

5.6 Disclaimer of Certain Implied Warranties.

Buyer agrees that except for the representations and warranties expressly set forth in this Agreement, the Purchased Assets are being sold on an “AS IS” basis and in “WITH ALL FAULTS” condition, and, without limiting the generality of the foregoing, SELLER MAKES NO WRITTEN OR ORAL REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE FITNESS, MERCHANTABILITY OR SUITABILITY OF THE PURCHASED ASSETS FOR ANY PARTICULAR PURPOSE OR THE OPERATION OF THE SYSTEM BY BUYER.

5.7 Financing

Buyer has the financial capability sufficient to permit it to perform timely its obligations hereunder and under the Related Agreements. Buyer acknowledges that this Agreement does not provide for a financing contingency as a condition to Buyer’s obligations to perform hereunder. At Seller’s request, Buyer shall promptly provide Seller with reasonable evidence that it has sufficient capital resources to perform its obligations hereunder and under the Related Agreements.

**ARTICLE 6.**  
**COVENANTS OF EACH PARTY**

6.1 Efforts to Close

Subject to the terms and conditions herein provided, including Article 9 and Article 10 hereof, each of the parties hereto agrees to use commercially reasonable efforts to take all actions and to do all things necessary, proper or advisable under applicable Laws to consummate and make effective, as soon as reasonably practicable, the transactions contemplated hereby, including the satisfaction of all conditions set forth herein. Such actions shall include exerting commercially reasonable efforts to obtain the approval of all Persons whose consent is reasonably necessary to effectuate the transactions contemplated hereby, and effecting all other necessary registrations and filings with any other Governmental Bodies that are required to effect the transactions contemplated hereby. Sellers shall cooperate with Buyer’s efforts to obtain the requisite regulatory consents, provided Sellers shall not be obligated to incur any liabilities or assume any obligations in connection therewith. Other than Buyer’s and Sellers’ obligations under Section 6.3, neither party shall have any liability to the other if, after using commercially reasonable efforts, it is unable to obtain any approvals necessary for such party to consummate the transactions contemplated hereby. Furthermore, Sellers and Buyer shall execute and deliver such other agreements, documents and instruments as are required to be delivered by such party at or prior to Closing to effectuate the transactions contemplated by this Agreement. Notwithstanding the foregoing, in the event that either Party learns for the first time, through any notice, delivery or disclosure to be made hereunder prior to Closing of any condition or fact that would have a Material Adverse Effect on the reasonable expectations of the Party learning such fact, such Party shall have no obligation to proceed to Closing hereunder.

## 6.2 Further Assurances; Post Closing Transmission Documents.

(a) After the Closing, upon prior reasonable written request, each party shall cooperate with the other, at the requesting party's expense (but including only out-of-pocket expenses to third parties), in furnishing non-privileged records, information, testimony and other assistance in connection with any inquiries, actions, audits, proceedings or disputes involving either of the parties hereto (other than in connection with disputes between the parties hereto) that relate to contracts, arrangements or acts of Seller which were in effect or occurred on or prior to Closing and which relate to the Purchased Assets. Each Party hereto shall, as requested by the other Party, provide additional assurance, execute and deliver such instruments, assignments, certificates, or other documents, and shall take such actions as shall be necessary or desirable to evidence and to give full effect to the provisions of this Agreement.

(b) After the Closing, Sellers shall execute and deliver any documents reasonably requested by Buyer to facilitate the transfer of certain assets, including portions of the 69 kV Transmission Line, to the designated transferee of Buyer, including, without limitation, the Post Closing Transmission Documents identified in Exhibit "L." Without limiting the foregoing, The Sellers will be responsible for and shall obtain the complete termination of Section 4.3 of the agreement entitled "Right-Of-Way and Pole Agreement Between Hildale, Utah and the City of Hurricane" a 69 kV transmission line, described in Exhibit B hereto (the "Hurricane City Release").

