, expenses and costs of the Independent Auditor in connection with such review and report shall be borne by Buyer and Seller in proportion to the amounts by which their proposed calculations of the Final Closing Adjustment Amounts as initially submitted to the Independent Auditor differed from the Independent Auditor’s final calculation of the Final Closing Adjustment Amount divided by the aggregate amount by which such proposed calculations of the Final Closing Adjustment Amounts differed from the Independent Auditor’s final calculation of the Final Closing Adjustment Amount.

(i) The amount reflected on the Preliminary Closing Adjustment Schedule as agreed to by the Parties (including agreement demonstrated by Seller’s silence pursuant to Section 3.2(d) or as resolved by the Parties or calculated by the Independent Auditor pursuant to Section 3.2(h)), as the case may be, shall be the “Final Closing Adjustment Amount”, which shall be conclusive for all purposes of this Agreement.

(j) If the Final Closing Adjustment Amount is greater than the Estimated Closing Adjustment Amount, Buyer shall promptly pay to Seller, in the manner and with interest as provided herein, the amount of the difference between the Final Closing Adjustment Amount and

the Estimated Closing Adjustment Amount. If the Final Closing Adjustment Amount is less than the Estimated Closing Adjustment Amount, Seller shall promptly pay to Buyer, in the manner and with interest as provided herein, the amount of the difference between the Final Closing Adjustment Amount and the Estimated Closing Adjustment Amount. Any payments pursuant to this Section 3.2(j) shall be made within two (2) Business Days after the determination of the Final Closing Adjustment Amount and shall be made by wire transfer of immediately available funds to one or more accounts of Buyer or Seller, as the case may be, as designated by the Party that will be receiving a payment under this Section 3.2(j).

(k) The amount of any payment to be made pursuant to any provision of this Section 3.2 (other than with respect to the Deposit, which shall be treated in accordance with the terms of the Deposit Escrow Agreement) shall bear interest at the rate of 4% per annum from and including the Closing Date but excluding the date of payment. Such interest shall be payable at the same time as the payment to which it relates and shall be calculated daily on the basis of a year of three hundred sixty-five (365) days and the actual number of days for which interest is due.

(l) Notwithstanding any other provision of this Agreement, Buyer (and any other Person that has any withholding obligation with respect to any payment made pursuant to this Agreement) shall be entitled to deduct and withhold from the payments to be made pursuant to this Agreement any Taxes required to be deducted and withheld with respect to the making of such payments under the Code or any other applicable provision of applicable Law. To the extent that amounts are so withheld and deducted pursuant to this Section 3.2(l), such withheld amounts shall be treated for all purposes of this Agreement as having been paid to such Person in respect of which such deduction and withholding was made.

Section 3.3. Purchase Price Allocation.

Seller and Buyer shall allocate the Purchase Price paid by Buyer hereunder and the Assumed Liabilities to the Purchased Assets according to relative fair market values in compliance with Code Section 1060 and Treasury regulations thereunder. Buyer shall prepare and deliver to Seller, within thirty (30) days after Closing, an initial allocation in compliance with Code Section 1060 and Treasury regulations thereunder. Seller shall have twenty (20) days from the receipt of the initial allocation of the Purchase Price to object to such initial allocation, after which Seller and Buyer shall reasonably agree on such allocation. Any adjustment to the Purchase Price paid pursuant to this Agreement shall result in an appropriate adjustment to such allocation pursuant to the same procedures. Seller and Buyer agree to file all Tax Returns in accordance with the allocation of Purchase Price agreed to in this Section 3.3 (including the timely filing of IRS Form 8594 by each of Seller and Buyer) and take no position contrary thereto unless (and only to the extent) otherwise required by an IRS audit or other administrative procedure or a final determination as defined in Section 1313 of the Code; provided that, neither Seller nor Buyer shall be required to litigate before any court any proposed deficiency or adjustment by any Tax Authority challenging the allocation of the Purchase Price, as applicable.

ARTICLE IV

CLOSING AND TERMINATION

Section 4.1. Closing Date.

Subject to the satisfaction of the conditions set forth in Section 10.1, Section 10.2 and Section 10.3 (or the waiver thereof by the applicable Parties entitled to waive that condition), the closing of the purchase and sale of the Purchased Assets and the assumption of the Assumed Liabilities provided for in Article II hereof (the “Closing”) shall take place at the offices of Bracewell & Giuliani LLP, 1251 Avenue of the Americas, 49th Floor, New York, New York 10020-1104 (or at such other place as the Parties may designate in writing) at 12:00 p.m. (Eastern Time) on the date that is the third Business Day following the satisfaction or waiver of the conditions set forth in Article X (other than conditions that by their nature are to be satisfied at the Closing, but subject to the satisfaction or waiver of such conditions), unless another time or date, or both, are agreed to in writing by the Parties. The date on which the Closing shall be held is referred to in this Agreement as the “Closing Date.” Unless otherwise agreed by the Parties in writing, the Closing shall be deemed effective and all right, title and interest of Seller in the Purchased Assets to be acquired by Buyer hereunder shall be considered to have passed to Buyer as of 12:01 a.m. (Eastern Time) on the Closing Date.

Section 4.2. Deliveries by Seller.

At the Closing, Seller shall deliver to Buyer:

(a) a duly executed bill of sale in the form attached hereto as Exhibit A (the “Bill of Sale”) in favor of Buyer with respect to the Purchased Assets;

(b) (i) duly executed assignment and assumption agreement by and among Seller and Buyer in the form attached hereto as Exhibit B; (ii) duly executed assignments of the U.S. patents, patent applications, trademark registrations, trademark applications, domain name registrations, copyright registrations, and copyright applications included in the Purchased Intellectual Property, in a form suitable for recording in the U.S. Patent and Trademark Office and/or the U.S. Copyright Office, as applicable; and (iii) assignments of the Intellectual Property Licenses that are Designated Contracts (collectively, the “Assignment and Assumption Agreement”);

(c) a certificate of an authorized officer or the manager of the general partner of Seller certifying to the matters under Section 10.1(a) and Section 10.1(b);

(d) copies of resolutions of Optim Energy, LLC authorizing and approving the execution and delivery of this Agreement and the other Transaction Documents to which Seller is a party and the performance by Seller of its obligations hereunder and thereunder, certified by a duly authorized officer or the manager of the general partner of Seller;

(e) termination statements, lien releases, discharges, financing change statements or other documents, notices or other instruments as Buyer may reasonably deem necessary to

release Liens (other than Permitted Exceptions) on the Purchased Assets, each in form and substance reasonably satisfactory to Buyer and duly executed by any holders of such Liens;

(f) a certified copy of the Sale Order;

(g) special quitclaim or similar deeds in proper statutory form for recording and in form and substance reasonably satisfactory to Buyer conveying good and marketable title to the Owned Real Property; and

(h) all other agreements, certificates and instruments of conveyance and transfer, in form and substance reasonably acceptable to Buyer (including estoppel certificates, subordination and non-disturbance agreements, and customary affidavits and indemnity agreements reasonably requested by a title company providing title insurance with respect to the Owned Real Property in favor of Buyer or its designee), as may be necessary to convey the Purchased Assets to Buyer or reasonably requested by Buyer.

Section 4.3. Deliveries by Buyer.

At the Closing, Buyer shall deliver, or cause to be delivered, to Seller:

(a) the Estimated Purchase Price;

(b) the Assignment and Assumption Agreement duly executed by Buyer; and

(c) a certificate of an authorized officer of Buyer certifying to the matters under Section 10.2(a) and Section 10.2(b).

Section 4.4. Termination of Agreement.

This Agreement may (or, as applicable, shall) be terminated at any time prior to the Closing:

(a) by Buyer or Seller, if the Closing shall not have occurred by the close of business on November 30, 2014 (the "Termination Date"); provided, however, that if the Closing shall not have occurred on or before the Termination Date due to a breach of any representations, warranties, covenants or agreements contained in this Agreement by Buyer on the one hand, or Seller, on the other hand, that has caused the conditions to the obligations of the non-breaching Party set forth in Article X, as applicable, not to be satisfied, then the breaching Party may not terminate this Agreement pursuant to this Section 4.4(a);

(b) by mutual written consent of Seller and Buyer;

(c) by Buyer, if any of the conditions to the obligations of Buyer set forth in Section 10.1 and Section 10.3 shall have become incapable of fulfillment other than as a result of a breach by Buyer of any covenant or agreement contained in this Agreement, and such condition is not waived by Buyer;

(d) by Seller, if any condition to the obligations of Seller set forth in Section 10.2 and Section 10.3 shall have become incapable of fulfillment other than as a result of a breach by Seller of any covenant or agreement contained in this Agreement, and such condition is not waived by Seller;

(e) by Buyer, if as a result of a breach of any representations, warranties, covenants or agreements contained in this Agreement by Seller that has caused any of the conditions to the obligations of Buyer set forth in Section 10.1 and Section 10.3 to not be satisfied, and such breach has not been waived or cannot be cured or, if curable, has not been cured by the earlier of (i) twenty (20) Business Days after the giving of written notice by Buyer to Seller of such breach and (ii) the Termination Date; provided that Buyer shall not have the right to terminate this Agreement pursuant to this Section 4.4(e) if Buyer is in breach of this Agreement so as to cause any condition to the obligations of Seller set forth in Section 10.2 and Section 10.3 to not be satisfied;

(f) by Seller, if as a result of a breach of any representations, warranties, covenants or agreements contained in this Agreement by Buyer that has caused any of the conditions to the obligations of Seller set forth in Section 10.2 and Section 10.3 to not be satisfied, and such breach has not been waived or cannot be cured or, if curable, has not been cured by the earlier of (i) twenty (20) Business Days after the giving of written notice by Seller to Buyer of such breach and (ii) the Termination Date; provided that Seller shall not have the right to terminate this Agreement pursuant to this Section 4.4(f) if Seller is in breach of this Agreement so as to cause any condition to the obligations of Buyer set forth in Section 10.1 and Section 10.3 to not be satisfied;

(g) by Seller or Buyer, if there shall be in effect a Final Order of a Governmental Body of competent jurisdiction restraining, enjoining or otherwise prohibiting the consummation of the Transactions; it being agreed that the Parties shall promptly appeal any adverse determination which is not non-appealable (and shall pursue such appeal with reasonable diligence);

(h) by Seller or Buyer, if the Sale Procedures Order has not been entered by the Bankruptcy Court on or before July 3, 2014 or if the Sale Order has not been entered by the Bankruptcy Court on or before August 12, 2014;

(i) by Buyer if any of the Chapter 11 Cases are dismissed or converted to a case under chapter 7 of the Bankruptcy Code for any reason and neither such dismissal or conversion contemplates the transactions contemplated by this Agreement;

(j) by Buyer if the Sale Procedures Order or the Sale Order is modified in any manner that is adverse to Buyer in any material respect (it being understood and agreed that any modification to Sections 4(a), 7(h) or 11(d) of the Sale Procedures shall be deemed an adverse and material modification for purposes of the foregoing) without the consent of Buyer (which consent may be withheld or waived in Buyer's sole discretion) or Seller fails to comply in any respect with the Sale Procedures Order or the Sale Order;

(k) by Seller, if the Sale Procedures Order or the Sale Order is modified in any manner that is adverse to Seller in any material respect without the consent of Seller (which consent may be withheld or waived in Seller's sole discretion);

(l) by Buyer or Seller, if the Bankruptcy Court shall enter an order approving (i) a Qualifying Bid by a Person other than Buyer or (ii) any sale or other disposition of any material portion of Seller's assets and properties relating to the Business to a Person other than Buyer (each, an "Alternative Transaction");

(m) by Seller in the event that Buyer has failed to comply with its obligation to consummate the Closing within three (3) Business Days after the date on which it is obligated to consummate the Closing pursuant to Section 4.1, and Seller stood ready, willing and able to consummate the Closing throughout such period;

(n) by Buyer, if the aggregate value of the Purchased Assets subject to any Destruction or Condemnation occurring after the date hereof, individually or in the aggregate, exceeds 10% of the Base Price; or

(o) by Seller, if Buyer has breached its obligations set forth in Section 3.2(a).

provided, however, in each case the right to terminate this Agreement under this Section 4.4 will not be available to any Party to this Agreement whose breach of any of its obligations under this Agreement has been a principal cause of, or resulted in, the failure of a condition to the Closing pursuant to Article X.

Section 4.5. Procedure Upon Termination.

In the event of termination and abandonment of this Agreement by Buyer or Seller, pursuant to Section 4.4 and except as set forth herein, written notice thereof shall forthwith be given to the other Party, and, subject to Section 4.6 and Section 4.7, this Agreement shall terminate, and the purchase of the Purchased Assets hereunder shall be abandoned, without further action by Buyer or Seller. If this Agreement is terminated as provided herein each Party shall redeliver, or, at such Party's election, destroy, all documents, work papers and other material of any other Party relating to the transactions contemplated hereby, whether so obtained before or after the execution hereof, to the Party furnishing the same, and provided that any such destruction shall be confirmed in writing to the other Party.

Section 4.6. Breakup Fee and Expense Reimbursement.

(a) In the event that this Agreement is terminated pursuant to Section 4.4(1), the Optim Parties shall pay to Buyer, in immediately available funds, the Expense Reimbursement, which shall be payable upon the closing of an Alternative Transaction, either directly from the proceeds of such Alternative Transaction or directly by the Optim Parties; provided that Buyer shall be required to provide to the Optim Parties such documentation as the Optim Parties may reasonably request evidencing the expenses and fees in respect of which a request for reimbursement is made hereunder.