## 6.3 Expenses

Whether or not the transactions contemplated hereby are consummated, except as otherwise provided in this Agreement, all costs and expenses incurred in connection with this Agreement and the transactions contemplated hereby shall be paid by the party incurring such expenses. Notwithstanding the foregoing, (a) recording costs and charges respecting real property will be borne by Seller and (b) all liabilities or obligations for taxes in the nature of sales taxes incurred as a result of the sale of the Purchased Assets hereunder to Buyer shall be borne by Buyer. All such charges and expenses shall be promptly settled between the parties at the Closing or upon termination or expiration of further proceedings under this Agreement, or with respect to such charges and expenses not determined as of such time, as soon thereafter as is reasonably practicable.

## 6.4 Preservation of Confidentiality

In connection with the negotiation of this Agreement and the preparation for the consummation of the transactions contemplated hereby, the parties acknowledge that each has had and will have access to confidential information relating to the other party, including without limitation any customer information provided by Seller to Buyer pursuant to Section 7.2, ("Confidential Information"). Prior to the Closing Date, and in the event this Agreement is terminated prior to the Closing, each of the parties shall treat all Confidential Information of the other party as confidential, preserve the confidentiality thereof and not disclose any such Confidential Information, except to their representatives and Affiliates who need to know such Confidential Information in connection with the transactions contemplated hereby. The parties shall use all reasonable efforts to cause their representatives and Affiliates to treat all Confidential Information as confidential, preserve the confidentiality thereof and not disclose

any Confidential Information. Each party shall be responsible for any breach of this Agreement by any of its representatives. Notwithstanding the foregoing, nothing in this Agreement shall be construed to limit any right of any Governmental Body to review the substantive terms and conditions hereof or to conduct any investigation or make any inquiry and to receive such information as may be necessary or desirable to approve this Agreement or any transaction contemplated hereby.

6.5 Collection of Accounts Receivable; Purchase of Certain Accounts Post Closing

(a) Following the Closing Date, but subject in all events to the provisions of Section 6.5(b) below, Sellers will retain, and each Seller or its designee shall have the right and authority to collect for such Seller's account, all accounts receivable and other similar such items relating to electricity delivered by each Seller to such Seller's municipal system customers on or before the Closing. To the extent that Buyer receives any payments in respect of any of the foregoing Buyer shall properly endorse and deliver to Sellers any cash or checks received on account of or otherwise relating to any such receivables, on a weekly basis, after offsetting any amount(s) due and owing from Sellers hereunder. To the extent Buyer delivers to either Seller any amount(s) collected and received on such accounts, provided Buyer uses its reasonable good faith efforts to identify and segregate such funds and deliver such to the appropriate Seller entitled thereto, Buyer's obligation pursuant to the foregoing provisions of this subsection shall be deemed to have been satisfied, and the Sellers shall be responsible, as between themselves, to account for and convey to one another any amount(s) erroneously paid by Buyer to the other Seller. Following the Closing Date, Buyer or its designee shall have the right and authority to collect on Buyer's account, all receivables and other similar items accruing after the Closing. To the extent that either Seller receives any payments related to the foregoing, such Seller shall properly endorse and deliver to Buyer any cash or checks received on account of or otherwise relating to any such receivables, to be paid each week on a weekly basis. Buyer agree it will use its commercially reasonable efforts, but at no additional cost to Buyer, to cooperate with Seller after the Closing Date in the collection of all accounts receivable and other similar such items relating to electricity delivered on or before the Closing.

(b) Notwithstanding the foregoing provisions of Section 6.5(a), on or before the tenth (10<sup>th</sup>) Business Day after the Closing Date, Buyer will determine, in its good faith judgment, which portion of Sellers' outstanding electrical accounts receivable arising on account of service properly and duly provided in accordance with applicable rates and tariffs of Sellers prior to the Closing Date are: (i) legally valid obligations enforceable against the customer of Seller for electric utility service rendered prior to the Closing Date; (ii) were not, as of the Closing Date, outstanding and payable over 90 days from the earliest date such amounts were or might have been deemed due and payable by the obligor thereunder; and (iii) are due and owing from an obligor who had not, as of the Closing Date, been determined to be delinquent in the payment of any utility invoices during the ninety (90) days preceding the Closing Date. Forty-five (45) days after the Closing Date, Buyer shall purchase, and Sellers shall sell and convey to Buyer, such of those same receivables that as of that date remain unpaid, at a discounted rate of 50% of the face (principal) amount outstanding. This amount will also be reduced by any outstanding balances of prepaid meter accounts. This amount will be paid directly to Sellers as of the effective date of transfer of such accounts, and shall be in addition to the Purchase Price. Sellers shall execute

and delivery such documents, assignments, or other written evidence of assignment of such accounts to Buyer simultaneous with payment of such amount from Buyer to Sellers.