(b) In the event that this Agreement is terminated pursuant to Section 4.4(l) and an Alternative Transaction is completed, the Optim Parties shall pay to Buyer in addition, in immediately available funds and in addition to the Expense Reimbursement due under Section 4.6(a), a cash amount equal to three percent (3%) of the Base Price (the “Break-Up Fee”), upon the closing of an Alternative Transaction, directly from the proceeds of such Alternative Transaction or directly by the Optim Parties.

(c) The Expense Reimbursement and Break-Up Fee, if payable and paid, and the return of the Deposit pursuant to this Agreement, will be the sole and exclusive remedy as liquidated damages of Buyer, whether at Law or in equity, for any breach by Seller or any of its Affiliates of the terms and conditions of this Agreement.

(d) The provision for payment of the Expense Reimbursement and Break-Up Fee is an integral part of this Agreement without which Buyer would not have entered into this Agreement. The Optim Parties’ obligation to pay the Expense Reimbursement and Break-Up Fee pursuant to this Section 4.6 shall survive termination of this Agreement and shall be authorized to be paid by the Sale Procedures Order. The Break-Up Fee and the Expense Reimbursement shall each constitute an administrative expense (which shall, subject only to the first proviso of this Section 4.6(d), be a super-priority administrative expense claim senior to all other administrative expense claims and payable out of the Optim Parties’ cash or other collateral securing the Optim Parties’ obligations to the DIP Lenders (as defined in the DIP Order) and the Pre-Petition Secured Parties, prior to any recovery by such parties) of the Optim Parties under Section 364(c)(1) of the Bankruptcy Code; provided, however, that notwithstanding the foregoing, the Break-Up Fee and the Expense Reimbursement shall be junior to the claims of Wells Fargo Bank, National Association (“Wells Fargo”) in its capacity as L/C Issuer and Agent (each as defined in the DIP Credit Agreement) arising under the DIP Credit Agreement; provided, further, that, for the avoidance of doubt, any increase in the amount of the Loan (as defined in the DIP Credit Agreement) on account of an L/C Disbursement (as defined in the DIP Credit Agreement) that gives rise to Unpaid Reimbursement Obligations (as defined in the DIP Credit Agreement) shall be junior to the Break-Up Fee and Expense Reimbursement. The Optim Parties agree that until the earlier to occur of (i) the Closing Date or (ii) payment of the Break-Up Fee and the Expense Reimbursement in full, the Optim Parties shall not incur or otherwise agree to any other administrative claim that is senior to, or *pari passu* with, the priorities of the Break-Up Fee and Expense Reimbursement set forth in this Section 4.6(d).

Section 4.7. Effect of Termination; Treatment of Deposit.

(a) In the event that this Agreement is validly terminated as provided herein, this Agreement shall become wholly void and of no further force and effect and such termination shall be without liability to Buyer or Seller, or any of their respective Affiliates or Representatives, and each shall be fully released and discharged from any Liability arising under this Agreement after the date of such termination; provided, however, that the provisions of Article I, Section 4.5, Section 4.6, this Section 4.7, Section 8.5, Section 8.7, Article XI and Article XII of this Agreement shall survive any such termination and shall be enforceable hereunder.

(b) In the case that this Agreement is terminated pursuant to Section 4.4(m), the Deposit shall be disbursed by the Deposit Escrow Agent to Seller in immediately available funds; in all other circumstances, the Deposit shall be disbursed by the Deposit Escrow Agent to Buyer in immediately available funds. If Seller elects to terminate this Agreement pursuant to Section 4.4(m), Seller's right to receive the Deposit shall be its sole and exclusive remedy. Alternatively, Seller shall have the right to seek specific performance under Section 12.1 to enforce the terms of the Equity Commitment Letter directly against the Sponsors (as defined therein) in accordance with the terms thereof (such Sponsors having waived any right or defense under section 365(c)(2) of the Bankruptcy Code with respect to such enforcement) and to cause Buyer to effect the Closing through funding 85% of the Purchase Price pursuant to the Equity Commitment Letter, with the remainder funded through the release of the Deposit to Seller. For the avoidance of doubt, while Seller may pursue both a grant of specific performance and the disbursement of the Deposit, under no circumstances shall Seller be permitted or entitled to receive both a grant of specific performance and any monetary damages, including any monetary damages in lieu of specific performance and all or any portion of the Deposit.

ARTICLE V

REPRESENTATIONS AND WARRANTIES OF SELLER

Except as set forth in the corresponding sections or subsections of Seller's Disclosure Schedule, Seller hereby represents and warrants to Buyer as of the date hereof and as of the Closing Date (except for representations and warranties that are made as of a specific date, which are made only as of such date) as follows:

Section 5.1. Organization and Good Standing.

(a) Seller is a limited partnership duly organized, validly existing and, except as a result of the commencement of the Chapter 11 Cases, in good standing under the Laws of Texas, and, subject to obtaining the approval of the Bankruptcy Court, has all necessary power and authority to enter into this Agreement and each of the other Transaction Documents to be executed by Seller (collectively, the "Seller Documents"), to carry out its obligations hereunder and thereunder, and to consummate the Transactions. Seller has all necessary power and authority to own, lease, operate and conduct its respective businesses, properties and assets as now being conducted. Seller is duly licensed or qualified to do business and is in good standing in each jurisdiction in which the properties owned or leased by it or the operation of its respective business makes such licensing or qualification necessary, except to the extent that the failure to be so licensed, qualified or in good standing has resulted from the commencement or continuance of the Chapter 11 Cases.

(b) Seller has no Subsidiaries.

Section 5.2. Authorization of Agreement.

Subject to the entry of the Sale Procedures Order and the Sale Order by the Bankruptcy Court, and except as otherwise disclosed in Schedule 5.2, the execution and delivery of this Agreement and each of the other Seller Documents, the performance by Seller of its obligations

hereunder and thereunder, and the consummation by Seller of the Transactions have been duly authorized by all requisite action on the part of Seller and no other action or proceeding on the part of Seller is necessary to authorize the execution and delivery of this Agreement and each of the other Seller Documents by Seller, or the consummation of the Transactions. This Agreement has been, and upon their execution, the other Seller Documents will be at or prior to Closing, duly and validly executed and delivered by Seller, and (assuming due and valid authorization, execution and delivery by Buyer), subject to the approval of the Bankruptcy Court, this Agreement constitutes, and, upon their execution, the other Seller Documents shall constitute, legal, valid and binding obligations of Seller, enforceable against Seller in accordance with their respective terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

Section 5.3. Conflicts; Consents of Third Parties.

(a) Except as set forth on Schedule 5.3(a), none of the execution and delivery by Seller of this Agreement or any of the other Seller Documents, the consummation of the transactions contemplated hereby or thereby, or compliance by Seller with any of the provisions hereof or thereof will materially conflict with, or result in any material violation of or material default or give rise to the creation of any Lien other than Permitted Exceptions (with or without notice or lapse of time, or both) under, or give rise to a right of consent, purchase, amendment, modification, acceleration, termination or cancellation under any provisions, terms or conditions of (i) the Organizational Documents of Seller; (ii) assuming compliance with the matters set forth on Schedule 5.3(b) and subject to entry of the Sale Order, any Material Contract or Permit to which Seller is a party or by which any of the properties or assets of Seller are bound; (iii) subject to entry of the Sale Order, any Order of any Governmental Body applicable to Seller or any of the properties or assets of Seller as of the date hereof; or (iv) subject to entry of the Sale Order, any applicable Law.

(b) Except as set forth on Schedule 5.3(b), no material consent, waiver, approval, Order, Permit or authorization of, or declaration or filing with, or notification to, any Person is required on the part of Seller in connection with the execution and delivery of this Agreement or the other Seller Documents, the compliance by Seller with any of the provisions hereof or thereof, the consummation of the Transactions or the taking by Seller of any other action contemplated pursuant to the Transaction Documents, except for (i) the entry of the Sale Order and (ii) the entry of the Sale Procedures Order.

Section 5.4. Financial Statements.

(a) Seller has delivered to Buyer true, correct and complete copies of the unaudited balance sheets of Seller as at December 31, 2012 and December 31, 2013 and the related statements of income and of cash flows of Seller for the years then ended (such statements, including the related notes and schedules thereto, are referred to herein as the "Financial Statements"). Each of the Financial Statements has been prepared from the books and records of Seller in accordance with GAAP consistently applied without modification of the accounting principles used in the preparation thereof throughout the periods presented and presents fairly in

all material respects the consolidated financial position, results of operations and cash flows of Seller as of the dates and for the periods indicated therein, subject to the absence of complete notes, which are not expected to be material in the aggregate. For the purposes hereof, the balance sheet of Seller as at December 31, 2013 is referred to as the “Balance Sheet” and December 31, 2013 is referred to as the “Balance Sheet Date”.

(b) Schedule 5.4 sets forth all collateral, deposits, guarantees, letters of credit and similar obligations posted by Seller or Seller’s Affiliates on its behalf as of the date hereof in connection with or for the benefit of the Business.

Section 5.5. Title to Purchased Assets.

(a) Except as set forth in Schedule 5.5, and other than the Easements, Seller’s rights under the Intellectual Property Licenses and leased personal property, Seller owns each of the Purchased Assets, and, subject to the entry of the Sale Order, Buyer will be vested with good and marketable title to the Purchased Assets, free and clear of all Liens other than Permitted Exceptions, to the fullest extent permissible under Law, including section 363(f) of the Bankruptcy Code.

(b) The Purchased Assets, together with Seller’s agreements hereunder and under the Seller Documents, constitute all of the assets, rights and services used by Seller to own, operate and maintain the Business in the Ordinary Course and in accordance with good utility practices, other than Excluded Assets.

Section 5.6. Absence of Certain Developments.

Except as expressly contemplated by this Agreement or as set forth on Schedule 5.6, since the Balance Sheet Date, (a) Seller has conducted the Business only in the Ordinary Course of Business and has not taken any actions which would be a breach of Section 8.2 if such actions were to be taken after the date hereof without Buyer’s prior written consent and (b) there has not been any (i) Material Adverse Effect or (ii) sale, assignment, transfer, lease or license (other than a Permitted Exception) of or on any of the tangible or intangible assets related to, in or held for use in the Business, except in the Ordinary Course of Business.

Section 5.7. Taxes.

Except as otherwise expressly set forth in this Section 5.7, the following representations and warranties relate to all Taxes other than U.S. federal, state, local and foreign income and franchise Taxes (“Income Taxes”):

(a) Except as set forth in Schedule 5.7 hereto, Seller has (i) timely filed, or caused to be timely filed, with the appropriate Tax Authorities all material Tax Returns required to be filed by or with respect to the Purchased Assets or the Business (taking into account any validly obtained extensions of time to file), and (ii) timely paid all amounts of material Taxes due and payable (including, without limitation, all withholding Taxes) whether or not shown on a filed Tax Return. During the preceding five (5) years, no claim has been made by a Governmental Body in a jurisdiction where Seller does not file Tax Returns that Seller, with respect to the Purchased Assets or the Business, is or may be subject to material taxation by such jurisdiction.

(b) Except for Taxes that are not yet due or payable or that are contested in good faith, there are no Liens for Taxes with respect to the Purchased Assets or the Business. Seller is not currently the beneficiary of any extension of time within which to file any Tax Return with respect to the Purchased Assets or the Business. Except as set forth in Schedule 5.7 hereto, there is no material dispute or claim concerning any Tax liability of Seller with respect to the Purchased Assets or the Business either (A) claimed or raised by any Tax Authority in writing or (B) as to which Seller has knowledge based upon contact with any agent of any such Tax Authority.

(c) No Tax allocation, Tax sharing or Tax indemnity or similar agreement or arrangement is in effect, in each case, with respect to the Purchased Assets or the Business, that would, in any manner, bind, obligate or otherwise restrict Buyer. Except as set forth on Schedule 5.7, Buyer will not be required to include any material item of income in, or exclude any material item of deduction from, taxable income for any taxable period (or portion thereof) ending after the Closing Date as a result of (or corresponding to) any prepaid amount received by Seller on or prior to the Closing Date.

Section 5.8. Real Property.

(a) Schedule 5.8(a) sets forth a true, correct and complete list of the Owned Real Property. Seller has good and marketable fee title to all Owned Real Property, free and clear of all Liens of any nature whatsoever except for (i) Liens set forth on Schedule 5.5 and (ii) the Permitted Exceptions. Seller has not received any written notice of any condemnation, zoning or other similar proceeding affecting any Seller Real Property. Neither the whole nor any material portion of any Seller Real Property has been damaged or destroyed by fire or other casualty.

(b) Schedule 5.8(b) sets forth a true, correct and complete list of all Contracts for the lease, license or use of the Owned Real Property.

(c) The Seller Real Properties constitute all of the real property used in held for use in, the conduct of the Business.

Section 5.9. Intellectual Property.

(a) Schedule 5.9(a) sets forth a true and complete list of (i) all registered Intellectual Property used, held for use or useful in connection with the Business that is owned by Seller (the "Owned Intellectual Property"); and (ii) all Intellectual Property exclusively used in connection with the Business that Seller is licensed or otherwise permitted to use by other Persons (other than an Affiliate of Seller) (the "Licensed Intellectual Property").