6.6 Termination of Certain Agreements Between Sellers; Dissolution of Twin City Power Board; Release and Discharge of Certain Payment Obligations Effective Upon Closing.

From and after the Closing, and as a material condition and inducement for this Agreement and the mutual covenants, promises, and consideration contemplated herein, each of the Sellers, for themselves, their officers, employees, agents, heirs, beneficiaries, successors and assigns do hereby consent to the termination of the following agreements between Hildale and Colorado City, and agree that such agreements shall terminate immediately and automatically upon the Closing hereunder:

(i) that certain *Electric Distribution Systems Management Operation and Maintenance Agreement* dated as of April 29, 1994 (the "Operations and Maintenance Agreement"); and

(ii) that certain *Twin Cities Power Project Power Sales Contract* dated as of December 15, 1995 (the "Power Sales Contract").

Furthermore, that certain Power Board established pursuant to Section 4 of the Operations and Maintenance Agreement, and confirmed in Section 8 of the Power Sales Contract, shall at the same time be immediately and forever dissolved. Finally, each of the Sellers, for themselves, their officers, employees, agents, heirs, beneficiaries, successors and assigns, hereby acknowledges and agrees that, immediately upon the termination of the foregoing agreements in accordance with the provision of this Section 6.6, each and every payment obligation of Colorado City under either of the above-described agreements or related in any way to the transactions and/or subject matter contemplated by either or both of those agreements, to or through Hildale or any other successor in interest to Hildale pursuant to this Agreement, shall be deemed fully and permanently satisfied, waived, extinguished, released and discharged at, from and forever after the Closing hereunder.

6.7 Defense of Property Claims

Sellers agree to indemnify and defend Buyer from and against any legal proceeding to which each of the following apply: (a) Buyer is a named defendant, and (b) the claim asserted by the plaintiff therein is that a portion of the System as it exists and is configured on the Closing Date materially and improperly violates the valid property rights of such person. Buyer agrees to promptly upon receipt by it of any Third Party Claims, give written notice thereof to Seller. Upon receipt by Seller of such notice, the procedures described in Section 12.6 shall apply to Seller's defense of proceedings under this Section 6.7, with Sellers acting as Indemnitor and Buyer acting as Indemnitee. Sellers shall have the right to settle or compromise any such proceeding so long as such settlement does not impose any additional obligation on Buyer. If a judgment is rendered in such proceeding that is adverse to Buyer in such matter, Sellers agree to pay all damages awarded as a result of the violation of the plaintiff's property rights by any System facilities and to pay all costs associated with complying with any valid order issued by the court in such action relating to the violation of the plaintiff's property rights by any System

facilities. Sellers reserve the right to appeal any judgment rendered in such proceeding, and Buyer agrees to reasonably cooperate with any such appeal. Notwithstanding the foregoing, Buyer agrees to make a good faith effort to settle any such claims prior to litigation; provided, **that such efforts shall not require Buyer to relocate any System facilities from their location on the Closing Date.**

## ARTICLE 7. ADDITIONAL COVENANTS OF SELLER

Seller hereby additionally covenants, promises and agrees as follows:

### 7.1 Access

Subject to the restrictions set forth in Section 6.4 respecting confidentiality and any restrictions imposed by applicable Laws, Seller shall afford Buyer and its representatives, reasonable access, until the Closing Date, to the Purchased Assets and thereafter for a period of twelve (12) months to the managerial personnel associated therewith and all the properties, books, contracts, commitments and records included in or relating to the Purchased Assets which Sellers have or to which they have access in order to facilitate transition planning. Such access shall be afforded to Buyer after no less than 24 hours' prior notice, during normal business hours and only in such manner so as not to disturb or interfere with the normal operations of Sellers. Sellers' covenants under this Section are made with the understanding that Buyer shall use all such information in compliance with all Laws. The foregoing notwithstanding, Buyer acknowledges and agrees that Buyer's access to the books and records of the Purchased Assets shall not include access to, and Sellers shall not have any obligation to deliver to Buyer, any information concerning any alleged dispute or any pending litigation, investigation or proceeding involving Sellers to the extent such information, if disclosed, would impair or waive any attorney-client privilege, or the disclosure of which is restricted by an agreement entered into in connection with such dispute, litigation, investigation or proceeding or an order entered by any court or otherwise restricted by applicable Law.