(b) Except as set forth on Schedule 5.9(b):

(i) Seller owns all Owned Intellectual Property listed on Schedule 5.9(a) and has valid rights in and to, including rights to manufacture, use, offer to sell, sell, publish, perform or exploit, as applicable, all other Purchased Intellectual Property as such Intellectual Property is used in the Ordinary Course of Business, in each case, free and clear of all Liens (other than Permitted Exceptions and Released Liens).

(ii) No Owned Intellectual Property is the subject of any ownership, validity, use or enforceability challenge and is maintained up to the Closing Date, and is not subject to any outstanding order, judgment or decree restricting its use or adversely affecting Seller's rights thereto.

(iii) Seller is neither currently violating nor has, in the past three (3) years, violated any third Person's intellectual property rights and there are no Actions, pending or threatened, concerning any claim that Seller has infringed, diluted, misappropriated, or otherwise violated any intellectual property rights of any other Person.

(iv) Seller has not received any written notice of any default or any event that with notice or lapse of time, or both, would constitute a default under any Contract providing for Licensed Intellectual Property and to which Seller is a party or by which it is bound. To Seller's Knowledge, no Person is infringing, diluting, misappropriating or otherwise violating any Purchased Intellectual Property.

Section 5.10. Material Contracts.

(a) Schedule 5.10(a) sets forth a true and correct list all of the following Contracts to which Seller is a party or by which it is bound or is otherwise subject to or a beneficiary thereof and that are related to the Business or by which Buyer or the Purchased Assets may be bound or affected (collectively, the "Material Contracts"):

(i) Contracts with any Affiliate or current or former employee, officer or director of Seller;

(ii) Contracts for the sale, lease, license or other disposition of any of the assets of Seller for consideration in excess of one hundred thousand dollars (\$100,000) individually;

(iii) Contracts for the sale, purchase or exchange of electric power in any form (including energy or ancillary services);

(iv) Contracts for the sale, purchase, exchange, transportation or storage of coal or other fuel;

(v) Contracts that are interconnection agreements with the electric transmission providers for the Facility;

(vi) Contracts relating to the acquisition by Seller of any operating business or the capital stock of any other Person or relating to a joint venture involving the Business or any of the Purchased Assets;

(vii) Contracts relating to incurrence of Indebtedness, guarantees or loans, or to mortgaging, pledging or otherwise place a Lien on any material portion of the Business or any of the Purchased Assets;

(viii) Contracts that are a swap, cap, floor, collar, futures contract, forward contract, option or any other derivative financial instrument, contract or arrangement, based on any commodity, security, instrument, rate or index of any kind or nature whatsoever, whether tangible or intangible, including electricity, natural gas, fuel oil, coal, emissions allowances and offsets, and other commodities, currencies, interest rates and indices;

(ix) Contracts that are a letter of credit, guaranty of any obligation for performance or borrowed money, bond, collateral account or similar credit support obligation, and each Contract requiring the posting thereof;

(x) Contracts that, by their specific terms, require that transferees of the Facility or the Purchased Assets be made a party thereto;

(xi) Contracts for the employment of any individual on a full-time, part-time or consulting or other basis;

(xii) Contracts that are a collective bargaining agreement or Contract with any labor union;

(xiii) Contracts that restrain, restrict, limit or impede the ability of Buyer to compete with or conduct any business or line of business in any geographic area;

(xiv) Contracts that are a settlement, conciliation or similar agreement with any Governmental Body or pursuant to Seller is obligated to make payments or offer credits, offsets or rebates or provide similar concessions after the date hereof involving a value or amount, individually or in the aggregate, in excess of two hundred fifty thousand dollars (\$250,000);

(xv) Contracts pursuant to which (a) Seller is granted any license to any Intellectual Property, (b) Seller grants to any Person any license to any Owned Intellectual Property, or (c) Seller is restricted in Seller's ability to use, disclose, license or enforce, or grant an exclusive right to use, any Intellectual Property (including royalty, joint development, concurrent use, settlement, indemnification, tolling and consent to use agreements or contracts), in each case other than licenses for commercially available, unmodified, "off-the-shelf" software used by the Business solely for internal use, for an aggregate fee, royalty or other consideration for any such software or group of related software licenses of no more than one hundred thousand dollars (\$100,000); and

(xvi) Contracts which involve the expenditure of more than one hundred thousand dollars (\$100,000) individually or require performance by any party more than one year from the date hereof that, in either case, are not terminable by Seller without penalty on less than thirty (30) days' notice.

(b) Except as set forth on Schedule 5.10(b), Seller has not received any written notice of any default or event that with notice or lapse of time or both would constitute a default by Seller under any Material Contract.

(c) Each of the Material Contracts is in full force and effect and is the legal, valid and binding obligation of Seller, enforceable against (i) Seller in accordance with its terms, subject to the terms of the Sale Order and applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity (regardless of whether enforcement is sought in a proceeding at law or in equity), and (ii) to Seller's Knowledge, each other party thereto. Except as a result of the commencement of the Chapter 11 Cases or as set forth on Schedule 5.10(c), no event has occurred with respect to any Material Contract that, after notice or lapse of time, or both, would constitute a breach of or default by Seller or, to Seller's Knowledge, any other party to such Material Contract. Seller has not received written notice from any other party to any Material Contract that such other party intends to terminate any such Material Contract. Seller has delivered or otherwise made available to Buyer true, correct and complete copies of all of the Contracts listed on Schedule 5.10(a), together with all amendments, modifications, supplements, exhibits and restatements thereto. Subject only to the satisfaction of the Determined Cure Costs applicable to such Contracts and the entry of the Sale Order, each Designated Contract may be assumed and assigned to Buyer pursuant to section 365 of the Bankruptcy Code.

Section 5.11. Employees; Employee Benefits.

(a) All individuals performing services with respect to the Business are employed by the Operator or the Asset Manager. There are no other employees of the Business.

(b) There are no: (i) "employee benefit plans", as defined in Section 3(3) of ERISA, or other material employee benefit arrangements, including bonus plans, consulting or other compensation agreements, incentive, equity or equity-based compensation, or deferred compensation arrangements, stock purchase, severance pay, sick leave, vacation pay, salary continuation, disability, hospitalization, medical insurance, life insurance, scholarship programs currently maintained by Seller or to which Seller contributed or is obligated to contribute thereunder for current or former employees or to which Seller has any liability (contingent or otherwise) ("Employee Benefit Plans"), or (ii) "employee pension plans", as defined in Section 3(2) of ERISA, subject to Title IV of ERISA or Section 412 of the Code, maintained by Seller and any trade or business (whether or not incorporated) which are or have been under common control in the past six years, or which are or have been treated as a single employer, with Seller under Section 414(b), (c), (m) or (o) of the Code ("ERISA Affiliate") or to which Seller or any ERISA Affiliate thereof, contributed or has been obligated in the past six years to contribute thereunder in the last six (6) years or to which Seller has any liability (contingent or otherwise) ("Title IV Plans").

Section 5.12. Litigation.

Except (i) as set forth on Schedule 5.12, (ii) for matters before the Bankruptcy Court involving Seller or any of its Affiliates, and (iii) any matters that will otherwise be resolved by the Sale Order without any Liability or restriction applicable to Buyer or the Purchased Assets, there are no Actions pending or, to Seller's Knowledge, threatened that relate to, or would otherwise affect, the Business or any of the Purchased Assets or Assumed Liabilities.

Section 5.13. Compliance with Laws.

Seller is, and has, during the past three (3) years, been in material compliance with all Laws applicable to its respective operations or assets or the Business, except with respect to Environmental Laws which are addressed in Section 5.14. Seller has not received any written notice of or been charged with the violation of any Laws.

Section 5.14. Environmental Matters.

(a) Except as set forth on Schedule 5.14 and except as would not reasonably be expected to result in Seller or Purchaser incurring material Liabilities: (i) the operations of Seller with respect to the Purchased Assets and the Facility are, and have during the past three (3) years been, in compliance with all applicable Environmental Laws, which compliance includes obtaining, maintaining and complying with all required Environmental Permits; (ii) to Seller's Knowledge, no Hazardous Materials have been Released on, at or under the Seller Real Properties that would reasonably be expected to give rise to Liabilities under applicable Environmental Laws; (iii) neither Seller nor any of its Affiliates is subject to any outstanding Order or Contract with any Governmental Body, nor have they received any written notice relating to any (A) Environmental Laws, (B) Remedial Action or (C) Release of a Hazardous Material, in each case in connection with the Business, the Purchased Assets or the Assumed Liabilities; (iv) neither Seller nor any other Person managing the Facility or employed by Seller or such manager, in the course of such employment, has disposed of, transported or arranged for the transportation or disposal of any Hazardous Materials generated by the Facility to any off-site location, or exposed any Person to any Hazardous Materials, which would give rise to Liabilities under applicable Environmental Laws; and (v) no claims have been asserted against Seller and, to Seller's Knowledge, there are no investigations of the Business, the Purchased Assets or the Facility, pending or threatened, including those which would reasonably be expected to result in the imposition of any liability pursuant to any Environmental Law.

(b) No Liens exist pursuant to Environmental Law related to Seller, the Business, the Facility, the Seller Real Property or the Purchased Assets.

(c) Seller has delivered or made available to Buyer copies of all material environmental site assessments, environmental compliance audits, and other material reports or analyses of pending or reasonably foreseeable requirements or costs to maintain or achieve compliance with Environmental Laws or Environmental Permits relating to the Business that are in Seller's possession or control, including all material reports or analyses concerning air emissions allowances.

(d) The representations and warranties contained in this Section 5.14 and in Section 5.15 are the sole and exclusive representations and warranties of Seller with respect to matters arising out of or relating to Environmental Laws, Environmental Permits or Hazardous Materials.

Section 5.15. Permits.

Schedule 5.15 lists all material Permits used by Seller in the Business. Seller holds all of such Permits and each such Permit is in full force and effect and has not expired. There are no

Actions pending or, to Seller's Knowledge, threatened, the object of which is to revoke, limit or otherwise affect any such Permit.

Section 5.16. Financial Advisors.

Except as set forth on Schedule 5.16, no Person has acted, directly or indirectly, as a broker, finder or financial advisor for Seller or any of its Affiliates in connection with the Transactions and no Person is entitled to any fee or commission or like payment from Buyer or any of its Affiliates in respect thereof.

Section 5.17. Insurance.

Set forth on Schedule 5.17 is an accurate and complete list of all material policies of insurance (by policy number, insurer, expiration date and type and amount of coverage) by which the Purchased Assets are covered as of the date hereof, including self-insurance (each an "Insurance Contract"), true and correct copies of which have been made available to Buyer. The Insurance Contracts satisfy all material requirements of applicable Laws and any Contracts to which Seller is a party or by which it is bound or is otherwise subject to or a beneficiary thereof. Seller is in material compliance with the terms and provisions of such policies and all premiums due and payable with respect thereto have been paid. Seller has not received a written notice of cancellation or termination of any such policy. Except as set forth on Schedule 5.17, all such policies are in full force and effect and there are no material claims pending as of the date hereof under any of such policies where underwriters have reserved their rights or disclaimed coverage under such policy. Notice has been provided under any applicable or potentially applicable Insurance Contract for all known incidents that occurred before the Closing Date and that could result in a claim in excess of one hundred thousand dollars (\$100,000) under any Insurance Contract after the Closing Date.

Section 5.18. Transactions with Related Parties.

Except as set forth in Schedule 5.18:

(a) No agreement or transaction between Seller and (i) any director, officer, owner or Affiliate of any of the foregoing, or (ii) any relative or spouse (or relative of such spouse) of any such director, officer, stockholder or Affiliate (such persons in (i) and (ii) being referred to herein as a "Related Party" or collectively as the "Related Parties") has been entered into.

(b) No Related Party is a director or officer of, or has any direct or indirect interest in (other than the ownership of not more than 5% of the publicly traded shares of), any Person or entity which is a supplier, vendor, or competitor of Seller.

(c) No Related Party owns or has any interest in, directly or indirectly, in whole or in part, any tangible or intangible property, which property is primarily used in the conduct of the Business.

(d) Seller has not, directly or indirectly, guaranteed or assumed any Indebtedness for borrowed money or otherwise for the benefit of any Related Party.

Section 5.19. No Other Representations or Warranties.

Except for the representations and warranties contained in this Article V (as modified by the Schedules hereto), neither Seller nor any other Person makes any other express or implied representation or warranty with respect to Seller, the Business, the Purchased Assets, the Assumed Liabilities or the Transactions, and Seller disclaims any other representations or warranties, whether made by Seller, any Affiliate of Seller or any of their respective officers, directors, employees, agents or Representatives. Except for the representations and warranties contained in Article V hereof (subject to the Schedules hereto), Seller (i) expressly disclaims and negates any representation or warranty, expressed or implied, at common law, by statute, or otherwise, relating to the condition of the Purchased Assets (including any implied or expressed warranty of merchantability or fitness for a particular purpose, or of conformity to models or samples of materials) and (ii) disclaims all liability and responsibility for any representation, warranty, projection, forecast, statement, or information made, communicated, or furnished (orally or in writing) to Buyer or its Affiliates or Representatives (including any opinion, information, projection, or advice that may have been or may be provided to Buyer by any director, officer, employee, agent, consultant, or Representative of Seller or any of its Affiliates). Seller makes no representations or warranties to Buyer regarding the probable success or profitability of the Business. The disclosure of any matter or item in any Schedule hereto shall not be deemed to constitute an acknowledgment that any such matter is required to be disclosed or is material or that such matter would reasonably be expected to result in a Material Adverse Effect.

ARTICLE VI

REPRESENTATIONS AND WARRANTIES OF BUYER

Except as set forth in the corresponding sections or subsections of Buyer's Disclosure Schedule, Buyer hereby represents and warrants to Seller as of the date hereof and as of the Closing Date (except for representations and warranties that are made as of a specific date, which are made only as of such date) as follows:

Section 6.1. Organization and Good Standing.

Buyer is a corporation, limited partnership or limited liability company duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation, formation or organization and has all requisite power and authority to own, lease and operate its properties and to carry on its business as now conducted.

Section 6.2. Authorization of Agreement.

Buyer has all requisite power, authority and legal capacity to execute and deliver this Agreement, the other Transaction Documents and each other agreement, document, instrument or certificate contemplated by this Agreement or to be executed by it in connection with the consummation of the Transactions (the "Buyer Documents"), and to consummate the Transactions. The execution, delivery and performance by Buyer of this Agreement and the Buyer Documents have been duly and validly authorized by all necessary action on behalf of

Buyer. This Agreement has been, and, upon their execution, each Buyer Document will be at or prior to the Closing, duly executed and delivered by Buyer and (assuming the due and valid authorization, execution and delivery by the other parties hereto and thereto) this Agreement constitutes, and, upon their execution, the Buyer Documents will, when so executed and delivered, constitute, the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity).

Section 6.3. Conflicts; Consents of Third Parties.

(a) None of the execution and delivery by Buyer of this Agreement or the Buyer Documents, the consummation of the Transactions, or the compliance by Buyer with any of the provisions hereof or thereof, will materially conflict with, or result in any material violation of or material default (with or without notice or lapse of time, or both) under, or give rise to a right of consent, purchase, amendment, modification, acceleration, payment, termination or modification under any provisions, terms or conditions of (i) the Organizational Documents of Buyer, (ii) any Contract or Permit to which Buyer is a party or by which Buyer or its properties or assets are bound or (iii) any Order of any Governmental Body applicable to Buyer or by which any of the properties or assets of Buyer are bound, (iv) any applicable Law, except, in the case of each of clauses (ii), (iii) and (iv), such conflicts, violations, defaults, terminations or cancellations that would not reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this Agreement or to consummate the Transactions.

(b) Except as set forth in Schedule 6.3(b), no consent, waiver, approval, Order, Permit or authorization of, or declaration or filing with, or notification to, any Person or Governmental Body is required on the part of Buyer in connection with the execution and delivery of this Agreement or the Buyer Documents, the compliance by Buyer with any of the provisions hereof or thereof, the consummation of the Transactions or the taking by Buyer of any other action contemplated hereby or thereby, or for Buyer to conduct the Business, except for (i) the entry of the Sale Order, and (ii) the entry of the Sales Procedure Order.

Section 6.4. Litigation.

There are no Actions pending or, to the knowledge of Buyer, threatened by or against Buyer, or to which Buyer is otherwise a party before any Governmental Body, which, if adversely determined, would reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this Agreement or to consummate the Transactions. Buyer is not subject to any Order of any Governmental Body except to the extent the same would not reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this Agreement or to consummate the Transactions.

Section 6.5. Financial Advisors.

Except as set forth on Schedule 6.5, no Person has acted, directly or indirectly, as a broker, finder or financial advisor for Buyer in connection with the Transactions and no Person is entitled to any fee or commission or like payment in respect thereof which would be payable by Seller.

Section 6.6. Capability.

(a) As of the date hereof, Buyer has received an executed equity commitment letter dated the date hereof (the "Equity Commitment Letter") from the Equity Financing Sources, pursuant to which such Equity Financing Sources have committed, subject to the terms and conditions set forth therein, to provide to Buyer the Equity Financing in cash in an aggregate amount set forth in the Equity Commitment Letter, which Equity Commitment Letter provides that Seller is a third party beneficiary thereto. A true and complete copy of the fully executed Equity Commitment Letter as in effect on the date hereof has been provided to Seller. As of the date hereof, the Equity Commitment Letter is valid and in full force and effect and enforceable in accordance with its terms against Buyer and each other party thereto, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar Laws affecting or relating to creditors' rights and remedies generally and to general principles of equity. As of the date hereof, there are no conditions precedent or other contingencies related to the Equity Financing as contemplated by the Equity Commitment Letter, other than as expressly set forth in the Equity Commitment Letter, and none of the commitments contained in the Equity Commitment Letter has been withdrawn or rescinded in any respect. Assuming the accuracy of Seller's representations and warranties and compliance with its covenants under this Agreement, the aggregate proceeds of the Equity Financing contemplated by the Equity Commitment Letter will be sufficient for Buyer to complete the transactions contemplated by this Agreement, pay the Estimated Purchase Price and to pay all fees and expenses required to be paid by Buyer in connection with the Transactions. Assuming the satisfaction of the conditions in Article X, as of the Closing Date, there is no reason to believe that any of the conditions to the Equity Financing within its control will not be satisfied or that the Equity Financing will not be available to Buyer on the Closing Date. For avoidance of doubt, none of the rights and obligations of any Party, nor the transactions contemplated hereby, are subject to any term or condition providing that Buyer and/or its Affiliates first obtain financing.

(b) Assuming (i) satisfaction of the conditions to Buyer's obligation to consummate the transactions contemplated hereby, or waiver by Buyer of such conditions, (ii) the accuracy of the representations and warranties of Seller set forth in Article V hereof (for such purposes, such representations and warranties shall be true and correct in all material respects without giving effect to any knowledge, materiality or "Material Adverse Effect" qualification or expectation) and (iii) any estimates, projections or forecasts of the Seller have been prepared in good faith based upon assumptions that were and (as of the Closing, but solely for purposes of this representation) continue to be reasonable, upon consummation of the transactions contemplated hereby, including the Equity Financing, payment of all amounts required to be paid in connection with the consummation of the transactions contemplated hereby, and payment of all related fees and expenses, Buyer will be Solvent as of the Closing and immediately after the consummation of the transactions contemplated hereby.

Section 6.7. Certain Communications.

Since February 12, 2014 until the date of this Agreement, Buyer, its officers, employees, Affiliates and/or Representatives have not had any substantive discussions or negotiations, or reached any agreement or understanding of any type, directly or indirectly, with the Walnut Creek Mining Company, its officers, employees, Affiliates and/or Representatives, relating to the Walnut Creek Mine, Seller, the Purchased Assets, any proposed transaction regarding any such entities or assets, any contractual arrangement between any such entities, or any confidential information relating to any of the foregoing.

Section 6.8. “AS IS/WHERE IS” SALE.

EXCEPT AS EXPRESSLY SET FORTH IN ARTICLE V HEREOF, THERE ARE NO REPRESENTATIONS OR WARRANTIES OF ANY KIND (INCLUDING ANY REPRESENTATIONS OR WARRANTIES AS TO THE QUALITY OR FITNESS OF THE PURCHASED ASSETS FOR THEIR INTENDED PURPOSES OR ANY PARTICULAR PURPOSE), EXPRESSED OR IMPLIED, WITH RESPECT TO THE PURCHASED ASSETS OR ASSUMED LIABILITIES. BUYER ACKNOWLEDGES THAT THE PURCHASED ASSETS ARE BEING SOLD, TRANSFERRED, CONVEYED, ASSIGNED AND DELIVERED TO, AND PURCHASED AND ACCEPTED BY, BUYER ON AN “AS IS/WHERE IS” BASIS.

BUYER IS EXPERIENCED AND SOPHISTICATED WITH RESPECT TO TRANSACTIONS OF THE TYPE CONTEMPLATED BY THIS AGREEMENT AND THE OTHER TRANSACTION DOCUMENTS. IN CONSULTATION WITH EXPERIENCED COUNSEL AND ADVISORS OF ITS CHOICE, BUYER HAS CONDUCTED ITS OWN INDEPENDENT REVIEW AND ANALYSIS OF THE BUSINESS, THE PURCHASED ASSETS, THE ASSUMED LIABILITIES AND THE RIGHTS AND OBLIGATIONS IT IS ACQUIRING AND ASSUMING UNDER THIS AGREEMENT AND THE OTHER TRANSACTION DOCUMENTS. BUYER ACKNOWLEDGES THAT IT AND ITS REPRESENTATIVES HAVE BEEN PERMITTED CERTAIN ACCESS TO THE BOOKS AND RECORDS, FACILITIES, EQUIPMENT, CONTRACTS AND OTHER PROPERTIES AND ASSETS OF THE BUSINESS AND THAT IT AND ITS REPRESENTATIVES HAVE HAD AN OPPORTUNITY TO MEET WITH REPRESENTATIVES OF SELLER TO DISCUSS THE BUSINESS.

Section 6.9. No Other Representations and Warranties.

Except for the representations and warranties contained in this Article VI (subject to the Schedules hereto), neither Buyer nor any other Person makes any other express or implied representation or warranty with respect to Buyer or the Transactions, and Buyer disclaims any other representations or warranties, whether made by Buyer, any Affiliate of Buyer or any of their respective officers, directors, employees, agents or Representatives.

ARTICLE VII

BANKRUPTCY COURT MATTERS

Section 7.1. Alternative Transaction.

This Agreement is subject to approval by the Bankruptcy Court and the consideration by Seller of higher or better Qualifying Bids (as defined in the Sale Procedures Order) in accordance with the terms of the Sale Procedures Order.

Section 7.2. Bankruptcy Court Filings.

(a) As soon as practicable after execution of this Agreement (and in no event later than two (2) Business Days thereafter), Seller shall file a copy of this Agreement (together with all necessary supporting papers) on the Bankruptcy Court docket.

(b) Seller shall obtain entry by the Bankruptcy Court of the Sale Procedures Order no later than July 3, 2014 and the Sale Order no later than August 12, 2014. Buyer agrees that it will promptly take such actions as are reasonably requested by Seller to assist in obtaining the entry of the Sale Procedures Order and the Sale Order, including furnishing affidavits or other documents or information for filing with the Bankruptcy Court for the purposes, among others, of providing necessary assurances of performance by Buyer under this Agreement and the Transaction Documents and demonstrating that Buyer is a “good faith” purchaser under section 363(m) of the Bankruptcy Code.

(c) Seller shall pursue the entry by the Bankruptcy Court of the Sale Order, which Sale Order shall provide for the transfer of the Purchased Assets and the Assumed Liabilities to the Prevailing Bidder (as defined in the Sale Procedures Order) free from any and all successor or transferee liability to the extent permitted by section 363 of the Bankruptcy Code. Seller shall comply (or obtain an Order from the Bankruptcy Court waiving compliance) with all requirements under the applicable provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules for the District of Delaware in obtaining the entry by the Bankruptcy Court of the Sale Order. In the event that the Sale Procedures Order or the Sale Order is appealed or a stay pending appeal is sought, subject to the Parties’ respective rights to terminate this Agreement pursuant to Section 4.4, Seller and Buyer shall use their respective reasonable efforts to oppose the appeal or the stay pending appeal and seek the dismissal of any appeal.

(d) Immediately after entry of the Sale Procedures Order or at such earlier time as Sellers shall determine (with consent of Buyer), Sellers shall serve notice of the sale contemplated hereby (the “Sale Notice”) on all parties (including all parties to the Assumed Contracts and all Persons who would appear on any search conducted to determine those Persons asserting a Lien on Seller’s assets) to whom service of the Sale Notice is required under the terms of the Sale Procedures Order or to whom service of notice is advisable pursuant to the Bankruptcy Code, in form and substance reasonably satisfactory to Buyer, disclosing the salient terms of this Agreement, the Sale Procedures Order and the identity of Buyer, and the transactions contemplated hereby.

Section 7.3. Assumption of Assigned Contracts.

(a) In addition to approval of the Sale Procedures Order and entry into this Agreement and the Transaction Documents, the Sale Motion shall also request the Bankruptcy Court's approval of the assumption and assignment to Buyer of the Assumed Contracts pursuant to section 365 of the Bankruptcy Code. Contemporaneously with the filing of the Sale Motion, Seller shall provide appropriate notice of the Sale Hearing as is required by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Local Bankruptcy Rules for the District of Delaware to all parties entitled to notice, including all parties to Assumed Contracts and all taxing and environmental Governmental Bodies in jurisdictions applicable to Seller.

(b) As soon as practicable after entry of the Sale Procedures Order but in no event later than two (2) Business Days thereafter, Seller shall file a notice of assumption (the "Assumption Notice") with the Bankruptcy Court and serve such notice via first class mail on each counterparty to a Contract listed thereon. The Assumption Notice shall identify all Contracts and Permits of Seller related to the Purchased Assets that Seller believes may be assumed and assigned in connection with the sale of the Purchased Assets and set forth a good faith estimate of the amount of cure costs applicable to each such Contract (and if no cure cost is estimated to be applicable with respect to any particular Contract, the amount of such cure cost designated for such Contract shall be "\$0.00"). In accordance with the Sale Procedures Order, Buyer reserves the right to cause Seller to supplement such list of Contracts and to provide additional notice of assumption up to three (3) Business Days prior to the Closing Date and to cause Seller to remove a Contract from the list of Contracts and Permits at any time prior to the Closing Date.