### 7.2 Customer Information

To the extent permitted by applicable Laws, Sellers will make available to Buyer prior to the Closing Date electrical customer information in either hard copy or electronic format. In addition, Sellers will make available to Buyer all drawings, maps, diagrams and other similar documents in Sellers' possession relating to the System.

### 7.3 Conduct Pending Closing

(a) Prior to consummation of the transactions contemplated hereby or the termination or expiration of this Agreement pursuant to its terms, each Seller will continue to operate the System in the ordinary course and will generally maintain the System in the condition in which it presently exists (reasonable wear and tear excepted), including, in each case, the acquisition and disposition of assets used in the operation and maintenance of the System. Notwithstanding the foregoing, each Seller represents that to its Knowledge, there are no acquisitions or dispositions which it intends, contemplates, or foresees prior to the Closing Date which, in the aggregate

would exceed Five Thousand Dollars (\$5,000.00). The parties agree that there shall be no adjustment to the Purchase Price as a result of such acquisitions or dispositions.

(b) Notwithstanding the provisions of Section 7.3(a), without the prior written consent of Buyer, which consent shall not be unreasonably withheld or delayed, prior to the consummation of the transactions contemplated hereby, each Seller covenants and agrees that it shall not:

- (i) dispose of any Purchased Assets valued in excess of Five Thousand Dollars (\$5,000);
- (ii) other than in the ordinary course of business, incur any additional debt related to the System or Purchased Assets; or
- (iii) except as contemplated by this Agreement, enter into any contracts that may impact the value of the Purchased Assets.

(c) At least 90 days prior to the anticipated Closing Date, Sellers shall provide Buyer with all electrical customer information necessary for Buyer to set up billing accounts, in a readily useable electronic format (i.e. an excel spreadsheet showing account activity during at least the prior 90 days, with weekly updates of changes to account data up to and through the Closing Date). Sellers will, prior to the closing date, provide copies of all drawings, maps (including base maps), diagrams and other similar documents relating to the System. Drawings and maps shall be provided in electronic AutoCAD 2000 format. Buyer will treat all information received from Sellers under this section as Confidential Information and, in the event that the sale and purchase does not close, will comply with the provisions of Section 6.4 with respect thereto.

#### 7.4 Retirement of Outstanding Debt

Sellers shall use commercially reasonable efforts to retire, repay, redeem, discharge or otherwise satisfy all outstanding bonds, inter-fund loans and other debt secured by the System. Notwithstanding the foregoing, and without excusing the obligation of Sellers, in no event shall Buyer be deemed to assume any liability or responsibility, whether primary, secondary, or otherwise for any payment of any such indebtedness.

#### 7.5 Disposition of Retained Generating Facility Post Closing

The generator and associated equipment included and constituting the Retained Generation Facility located in and on the generator building and adjacent site shall be removed by Hildale City no later than 12 months after Closing, provided however, that in no event shall the removal of such items in any way interfere, disrupt, or jeopardize the continuous functioning of any metering, relaying, and other control equipment included in the Purchased Assets. Hildale City will be responsible for cleaning up and debris removal, including any and all hazardous materials, from the generator building and site. Hildale City will be responsible to safeguard and minimize damage to the building and site during equipment removal, and shall in all events indemnify Buyer against any and all costs, damages, and injury from disruption in the continuous operation of all portions of the System arising from any such removal work. In the event that Hildale City fails in any material respect to complete the disposition of the Retained

Generation Facility or to properly and fully remove and dispose of any hazardous materials in the manner and according to the time limit set forth herein, Buyer may (but shall be under no obligation to), in addition to any and all other remedies available hereunder, at law, or in equity, proceed to dispose of the Retained Generating Facility and otherwise remove and dispose of such hazardous material in any lawful manner which Buyer shall deem advisable and prudent, and Sellers jointly and severally shall reimburse Buyer in full for all costs, fees, expenses, damages, losses, attorneys fees, consultant's fees, disposal fees and licenses, and all other costs whatsoever incurred in completing such work.