(c) Schedule 7.3(c) contains a list of those Contracts and Permits that Buyer elects to have assumed and assigned to Buyer on the Closing Date (the "Designated Contracts"). Buyer shall be entitled to remove certain Contracts from the list of Designated Contracts at any time immediately prior to the Closing. In the event that Buyer removes any of such Contracts from such list, Seller will provide the relevant counterparty written notice that the applicable Contract is no longer identified as a Designated Contract. For the avoidance of doubt, only those executory contracts that remain identified as Designated Contracts as of the Closing Date will constitute Assumed Contracts and will be assumed by Seller and assigned to Buyer pursuant to the Sale Order. There shall be no adjustment to the Purchase Price as a result of Buyer's election to exclude any one or more of such Contracts or Permits from list of Designated Contracts pursuant to this Section 7.3(c) except that Buyer shall not be required to make any payments for Determined Cure Costs or any other amounts for any such Excluded Contracts or Permits.

(d) Subject to the terms of Section 2.5 and Section 7.3(a) and (b), Buyer shall make provision for the payment of the Determined Cure Costs in accordance with the Sale Order. Seller shall use its commercially reasonable efforts, including the filing and prosecution of any and all appropriate proceedings in the Bankruptcy Court, to establish the Determined Cure Costs, if any, for each Designated Contract, in accordance with Section 7.3(a).

(e) On or prior to the date hereof, Seller shall have delivered to Buyer true and complete copies of all Permits listed on Schedule 5.15, or otherwise provide Buyer with access to such true and complete copies of such Permits.

(f) Notwithstanding any provision in this Agreement to the contrary, Buyer shall have no obligation to purchase, acquire or assume any Contract or Permit (or any Liabilities thereunder) if a true and complete copy of such Contract or Permit has not been made available by Seller to Buyer in accordance with Sections 2.5, Section 7.3(a), Section 7.3(c) and Section 7.3(d) above. Notwithstanding any provision in this Agreement to the contrary, from and after the date hereof through the Closing Date, Seller will not reject or take any action (or fail to take any action that would result in rejection by operation of Law) to reject, repudiate or disclaim any Contract without the prior written consent of Buyer. Notwithstanding any provision in this Agreement to the contrary, Seller shall have no obligation to assume or assign any Insurance Contracts or any Contracts for services provided by any of its Affiliates.

ARTICLE VIII

COVENANTS

Section 8.1. Access to Information.

Seller agrees that, prior to the Closing Date, Buyer shall be entitled, through its Representatives, to make such investigation of the Purchased Assets (including non-invasive environmental site assessments), the Assumed Liabilities and the Business, and make such examination (and copies) of the books and records of Seller and its Affiliates related thereto as Buyer or its Representatives reasonably request. Any such investigation and examination shall be conducted during regular business hours upon reasonable advance notice and under reasonable circumstances and shall be subject to restrictions under applicable Law. Seller shall cause its Representatives to cooperate with Buyer and its Representatives and Buyer and its Representatives shall cooperate with Seller and its Representatives and shall use their reasonable efforts to minimize any disruption to the Business. Notwithstanding anything herein to the contrary, no such investigation or examination shall be permitted to the extent that it, in the opinion of Seller's counsel, would require Seller to disclose information where such disclosure would jeopardize the protection of attorney-client privilege or conflict with any contractual confidentiality obligations by which Seller is bound; provided, however, that Seller shall use commercially reasonable efforts to obtain a waiver of any such confidentiality provisions and to otherwise cause such information to be provided in a manner that would not result in such jeopardy or conflict. No investigation by Buyer or its Representatives prior to or after the date of this Agreement shall diminish or obviate any of the representations, warranties, covenants or agreements of Seller contained in this Agreement or any of the other Transaction Documents.

Section 8.2. Conduct of the Business Pending the Closing.

(a) Prior to the Closing, except (1) as set forth on Schedule 8.2(a), (2) as required by applicable Law, (3) as otherwise expressly contemplated by this Agreement or (4) with the prior written consent of Buyer, Seller shall:

(i) operate the Purchased Assets in the Ordinary Course of Business and in accordance with good utility practice and any subsequent Orders of the Bankruptcy Court;

(ii) use its reasonable best efforts to (A) preserve the present business operations, organization and goodwill of the Business, and (B) preserve the present relationships with Persons having business dealings with Seller (including customers and suppliers of the Business);

(iii) use its reasonable best efforts to (A) maintain its books, accounts and records in the Ordinary Course of Business, (B) continue to operate billing procedures and collect accounts receivable utilizing normal procedures and without discounting or accelerating payment of such accounts and (C) pay accounts payable and comply with all contractual and other obligations applicable to the operation of the Business;

(iv) use its reasonable best efforts to maintain the Purchased Assets in their current condition, ordinary wear and tear excepted;

(v) maintain in full force and effect until the Closing insurance upon all of the Purchased Assets in such amounts and of such kinds comparable to that in effect on the date of this Agreement;

(vi) use its reasonable best efforts to maintain in full force and effect the Permits and operate the Facility in compliance therewith;

(vii) comply, in all material respects, with applicable Laws, including Environmental Laws; and

(viii) not sell or transfer any air emission allowances or credits held by Seller or in the possession or control of Seller.

(b) Except (1) as set forth on Schedule 8.2(b), (2) as required by applicable Law, or (3) as otherwise expressly contemplated by this Agreement, Seller shall not solely as it relates to any of the Purchased Assets or the Business, without the prior written consent of Buyer:

(i) (A) enter into any employment, deferred compensation, severance, consulting or similar agreement or arrangement (or amend any such agreement or arrangement) with any individual or (B) create any Employee Benefit Plan;

(ii) subject any of the Purchased Assets to any Lien, except for Permitted Exceptions and Liens under the DIP Credit Agreement;

(iii) acquire any material properties or assets that would be Purchased Assets or sell, assign, license, transfer, convey, lease, permit to lapse or expire, or otherwise dispose of any assets, properties, rights or interests related to, used or held for use in the Business (including, without limitation, any spare parts);

(iv) cancel or compromise any material debt or claim or waive or release any material right of Seller relating to the Business or any assets, properties, rights or interests related to, used or held for use in the Business;

(v) incur any capital expenditures during any month in excess of 110% of Budget for such month except upon the occurrence of any emergency or other similar contingency or as required by applicable Law; provided that, Seller will notify Buyer in writing three (3) Business Days prior after the last day of any such month, and Seller and Buyer will discuss the nature and effects of such variance;

(vi) enter into any Material Contract or terminate, amend, restate, supplement, extend or waive (partially or completely) any rights under any Material Contracts (other than Excluded Contracts) or Permits (other than Excluded Permits);

(vii) amend its Organizational Documents or take any other action which would reasonably be expected to have an adverse effect on the ability of Seller to consummate the Transactions or would otherwise adversely affect the Business or the value, utility or transferability of any of the Purchased Assets, other than in accordance with the Sales Procedure Order;

(viii) introduce any material change with respect to the operation of the Business (except as otherwise provided in the Budget), including any material change in the types, nature, composition or quality of products or services;

(ix) waive, release, assign, settle or compromise any pending or threatened Action regarding the Business or any Purchased Asset;

(x) fail to use reasonable best efforts to maintain all Permits relating to any of the Purchased Assets or the Business or take or fail to take any action which may result in the denial of any pending applications, the issuance of any cease and desist order or the imposition of any fines, forfeitures or other administrative actions by any Governmental Body with respect to the Facility or its operations;

(xi) alter in any way the manner in which it has regularly and customarily maintained its books and records, except as may be required by applicable law, any Governmental Body or professional standards of accountancy, or change any accounting policies or practices (except for changes required by reason of any concurred change in GAAP);

(xii) recognize any labor organization as a collective bargaining representative of any Persons whose place of employment is the Facility, or enter into a collective bargaining agreement with any labor organization effecting any such Persons;

(xiii) file any material Tax Return, make any material Tax election, or settle any material Liability for Taxes to the extent it would materially adversely affect Buyer in the Post-Closing Tax Period; and

(xiv) authorize or agree, in writing or otherwise, to do anything prohibited by this Section 8.2.

(c) From the date hereof until the Closing, Seller shall replace (including with refurbished parts), in the Ordinary Course of Business, but in any event prior to the Closing, any

spare parts held by Seller and its Affiliates that are designated or otherwise intended for use at the Facility and that are used prior to the Closing.

Section 8.3. Consents.

Seller shall use its reasonable best efforts, and Buyer shall use its reasonable best efforts to cooperate with Seller, to obtain at the earliest practicable date all Required Consents, including the Consents referred to in Section 5.3(b), and any other Consents required to consummate the Transactions; provided, however, that no Party shall be obligated to (a) pay any material consideration therefor to any third party from whom a Consent is requested (other than filing fees with any Governmental Body), (b) agree to any restrictions on their ability to operate the Business or the Purchased Assets or hold or exercise ownership over the Purchased Assets, or (c) initiate any Actions to obtain any such Consent.

Section 8.4. Regulatory Approvals.

(a) Seller and Buyer shall cooperate with each other and use (and shall cause their respective controlled Affiliates to use) reasonable best efforts: (i) to take, or to cause to be taken, all actions, and to do, or to cause to be done, all things reasonably necessary, proper or advisable on their part under this Agreement, applicable Law or otherwise to consummate and make effective the Transactions, (ii) to obtain promptly from any Governmental Body any Consents, Orders or Permits required to be obtained by Seller or Buyer or any of their respective controlled Affiliates in connection with the authorization, execution, delivery and performance of this Agreement and the consummation of the Transactions, (iii) to promptly, and in any event within five (5) Business Days after the date of entry of the Sale Order make all necessary filings and thereafter make any other required submissions with respect to this Agreement and the consummation of the Transactions required under applicable Laws, including jointly filing with the Federal Trade Commission and United States Department of Justice any notice required to be filed under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (as amended) and the rules and regulations promulgated thereunder, if required, (iv) to defend any and all Actions by or before any Governmental Body challenging this Agreement or the consummation of the Transactions, (v) to cause to be lifted or rescinded any injunction, decree, ruling, order or other action of any Governmental Body adversely affecting the ability of any of the Parties to consummate the Transactions, and (vi) to provide prompt notification to the other Parties of any actions pursuant to clauses (i)-(v) of this Section 8.4(a); provided, however, that (A) neither Buyer nor Seller shall be obligated to pay any material consideration or incur any costs (other than the expenses of their respective Representatives or filing fees with any Governmental Body) to obtain any Consents from third parties, whether or not they may be necessary, proper or advisable to consummate the Transactions and (B) without the prior written consent of Buyer, Seller shall not take, or agree to take, any action that would be binding on the Business or the Facility after the Closing, and Buyer shall not take, or agree to take, any action that would be binding on the Business or the Facility prior to the Closing.

(b) In connection with seeking the foregoing approvals, neither Buyer nor Seller nor any of their respective Affiliates shall be required to consent to, or offer or agree to, or otherwise take any action with respect to, any requirement, condition, limitation, understanding, agreement or order to (i) sell, license, assign, transfer, divest, hold separate or otherwise dispose of any of

their assets, their business or portion of their business in any manner, (ii) conduct, restrict, operate, invest or otherwise change any of their assets, their business or portion of their business in any manner, or (iii) impose any restriction, requirement or limitation on the operation of their business or portion of their business in any manner.

Section 8.5. Confidentiality.

(a) For the period from the date hereof until Closing, any and all information provided to Buyer, its Affiliates and their respective Representatives by or on behalf of Seller shall be governed by and subject to the Confidentiality Agreement dated as of February 24, 2014 (the "Confidentiality Agreement"). For the avoidance of doubt, as of the Closing, material non-public information with respect to the Purchased Assets and the Assumed Liabilities shall be deemed the confidential information of Buyer, and Seller shall maintain the confidentiality thereof in accordance with the terms of the Confidentiality Agreement for a period of two (2) years from and after the Closing Date, notwithstanding any earlier termination or expiration of the Confidentiality Agreement in accordance with the terms thereof.

(b) For the period from the date hereof until Closing, any and all information provided to Seller, its Affiliates and their respective Representatives by or on behalf of Buyer shall be governed by and subject to the terms and conditions of the Confidentiality Agreement.

Section 8.6. Preservation of Records.

Seller and Buyer shall (and shall cause their respective controlled Affiliates to) preserve and keep in their possession all records held by them on and after the date hereof relating to the Purchased Assets or the Assumed Liabilities for a period of two (2) years or such longer period as may be required by applicable Law. Seller and Buyer shall (and shall cause their respective controlled Affiliates to) make such records and personnel available to the other Party as may reasonably be requested by any such Party and at the sole cost and expense of such requesting Party, including in connection with any insurance claims or Actions involving the Purchased Assets or the Assumed Liabilities, or any governmental investigations of Seller or Buyer or any of their respective controlled Affiliates related to the Purchased Assets or the Assumed Liabilities or in order to enable Seller or Buyer to comply with their respective obligations hereunder. Buyer further acknowledges that Seller (i) shall have full and unfettered access as reasonably requested to all books and records being transferred in order to fulfill its obligations under the Bankruptcy Code and (ii) shall be entitled to copy any such records, at Seller's sole cost and expense, and to retain copies of such records. After the expiration of any applicable retention period, before Buyer shall dispose of any of such records, at least ninety (90) days' prior written notice to such effect shall be given by Buyer to Seller or its successors (or a Person designated by Seller and Seller or its successors (or a Person designated by Seller) shall have the opportunity (but not the obligation), at their sole cost and expense, to remove and retain all or any part of such records as it may in its sole discretion select. In the event Seller wish to destroy any records after the expiration of any applicable retention period, before Seller shall dispose of any of such records, at least ninety (90) days' prior written notice to such effect shall be given by Seller to Buyer or its successors (or a Person designated by Buyer) and Buyer or its successors (or such designated Person) shall have the opportunity (but not the obligation), at its sole cost

and expense, to remove and retain all or any part of such records as it may in its sole discretion select.

Section 8.7. Publicity.

Prior to the Closing and without limiting or restricting any Party from making any filing with the Bankruptcy Court with respect to this Agreement or the Transactions, no Party shall issue any press release or public announcement concerning this Agreement or the Transactions without obtaining the prior written approval of the other Party, which approval will not be unreasonably withheld or delayed, unless, in the reasonable judgment of any Party, disclosure is otherwise required by applicable Law or by the Bankruptcy Court with respect to filings to be made with the Bankruptcy Court in connection with this Agreement or by the applicable rules of the Securities Exchange Commission or any stock exchange on which the securities of such Party or its Affiliates are listed, provided that the Party intending to make such release shall use its commercially reasonable efforts consistent with such applicable Law or Bankruptcy Court requirement to consult with the other Parties with respect to the text thereof prior to making such release. After the Closing, the Parties may issue public announcements regarding the Transactions so long as such announcements do not disclose the specific terms or conditions of this Agreement or any other Transaction Document except where such terms and conditions have already been disclosed as required by Law, applicable stock exchange regulation or in filings that Seller is required to make in the Bankruptcy Court or office of the United States Trustee; provided, however, that the issuing Party shall use its commercially reasonable efforts to consult with the other Party with respect to the text thereof prior to such disclosure. Notwithstanding the foregoing, the Parties acknowledge and agree that the Equity Financing Sources and their Affiliates may provide general information about the subject matter of this Agreement in connection with its customary fund raising, marketing, informational or reporting activities.

Section 8.8. Transition Services Agreement; Further Assurances.

If requested by Buyer, Seller shall use commercially reasonable efforts to facilitate negotiations between Buyer and the Asset Manager to execute an agreement at Closing pursuant to which the Asset Manager will continue to provide to Buyer, on terms to be mutually agreed upon, certain general and administrative services then being provided by Seller and its Affiliates with respect to the Business or any of the Purchased Assets (the "Transition Services Agreement").

Section 8.9. Damage or Destruction.

(a) Until the Closing, the Purchased Assets shall remain at the risk of Seller. In the event of any damage to or destruction of the Facility (other than normal wear and tear) after the date hereof and prior to the Closing (in any such case, a "Destruction") or expropriation or condemnation by Order ("Condemnation"), Seller shall give prompt written notice to Buyer.

(b) If any Destruction occurring on or after the date hereof but prior to the Closing is covered by policies of insurance, all right and claim of Seller or its Affiliates to any proceeds of insurance for such Destruction shall be assigned and (if previously received by Seller or its

Affiliates and not used prior to the Closing Date to repair any damage or destruction) paid to Buyer at Closing.

(c) If any Condemnation occurring on or after the date hereof but prior to the Closing results in Condemnation proceeds or compensation to Seller in respect of Purchased Assets (“Condemnation Proceeds”), all right and claim of Seller or its Affiliates to any such Condemnation Proceeds shall be assigned and (if previously received by Seller or its Affiliates) paid to Buyer at Closing.

Section 8.10. Financing Cooperation.

(a) Prior to Closing and for a period of one year thereafter, Seller shall, and shall cause its Affiliates to, and shall use its commercially reasonable efforts, to cause the respective Representatives of Seller and its Affiliates to cooperate with Buyer as necessary and customary in connection with the arrangement of debt financing as may be reasonably requested by Buyer, including (i) causing appropriate senior executive officers and employees of Seller and its Affiliates to participate at reasonable times in a reasonable number of meetings, presentations and rating agency and due diligence sessions, (ii) assisting Buyer and its financing sources in the preparation of rating agency presentations and customary marketing materials, (iii) cooperating with the marketing efforts of Buyer and its financing sources for any portion of the contemplated financing, (iv) facilitating the pledging of collateral, including executing and delivering any customary pledge and security documents, currency, interest or commodity hedging arrangements or other definitive financing documents or other certificates, legal opinions, surveys and title insurance and documents as may be reasonably requested by Buyer (including a certificate of the chief financial officer of Seller or its appropriate Affiliates with respect to solvency matters as of the Closing on a pro forma basis) to facilitate the pledging of collateral from and after the Closing (provided that any obligations contained in such documents shall be effective no earlier than as of the Closing), (v) providing to Buyer and its financing sources all documentation and other information required by regulatory authorities under applicable “know your customer” and anti-money laundering rules and regulations, including without limitation the PATRIOT Act and (vi) facilitating the execution and delivery of definitive documents related to such financing as may be reasonably requested by the Buyer; provided that neither Seller nor any of its Affiliates shall be required, under the provisions of this Section 8.10 or otherwise in connection with the any such financing to pay any commitment or other similar fee that is not advanced or simultaneously reimbursed by Buyer. Buyer shall indemnify, defend and hold harmless Seller and its Affiliates and their respective Representatives from and against any and all losses and reasonable out-of-pocket expenses suffered or incurred by them in connection with their assistance to Buyer in connection with any financing contemplated by Buyer. Nothing contained in this Section 8.10 or otherwise shall require Seller or any of its Affiliates to be an issuer or other obligor with respect to any financing prior to or following the Closing.

(b) In connection with the financing described in Section 8.10, Buyer may be required to prepare audited financial statements regarding the Business. Seller shall use its commercially reasonable efforts (and use its commercially reasonable efforts to cause its Representatives) to provide cooperation and assistance to Buyer or Buyer’s Representatives in connection with Buyer’s preparation and completion of audited financial statements for the fiscal periods for which Buyer is requested or required to prepare such statements (including reviews

of any unaudited interim financial information to be prepared or provided in connection therewith). In addition, following the Closing Date and for a period of one (1) year after the Closing Date, unless Seller shall have been liquidated, Seller shall use (and use its reasonable best efforts to cause its Representatives to use) its reasonable best efforts to provide (i) cooperation and assistance in Buyer's preparation of such normal and customary financial statements and other financial information regarding the Business (including MD&A, unaudited five year summary and selected financial information, pro forma financial information, capitalization table, the issuance by any auditor of "comfort letters" and assistance in responding to comment letters), (ii) to any auditors such customary certifications (including management representation letters) and other information (including information necessary for subsequent event reviews) as such auditors may reasonably require and (iii) all necessary assistance to Buyer, its Representatives and Buyer's auditors related to Buyer's preparation of any financial reporting, responding to comment letters and transitioning of auditors (including reasonably requested access to working papers). Seller shall give (and use its reasonable best efforts to cause its Representatives to give) Buyer and its Representatives access at all reasonable times and on reasonable advance notice to the books, records, properties, working papers and personnel of Seller and its Affiliates (including the senior finance and accounting personnel employed or retained by Seller or any of its Affiliates, and Seller's accountants) to the extent such access is reasonably required by Buyer and its Representatives in connection with the activities contemplated by this Section 8.10(b).

Section 8.11. Removal of Marks.

Buyer shall, as soon as reasonably practicable following the Closing, remove all trademarks, trade names and service marks utilizing the name "Optim" or "Optim Energy" (the "Optim Marks") from (i) all sales literature, marketing materials, letterheads and stationery (and in any event Buyer shall remove the Optim Marks from such materials within one hundred eighty (180) days of the Closing); and (ii) all buildings, signage and vehicles, including the Facility (and in any event Buyer shall remove the Optim Marks from such buildings, signage and vehicles within ninety (90) days of the Closing).

Section 8.12. Substitute Credit Arrangements.

Prior to and following the Closing, Buyer shall use its commercially reasonable efforts to deliver to each appropriate Governmental Body substitute credit arrangements in replacement of the letters of credit and/or guaranties currently provided by Seller and its Affiliates which are set forth in Schedule 8.12. To the extent Buyer does not deliver any such substitute credit arrangement prior to the Closing, Buyer shall indemnify and hold harmless Seller and its Affiliates from any and all Liabilities incurred by Seller or its Affiliates under any such outstanding letters of credit and/or guaranties as a result of Buyer's conduct of the Business and operation of the Facility from and after the Closing.

Section 8.13. Insurance Matters.

From and after the Closing, Seller shall use commercially reasonable efforts to cooperate with and permit Buyer to seek and obtain coverage under each of the occurrence based insurance policies of Seller and its Affiliates, including, without limitation, all general liability, automobile

liability and other occurrence based insurance policies, whether primary, umbrella, or excess, issued at any time prior to the Closing under which the Facility is insured (the “Occurrence Based Policies”). Seller shall not, and shall cause its Affiliates not to, release, commute, buy-back, or otherwise eliminate the coverage available for the Facility under any Occurrence Based Policy. Seller shall be responsible for any out-of-pocket expenses and deductibles payable with respect to any claims asserted by Buyer under the Occurrence Based Policies. The rights of Buyer under this Section 8.13 shall be without prejudice to the rights of Seller and its Affiliates to continue to make claims under the Occurrence Based Policies.

Section 8.14. Exclusivity.

During the period from the date of this Agreement through the date of entry by the Bankruptcy Court of the Sales Procedures Order or the earlier termination of this Agreement pursuant to Section 4.4, Seller shall not, and shall its Affiliates not to, take or permit any other Person on its behalf to take any action to encourage, initiate or engage in discussions or negotiations with, or provide any information to, any Person (other than Buyer) concerning any purchase of the Facility or the Purchased Assets, or other similar transaction. Seller shall, and shall cause its Affiliates and its and their respective representatives to, immediately cease and cause to be terminated all existing discussions or negotiations with any Person conducted heretofore with respect to any proposal involving a purchase of the Facility or the Purchased Assets.

ARTICLE IX

EMPLOYEES AND EMPLOYEE BENEFITS; TAX MATTERS

Section 9.1. Employment.

If the O&M Contract is not an Assumed Contract, prior to the Closing, Buyer shall deliver, in writing individually or generally, an offer of employment commencing on the Closing Date and contingent upon the Closing, on an at-will basis (except to the extent otherwise expressly agreed in a writing signed by Buyer and such employee) and on such other terms and conditions as Buyer may determine, in its sole discretion, to each of the individuals designated by Buyer, in its sole discretion, who shall be employed by Buyer to work at the Facility.

Section 9.2. Employee Benefits.

(a) Welfare and Retirement. If the O&M Contract is not an Assumed Contract, and if and to the extent that any existing Facility Employees are offered employment by Buyer, such employment shall include welfare and retirement benefits that are consistent with Buyer’s existing plans and policies, if any. Buyer shall not be responsible for any compensation or other benefits due to any Facility Employees on or prior to the Closing Date.

(b) Severance. Buyer shall not be responsible for any severance Liabilities with respect to any Facility Employees whose employment is terminated on or prior to the Closing Date.

(c) WARN Act. Buyer shall not be responsible for any WARN Act Liabilities with respect to any Facility Employees whose employment is terminated on or prior to the Closing Date.

(d) No Rights to Employment or Benefits. Nothing expressed or implied in this Agreement is intended to confer upon any Person or his or her legal representatives any rights or remedies, including, any rights of employment for any specified period, of any nature or kind whatsoever under or by reason of this Agreement. Nothing contained in this Section 9.2 or elsewhere in this Agreement shall be construed to modify any employee benefit plan of Buyer or Seller (or any Person acting as a professional employer organization or employee leasing company) or prevent the termination of employment of any Facility Employee or any change in the employee benefits available to any Facility Employee.

Section 9.3. Tax Matters.

(a) Buyer and Seller shall be responsible for 50% of the aggregate sales, use, stamp, documentary stamp, filing, recording, transfer (including any real property transfer taxes), goods and services, value added, or similar Taxes payable in connection with the Transactions ("Transfer Taxes"), regardless of whether such Transfer Taxes are levied on Seller, Buyer or the Purchased Assets. To the extent that either party is required to pay an amount in excess of such party's allocable portion of any Transfer Tax, the other party shall promptly reimburse such party on demand for the excess portion of such Transfer Tax. Seller and Buyer shall cooperate and consult with each other prior to filing any Tax Returns in respect of Transfer Taxes and in determining each party's allocable portion of each Transfer Tax pursuant to this Section 9.3; provided, that, except as otherwise required by applicable Law, Buyer shall prepare and file all Tax Returns with respect to Transfer Taxes and shall provide a copy of such proposed filings to Seller for Seller's review and comment and shall reflect thereon any reasonable comments submitted by Seller at least five (5) days before the due date for filing such Tax Return, and shall file such Tax Return and provide a copy of such filing to Seller. The Parties shall cooperate and otherwise use commercially reasonable efforts to obtain any exemptions, exclusions or available refunds with respect to Transfer Taxes.

(b) Subject to Section 3.1(e), all real and personal property Taxes and similar ad valorem Taxes levied with respect to the Purchased Assets or the Business for any Straddle Period during which such Taxes accrue shall be prorated between Seller and Buyer, with (i) Seller being liable for such Taxes attributable to any portion of a Straddle Period ending on the Closing Date and (ii) Buyer being liable for such Taxes attributable to any portion of a Straddle Period beginning after the Closing Date. All such pro rations shall be allocated so that items relating to the portion of a Straddle Period ending on the Closing Date shall be allocated to Seller based upon the number of days in the Straddle Period on and prior to the Closing Date and items related to the portion of a Straddle Period beginning after the Closing Date shall be allocated to Buyer based upon the number of days in the Straddle Period after the Closing Date. If any refund, rebate, or similar payment is received by or on behalf of Buyer or Seller for any Taxes of a Straddle Period to which this Section 9.3(b) applies, such payment shall be allocated to and prorated between Seller and Buyer in the same manner as the Tax to which such payment relates. Buyer and Seller will promptly notify each other upon receipt of a refund, rebate or similar payment described in this Section 9.3(b). Buyer shall reimburse Seller on the Closing Date for

any amount of such Taxes paid by or on behalf of Seller on or prior to the Closing Date which are Buyer's responsibility under this Agreement.