7.6 Post Closing Conversion of Metering Equipment

After Closing, Sellers will cooperate and will provide technical and logistical assistance (at no substantial additional cost to Sellers) to Buyer in converting the existing L&G Prepaid Metering System to a replacement system which can be supported by the manufacturer.

**ARTICLE 8.  
ADDITIONAL COVENANTS OF BUYER**

8.1 Acquired Customer Rates and Fees; Policies

Buyer agrees that all customers located in the areas presently served by the Systems will become members of Buyer as of the Closing. Changes in rates and charges to System Customers from and after closing shall be subject to policies that from time to time may be established by the governing board of Buyer. Notwithstanding the foregoing, Sellers acknowledge and agree that increases to rates charged to System Customers may be in the same percentage as increases in rates charged to other customers of Buyer. Each Seller acknowledges and agrees that such rates and charges may include one or more energy and/or demand adder(s) as well as an investment adder to recover the cost and risks associated with the acquisition of the System.

8.2 Conduct Pending Closing

Prior to consummation of the transactions contemplated hereby or the termination or expiration of this Agreement pursuant to its terms, unless Sellers shall otherwise consent in writing, Buyer shall not take any action which would cause any of Buyer's representations and warranties set forth in Article 5 to be materially false as of the Closing.

8.3 Conduct Following Closing

(a) Buyer's Office. Provided all transactions contemplated hereby have been consummated as set forth herein, Buyer will, within a reasonable time following transfer of title of the Systems, establish an office for receipt of payment and customer service located in either Hildale or Colorado City, to be maintained for a period of three years after the closing, after which the office may be closed or consolidated, according to Buyer's discretion. The hours of operation, staffing, and location of the office shall at all times be at the discretion of the Buyer.

(b) District Voting. Buyer will undertake a realignment of its voting districts for elections to its governing board, which realignment shall take place during a normal and

regular district election process within a reasonable time following closing. Such realignment shall occur in such manner as Buyer's governing board shall determine and direct, in Buyer's sole business judgment, using prudent business judgment, to adequately reflect the interests of the addition of approximately 1000 new System Customers onto Buyer's system.

(c) Employment Offers. Following closing hereunder, Buyer will offer employment to two (2) existing Journeyman Linemen employed by Hildale City. The terms and conditions of employment shall be as determined by Buyer in Buyer's sole discretion, and shall be based on an at-will employment relationship, with no contract or other rights accruing to or vested in any manner.

## **ARTICLE 9. BUYER'S CONDITIONS TO CLOSING**

The obligations of Buyer to consummate the transactions contemplated hereby with respect to the System and the Purchased Assets and Assumed Liabilities related thereto shall be subject to fulfillment at or prior to the Closing of the following conditions, unless Buyer waives in writing such fulfillment.

### 9.1 Performance of Agreement; Cross Default.

Both Sellers each shall have performed in all material respects its agreements and obligations contained in this Agreement required to be performed on or prior to the Closing. Without limiting any other provision of this Agreement, in no event shall Buyer be obligated to pay any portion of the Purchase Price or proceed to purchase any portion of the Purchased Assets or otherwise proceed to Closing unless and until both Sellers have tendered all deliveries and conveyances, in accordance with the express terms of this Agreement on or prior to Closing. Except as waived or otherwise modified in writing executed by an authorized officer of Buyer, the agreement set forth in this Agreement for the purchase of the System is dependent on the purchase and delivery from Sellers of the entire System, including all of the Purchased Assets. Any breach or default by either Seller hereunder shall constitute a breach by both Sellers.

### 9.2 Accuracy of Representations and Warranties

The representations and warranties of Sellers set forth in Article 4 of this Agreement shall be true and correct in all material respects as to the System or Purchased Assets in question as of the date of this Agreement (unless the inaccuracy or inaccuracies which would otherwise result in a failure of this condition have been cured as of the Closing) and as of the Closing as if made as of such time.

### 9.3 Officers' Certificate

Buyer shall have received from each Seller a certified statement, executed on such Seller's behalf by an Authorized Officer of Seller dated the Closing Date and stating that the conditions in Sections 9.1 and 9.2 above have been met.