(c) Seller shall prepare and file, or cause to be prepared and filed, in accordance with past practice and on a timely basis all Tax Returns (other than with respect to Income Taxes) ("Non-Income Tax Returns") relating to the Purchased Assets and Business for Pre-Closing Tax Periods (other than Straddle Periods), and Seller shall timely pay all Taxes required to be paid with respect to such Non-Income Tax Returns. Seller shall deliver to Buyer a copy of each Non-Income Tax Return relating to any Pre-Closing Tax Period prepared by, or on behalf of, Seller at least thirty (30) days prior to the due date for such return. After the Closing Date, Buyer shall prepare and file (or cause to be prepared and filed) all Non-Income Tax Returns with respect to the Purchased Assets or the Business for any Straddle Period and for Post-Closing Tax Periods. Seller shall promptly provide Buyer on demand reimbursement for (x) all Taxes paid by or on behalf of Buyer which are Seller's responsibility under this Agreement and (y) any refund, rebate or similar payment for Taxes allocated to Buyer under this Agreement. Buyer shall promptly provide Seller on demand reimbursement for all Taxes which are Buyer's responsibility under this Agreement. Buyer shall deliver to Seller a copy of any Non-Income Tax Return relating to any Straddle Period prepared by, or on behalf of, Buyer at least thirty (30) days prior to the due date for such return and shall not file such Non-Income Tax Return without the written approval of Seller (not to be unreasonably withheld or delayed). With respect to any such Taxes for a Straddle Period, Seller shall pay its allocable share of such Taxes (including any additional Taxes assessed by a Tax Authority with respect to a Straddle Period) to Buyer within five (5) days of Seller's written approval of the relevant Tax Return.

(d) In the case of any audit, examination, or other proceeding (other than with respect to Income Taxes) ("Tax Proceeding") with respect to any Straddle Period or any Pre-Closing Tax Period, the party receiving notice of such Tax Proceeding shall inform the other party in writing within fifteen (15) days after the receipt of written notice thereof. In the event Buyer fails to timely provide Seller with written notice of such Tax Proceeding, Seller's obligation to indemnify Buyer or its Affiliates hereunder shall be reduced only to the extent of any adverse consequence arising as a result of such failure to notify. In the case of any Tax Proceeding relating to any Pre-Closing Tax Period, Seller shall be entitled to control the conduct of such Tax Proceeding, provided that Buyer may participate in such Tax Proceeding at its own expense. In the case of any Tax Proceeding with respect to a Straddle Period, the Parties shall jointly represent their interests in any Tax Proceeding, shall employ counsel of their mutual choice and shall cooperate with each other and each other's representatives in a prompt and timely manner. The Parties shall mutually agree on any settlement or other disposition of such Tax Proceeding. In the event the Parties are unable to agree regarding any aspect of the conduct of any such Tax Proceeding, the decision shall be made by the counsel employed to pursue such Tax Proceeding on the basis of the counsel's good faith judgment regarding the course of action that would produce the overall lowest present value of Tax and litigation costs of the Parties. Any expenses arising from a Tax Proceeding with respect to a Straddle Period shall be borne by Buyer and Seller in the same proportion as such related Taxes are borne by Buyer and Seller in accordance with Section 9.3(c). Buyer shall have the right to control the conduct of any other Tax Proceeding not discussed in this Section 9.3(d).

(e) Buyer and Seller will provide each other with such assistance, cooperation and information as either of them reasonably may request of the other in preparing and filing any Non-Income Tax Return, amended Tax Return or claim for refund, determining a liability for Taxes or a right to a refund, rebate, abatement or recovery of such Taxes, or participating in or conducting any audit or other proceeding in respect of such Taxes. Such assistance, cooperation and information shall include retaining and providing copies of relevant Non-Income Tax Returns or portions thereof, together with accompanying schedules, related work papers and documents relating to rulings and other determinations by Taxing Authorities and all records and information which may be relevant with respect to any such Tax matter, provided, however that such assistance, cooperation and information shall not include providing materials subject to confidentiality obligations or attorney client privilege or which may not be shared with the other Party pursuant to applicable Law. Any information obtained under this paragraph shall be kept confidential except as may be otherwise necessary in connection with the filing of Non-Income Tax Returns or claims for refund or in conducting any audit or other proceeding.

(f) In accordance with section 1146(a) of the Bankruptcy Code, the making or delivery of any instrument or transfer, including the filing of any deed or other document of transfer to evidence, effectuate or perfect the right, title and interest contemplated by this Agreement, shall be in contemplation of a plan of reorganization to be confirmed in the Chapter 11 Cases, and such shall be free and clear of any and all Transfer Taxes. Such instrument, Order and Contract transferring the Purchased Assets to Buyer shall contain the following endorsement:

“Because this instrument has been authorized pursuant to an order of the United States Bankruptcy Court for the District of Delaware, in contemplation of a plan of reorganization of the Debtors, it is exempt from transfer taxes, stamp taxes or similar taxes pursuant to 11 U.S.C. §1146(a).”

Notwithstanding the foregoing, in the event any Transfer Tax or similar Taxes are payable hereunder to a Governmental Body, such Transfer Taxes shall be borne 50% by Buyer and 50% by Seller.

(g) The obligations of the Parties under this Section 9.3 shall survive the Closing.

ARTICLE X

CONDITIONS TO CLOSING

Section 10.1. Conditions Precedent to Obligations of Buyer.

The obligations of Buyer to consummate the Transactions or to take the other actions required to be taken by Buyer at the Closing, is subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived in whole or in part, only if Buyer consents to such waiver in writing):

(a) The representations and warranties of Seller set forth in Sections 5.1, 5.2, 5.16 and 5.18(c) of this Agreement shall be true and correct at and as of the date hereof and as of the Closing Date as if made on the Closing Date. All of the other representations and warranties of

Seller set forth in Article V of this Agreement (and when such representations or warranties are qualified by materiality, “Material Adverse Effect” or similar qualifiers, without consideration of such qualifiers) shall be true and correct at and as of the date hereof and as of the Closing Date as if made on the Closing Date except if the effect of all such breaches of representations and warranties, individually or in the aggregate, would not reasonably be expected to result in a Material Adverse Effect;

(b) Seller shall have performed and complied in all material respects with all obligations and agreements required in this Agreement to be performed or complied with by them prior to the Closing Date;

(c) Seller shall have executed, delivered and/or filed or authorized Buyer to file such termination statements, lien releases, discharges, financing change statements or other documents, notices or other instruments as Buyer may reasonably deem necessary to release any Liens (other than Permitted Exceptions) on the Purchased Assets;

(d) Each Consent set forth on Schedule 10.1(d) shall have been obtained without any change in the terms and conditions of any Permit or Contract to which such Consent relates from those in effect on the date hereof that is materially adverse to Buyer or the Business;

(e) There shall have not been commenced any Action by a Governmental Body of competent jurisdiction for the purpose of restraining, enjoining, delaying or otherwise materially restricting the consummation of the Transactions or materially limiting or materially restricting the conduct of Buyer or any of its Affiliates or the operation of the Business following consummation of the Transactions or requiring Buyer or any of its Affiliates to divest or hold separate any assets or businesses nor shall any such Action be pending;

(f) Buyer shall have received an American Land Title Association 2006 Form extended policy of title insurance (or such other form as acceptable to Buyer) or a binding marked commitment to issue such policy on forms of and issued by one or more title companies reasonably satisfactory to Buyer insuring Buyer’s title to the Owned Real Property listed in Schedule 5.8(a) in an amount reasonably acceptable to Buyer, subject only to such Permitted Exceptions and other exceptions as are satisfactory to Buyer;

(g) If any material Permits required to own the Purchased Assets, to generate and sell power from the Facility or to conduct the Business do not constitute Purchased Assets or if any Required Consent with respect to any such Permit shall not have been obtained as of the Closing Date, Buyer shall have obtained a replacement Permit for such Permit in its own name;

(h) Seller shall have delivered, or caused to be delivered, to Buyer all of the items set forth in Section 4.2;

(i) Seller shall have delivered to Buyer a duly executed and acknowledged certificate of an authorized officer or the manager of the general partner of Seller certifying that at Closing the quality and specifications of the Coal are at a level reasonably consistent with the Coal inventory at the Facility existing as of the date of this Agreement;

(j) No Material Adverse Effect shall have occurred; and

(k) Seller shall have delivered to Buyer a certificate of non-foreign status pursuant to Section 1445 of the Code and Treasury Regulation Section 1.1445-2(b) in form and substance reasonably satisfactory to Buyer.

Section 10.2. Conditions Precedent to Obligations of Seller.

The obligations of Seller to consummate the Transactions are subject to the fulfillment, prior to or on the Closing Date, of each of the following conditions (any or all of which may be waived by Seller in whole or in part to the extent permitted by applicable Law):

(a) The representations and warranties of Buyer set forth in Section 6.1, 6.2 and 6.5 of this Agreement shall be true and correct at and as of the date hereof and as of the Closing. All of the other representations and warranties of Buyer set forth in Article VI of this Agreement (and when such representations or warranties are qualified by materiality, “material adverse effect” or similar qualifiers, without consideration of such qualifiers) shall be true and correct at and as of the date hereof and as of the Closing Date as if made on the Closing Date, except if the effect of all such breaches of representations and warranties taken together would not reasonably be expected to result in a material adverse effect on the ability of Buyer to perform its obligations under this Agreement or to consummate the Transactions;

(b) Buyer shall have performed and complied in all material respects with all obligations and agreements required by this Agreement to be performed or complied with by them on or prior to the Closing Date; and

(c) Buyer shall have delivered, or caused to be delivered, to Seller all of the items set forth in Section 4.3.

Section 10.3. Conditions Precedent to Obligations of Buyer and Seller.

The respective obligations of Buyer and Seller to consummate the Transactions are subject to the fulfillment, on or prior to the Closing Date, of each of the following conditions (any or all of which may be waived by agreement of Buyer and Seller in whole or in part to the extent permitted by applicable Law):

(a) there shall not be in effect any Order by a Governmental Body of competent jurisdiction restraining, enjoining, delaying or otherwise materially restricting the consummation of the Transactions, and no Order by a Governmental Body of competent jurisdiction seeking or asserting any of the foregoing shall be pending;

(b) the Sale Procedures Order (i) shall have been entered on the docket by the Clerk of the Bankruptcy Court and (ii) shall not have been stayed;

(c) the Sale Order (i) shall have been entered on the docket by the Clerk of the Bankruptcy Court and (ii) shall not have been stayed;

(d) the Sale Order shall approve and authorize the assumption and assignment of the Assumed Contracts and the Assumed Contracts shall have been actually assumed and assigned to Buyer such that the Assumed Contracts will be in full force and effect from and after the Closing

with non-debtor parties being barred and enjoined from asserting against Buyer, among other things, defaults, breaches or claims of pecuniary losses existing as of the Closing or by reason of the Closing; and

(e) each Consent set forth on Schedule 10.3(d) shall have been obtained.

Section 10.4. Frustration of Closing Conditions.

Neither Seller nor Buyer may rely on the failure of any condition set forth in Section 10.1, Section 10.2 or Section 10.3, as the case may be, if such failure was primarily caused by such Party's failure to comply with any provision of this Agreement.

ARTICLE XI

NON-SURVIVAL OF REPRESENTATIONS AND WARRANTIES

Section 11.1. Non-Survival of Representations and Warranties.

The representations, warranties, covenants and agreements (other than Article II, Article III, Section 8.5, 8.6, 8.10, 8.11 and 8.12 and Article XII) in this Agreement shall terminate at the Closing and, following the Closing, no Party shall make any claim whatsoever for any breach of any such representation, warranty or covenant hereunder. All covenants and agreements contained in this Agreement shall survive the Closing in accordance with their respective terms until fully performed in accordance with its terms.

ARTICLE XII

MISCELLANEOUS

Section 12.1. Remedies.

It is understood and agreed by the Parties that money damages would not be a sufficient remedy for any breach of this Agreement by any Party, including a failure to take all actions necessary to consummate the transactions contemplated by this Agreement in accordance with the terms of this Agreement, and each non-breaching Party should be entitled to specific performance and injunctive or other equitable relief as a remedy of such a breach in addition to any other rights which such Party may have at law, in equity or pursuant to this Agreement, and to thereafter cause the transactions contemplated by this Agreement to be consummated on the terms and subject to the conditions set forth herein. Each of the Parties hereto hereby waives (i) any defenses in any action for specific performance that a remedy at law would be adequate and (ii) any requirement under any law to post a bond or other security as a prerequisite to obtaining equitable relief. If any party brings any action to enforce specifically the performance of the terms and provisions hereof by any other party, the Termination Date shall automatically be extended by (x) the amount of time during which such action is pending, plus twenty (20) Business Days or (y) such other time period established by the court presiding over such action. Seller shall be entitled to seek specific performance to enforce the terms of the Equity Commitment Letter directly against the Sponsors (as defined therein) in accordance with the terms thereof (such Sponsors having waived any right or defense under section 365(c)(2) of the

Bankruptcy Code with respect to such enforcement) and to cause Buyer to effect the Closing in accordance with Section 4.1, on the terms and subject to the conditions in this Agreement, if, but only if, (A) all conditions in Section 10.1 or Section 10.3 (other than those conditions that by their nature are to be satisfied at the Closing, but subject to those conditions being capable of being satisfied at the Closing) have been satisfied, (B) Buyer fails to complete the Closing by the date the Closing is required to have occurred pursuant to Section 4.1 and (C) Seller has irrevocably confirmed that if specific performance is granted and the Equity Financing is funded, then the Closing will occur. The Parties acknowledge and agree that, notwithstanding anything to the contrary contained herein, prior to the Closing, (a) the sole and exclusive remedy available to Buyer in the event of Seller's breach of any representation, warranty, covenant or agreement of Seller in this Agreement (including a willful breach) shall be to terminate this Agreement pursuant to and in accordance with Section 4.4, Section 4.6 and Section 4.7, or, in the alternative, the right to seek specific performance pursuant to this Section 12.1; and (b) the sole and exclusive remedy available to Seller in the event of a breach by Buyer of any representation, warranty, covenant or agreement by Buyer in this Agreement shall be to terminate this Agreement if and to the extent permitted under Section 4.4, Section 4.6 and Section 4.7, or, in the alternative, the right to seek specific performance pursuant to this Section 12.1.

Section 12.2. Expenses.

Except as otherwise provided herein or in the Sale Procedures Order or in the Sale Order, each of the Parties shall pay its own expenses in connection with this Agreement and the transactions contemplated hereby, including any legal and accounting fees, whether or not the transactions contemplated hereby are consummated.

Section 12.3. Non-Recourse.

Except to the extent a named party to this Agreement or the Equity Commitment Letter, and subject in all cases to the terms and conditions of and limitations in, the Equity Commitment Letter (and then only to the extent of the specific obligations undertaken by such named party in this Agreement or the Equity Commitment Letter and not otherwise), the Parties acknowledge and agree that no past, present or future director, manager, officer, employee, incorporator, member, partner, stockholder, agent, attorney, Representative, Affiliate or financing source (other than the Persons party to the Equity Commitment Letter and then only with respect to the specific obligations set forth therein with respect to such party) of any of the Parties to this Agreement (each, a "Non-Recourse Person"), in such capacity, shall have any liability or responsibility (in contract, tort or otherwise) for any Liabilities of any party hereto, as applicable, under this Agreement or for any claim based on, in respect of, or by reason of, the transactions contemplated hereby and thereby. Except to the extent otherwise set forth in, and subject in all cases to the terms and conditions of and limitations in, the Equity Commitment Letter, or as a consequence of receiving specific performance pursuant to Section 12.1, this Agreement may only be enforced against, and any Action based upon, arising out of, or related to this Agreement, or the negotiation, execution or performance of this Agreement, may only be brought against the entities that are expressly named as parties hereto or to the Equity Commitment Letter and then only with respect to the specific obligations set forth herein or therein with respect to such party. Each Non-Recourse Person is expressly intended as a third-party beneficiary of this Section 12.3.

Section 12.4. Submission to Jurisdiction; Consent to Service of Process.

(a) Without limiting any Party's right to appeal any Order of the Bankruptcy Court, (i) the Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Agreement and to decide any claims or disputes which may arise or result from, or be connected with, this Agreement, any other Transaction Document, any breach or default hereunder or thereunder, or the Transactions, and (ii) any and all proceedings related to the foregoing shall be filed and maintained only in the Bankruptcy Court, and the Parties hereby consent to and submit to the jurisdiction and venue of the Bankruptcy Court and shall receive notices at such locations as indicated in Section 12.9 hereof; provided, however, that if the Chapter 11 Cases have closed, the Parties agree to unconditionally and irrevocably submit to the exclusive jurisdiction of the United States District Court for the Southern District of New York sitting in New York County or the Commercial Division, Civil Branch of the Supreme Court of the State of New York sitting in New York County and any appellate court from any thereof, for the resolution of any such claim or dispute. The Parties hereby irrevocably waive, to the fullest extent permitted by applicable Law, any objection which they may now or hereafter have to the laying of venue of any such dispute brought in such court or any defense of inconvenient forum for the maintenance of such dispute. Each of the Parties agrees that a judgment in any such dispute may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law.

(b) Each of the Parties hereby consents to process being served by any Party to this Agreement in any suit, action or proceeding by delivery of a copy thereof by personal delivery, prepaid overnight courier or certified mail in accordance with the provisions of Section 12.9.

Section 12.5. Waiver of Right to Trial by Jury.

THE PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT THAT THEY MAY HAVE TO TRIAL BY JURY OF ANY CLAIM OR CAUSE OF ACTION, OR IN ANY PROCEEDING, DIRECTLY OR INDIRECTLY BASED UPON OR ARISING OUT OF THIS AGREEMENT OR THE TRANSACTIONS (WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY). EACH PARTY (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT, OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HAS BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION 12.5.

Section 12.6. Time of Essence.

With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

Section 12.7. Entire Agreement; Amendments and Waivers.

This Agreement (including the Schedules and Exhibits hereto) and the other Transaction Documents represent the entire understanding and agreement between the Parties with respect to

the subject matter hereof and supersede all prior discussions and agreements between the Parties with respect to the subject matter hereof. This Agreement can be amended, supplemented or changed only by written instrument making specific reference to this Agreement and executed by each of the Parties hereto. Any provision hereof can be waived only by written instrument making specific reference to this Agreement and signed by the applicable Party against whom enforcement of any such waiver is sought. No action taken pursuant to this Agreement, including any investigation by or on behalf of any Party, shall be deemed to constitute a waiver by the Party taking such action of compliance with any representation, warranty, covenant or agreement contained herein. The waiver by any Party hereto of a breach of any provision of this Agreement shall not operate or be construed as a further or continuing waiver of such breach or as a waiver of any other or subsequent breach. No failure on the part of any Party to exercise, and no delay in exercising, any right, power or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of such right, power or remedy by such Party preclude any other or further exercise thereof or the exercise of any other right, power or remedy. All remedies hereunder are cumulative and, except as otherwise provided herein, are not exclusive of any other remedies provided by Law.

Section 12.8. Governing Law.

THIS AGREEMENT, THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER, AND ANY CLAIM OR CONTROVERSY (WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY) DIRECTLY OR INDIRECTLY BASED UPON OR ARISING OUT OF THIS AGREEMENT OR THE NEGOTIATION, EXECUTION OR PERFORMANCE OF THIS AGREEMENT (INCLUDING ANY CLAIM OR CAUSE OF ACTION BASED UPON, ARISING OUT OF OR RELATED TO ANY REPRESENTATION OR WARRANTY MADE IN OR IN CONNECTION WITH THIS AGREEMENT OR AS AN INDUCEMENT TO ENTER INTO THIS AGREEMENT), INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, SHALL IN ALL RESPECTS BE GOVERNED BY AND INTERPRETED, CONSTRUED, AND DETERMINED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF NEW YORK (WITHOUT REGARD TO ANY CONFLICT OF LAWS PROVISION THAT WOULD REQUIRE THE APPLICATION OF THE LAW OF ANY OTHER JURISDICTION OTHER THAN THE PRINCIPLES SET FORTH IN SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK) AND, TO THE EXTENT APPLICABLE, THE BANKRUPTCY CODE.

Section 12.9. Notices.

All notices and other communications under this Agreement shall be in writing and shall be deemed duly given (i) when delivered personally or by prepaid overnight courier, with a record of receipt, (ii) the fourth day after mailing if mailed by certified mail, return receipt requested, or (iii) the day of transmission, if sent by email prior to 5:00 p.m. eastern prevailing time on any Business Day or the Business Day after transmission, if sent after such time (with a copy promptly sent by prepaid overnight courier with record of receipt or by certified mail, return receipt requested), to the Parties at the following addresses or email addresses (or to such other address or email address as a Party may have specified by notice given to the other Parties pursuant to this Section 12.9):

If to Seller, to:

Optim Energy Twin Oaks, LP
c/o Competitive Power Ventures, Inc.
8403 Colesville Road, Suite 915
Silver Spring, MD 20910
Telephone: 301-628-4214
Attention: Nick Rahn
Email: NRahn@cpv.com

With copies (which shall not constitute notice) to:

Bracewell & Giuliani LLP
Goodwin Square
225 Asylum Street, Suite 2600
Hartford, CT 06103
Telephone: 860-947-9000
Attention: Kurt Mayr
Email: Kurt.Mayr@bgllp.com

and

Bracewell & Giuliani LLP
1251 Avenue of Americas, 49th Floor
New York, New York 10020-1104
Telephone: 212-508-6100
Attention: John Klauberg
Robert G. Burns
Email: John.Klauberg@bgllp.com
Robert.Burns@bgllp.com

If to Buyer, to:

Twin Oaks Power, LLC
c/o ArcLight Capital Partners, LLC
200 Clarendon Street, 55th Floor
Boston, MA 02117
Attention: General Counsel
Email: tburke@arclightcapital.com

With copies (which shall not constitute notice) to:

Hunton & Williams LLP
200 Park Avenue
New York, NY 10166
Telephone: 713-835-3600
Attn: Peter Partee and
Michael Madden

E-mail: ppartee@hunton.com
mmadden@hunton.com

Section 12.10. Severability.

If any term or provision of this Agreement is invalid, illegal, or incapable of being enforced by any law or public policy, all other terms or provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the Transactions is not affected in any manner materially adverse to any Party. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner in order that the Transactions are consummated as originally contemplated to the greatest extent possible. Notwithstanding the foregoing, the parties intend that the remedies and limitations thereon contained in Section 4.6, Section 4.7 and Section 12.1 be construed as an integral provision of this Agreement and that such remedies and limitations shall not be severable in any manner that increases a party's liability or obligations hereunder.

Section 12.11. Binding Effect; Assignment.

This Agreement shall be binding upon the parties and their respective successors (including any trustee, receiver, receiver-manager, interim receiver or monitor or similar officer appointed in respect of Seller in the Chapter 11 Cases) and permitted assigns. Except for Buyer's right to direct that some or all of the Purchased Assets be assigned and conveyed to one or more subsidiaries of Buyer, no assignment of this Agreement or of any rights or obligations hereunder may be made by Seller or Buyer (by operation of law or otherwise) without the prior written consent of the other Party and any attempted assignment without the required consent shall be void; provided, however, Buyer shall have the right to assign its rights and/or delegate its obligations hereunder (A) to any Affiliates (B) to any financing sources for collateral purposes or (C) to any subsequent purchaser of all or any portion of the stock or assets of Buyer or the Business. Upon any such permitted assignment, the references in this Agreement to Buyer shall also apply to any such assignee unless the context requires otherwise.

Section 12.12. No Third Party Beneficiaries.

Except as provided in Section 12.3, this Agreement shall inure solely to the benefit of the Parties and their respective successors and permitted assigns and nothing herein, express or implied, is intended to or shall confer upon any Person that is not a Party (or a successor or permitted assign of any such Party) any legal or equitable right, benefit or remedy of any nature whatsoever, including any rights of employment for any specified period, under or by reason of this Agreement.


Section 12.13. Counterparts.

This Agreement may be executed and delivered (including by electronic transmission) in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement.

[REMAINDER OF PAGE INTENTIONALLY BLANK]

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its respective representatives thereunto duly authorized, as of the date first written above.

OPTIM ENERGY TWIN OAKS, LP
By: OPTIM ENERGY TWIN OAKS GP, LLC,
its General Partner

By: 
Name: Nicholas R. Rahn
Title: Manager

TWIN OAKS POWER, LLC

By: _____
Name: Daniel R. Revers
Title: President

IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its respective representatives thereunto duly authorized, as of the date first written above.

OPTIM ENERGY TWIN OAKS, LP
By: OPTIM ENERGY TWIN OAKS GP, LLC,
its General Partner


By: _____
Name: Nicholas R. Rahn
Title: Manager

TWIN OAKS POWER, LLC

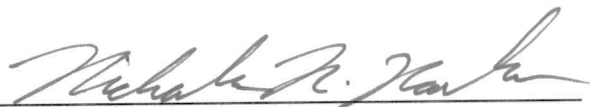
By:  _____
Name: Daniel R. Revers
Title: President

SOLELY FOR PURPOSES OF SECTION 4.6:


OPTIM ENERGY, LLC

By: 
Name: Nicholas R. Rahn
Title: Chief Executive Officer


OPTIM ENERGY MARKETING, LLC

By: 
Name: Nicholas R. Rahn
Title: Manager

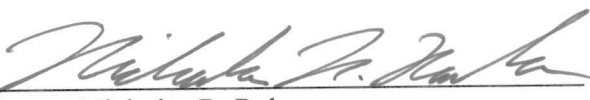
OEM 1, LLC

By: 
Name: Nicholas R. Rahn
Title: Manager

OPTIM ENERGY GENERATION, LLC

By: 
Name: Nicholas R. Rahn
Title: Manager

OPTIM CEDAR BAYOU 4, LLC

By: 
Name: Nicholas R. Rahn
Title: Manager

OPTIM ENERGY ALTURA COGEN, LLC

By: 

Name: Nicholas R. Rahn

Title: Manager

OPTIM ENERGY TWIN OAKS GP, LLC

By: 

Name: Nicholas R. Rahn

Title: Manager