#### 9.4 Approvals; Acceptance of Initial Rates to System Customers

All Permits and all other approvals, consents, authorizations and waivers from other third parties (collectively "Approvals") required to consummate the transactions contemplated by this Agreement and required for Buyer to operate the System materially in accordance with the manner in which it was operated by Sellers prior to the Closing shall have been obtained. Without limiting the foregoing, the rates and charges proposed by Buyer to be charged to System Customers as of the time of closing must have been approved and/or accepted without any change or condition, and such approval must have become final and non-appealable, by the regulatory authority of the state in which each Seller is located prior to Buyer's obligation to proceed to consummate any transaction contemplated hereby.

#### 9.5 No Restraint

There shall be no:

(a) injunction, restraining order or order of any nature issued by any court of competent jurisdiction or Governmental Body directing that the transactions contemplated hereby shall not be consummated as herein provided or compelling Buyer to dispose of or discontinue, or materially restrict the operation of, the System as a result of the consummation of the transactions contemplated hereby;

(b) suit, action or other proceeding by or before any court or Governmental Body pending or threatened (pursuant to a written notification), wherein such complainant seeks the restraint or prohibition of the consummation of the transactions contemplated hereby or seeks to compel, or such complainant's actions would compel, Buyer to dispose of or discontinue, or materially restrict the operation of, the System as a result of the consummation of the transactions contemplated hereby; or

(c) action taken, or Law enacted, promulgated or deemed applicable to the transactions contemplated hereby, by or before any court or Governmental Body which would render the purchase and sale of the System and related Purchased Assets illegal or which would threaten the imposition of any material penalty or material economic detriment upon Buyer if such transactions were consummated; provided that, the parties will use their reasonable efforts to litigate against, and to obtain the lifting of, any such injunction, restraining or other order, restraint, prohibition, action, suit, Law or penalty.

#### 9.6 Comprehensive Franchise Agreement

Each Seller shall have executed and delivered to Buyer the Comprehensive Franchise Agreement, in substantially the form attached hereto as Exhibit J (the "Comprehensive Franchise Agreement"), and the Comprehensive Franchise Agreement shall be binding and enforceable in accordance with its terms.

#### 9.7 Execution of Deseret Generation Special Incentive Load Contract.

Buyer shall have entered into an amendment to its existing contract with Deseret Generation & Transmission Co-operative ("Deseret G&T") for the supply of wholesale power and energy to service the acquired load (the "Deseret Generation Contract") satisfactory in form

and substance to Buyer, provided however, that to the extent that that the final negotiated wholesale rate from Deseret G&T under the Deseret Generation Contract exceeds the "Anticipated Wholesale Rate" (defined below), then the Purchase Price in Section 2.1 shall be reduced as follows:

(i) the Purchase Price shall be reduced by the net present value of the positive difference (if any) in Buyer's projected power cost over a period of 25 years following Closing, discounted at 7.5%, based assumed load size and characteristics (*i.e.*, load factor) for the System load equal to the size and characteristics of such load during the most recent twelve (12) full calendar months preceding the Closing Date.

(ii) for purposes of the foregoing, the "Anticipated Wholesale Rate" shall equal the existing "Rate Schedule "A"" wholesale energy and capacity rate charged to Buyer by Deseret G&T as of the date of this Agreement, plus an annual fixed facilities charge (for service to the acquired System Customers' load) equal to \$930,000 per year.

#### 9.8 Modification of Deseret G&T TSO Agreement

Deseret G&T shall have obtained (at no substantial additional or increased cost, risk, or future liability to Deseret G&T) written agreement, in final and enforceable form, together with any necessary Governmental Approvals, from Rocky Mountain Power, as a transmission provider, to modify the terms and conditions of the existing transmission services operating agreement to provide for an additional point of delivery to Deseret G&T at Hildale, Utah or at another point of interconnection with the 69 kV Transmission Line otherwise acceptable to Deseret G&T for delivery of power and energy requirements of customers served by the System.

#### 9.9 Bill of Sale; Special Warranty Deed; Assignment of Right-of-Way

Sellers shall have executed and delivered to Buyer such Bills of Sale, Special Warranty Deeds and assignments, including the Assignment of Right-of-Way and associated permits, as are necessary to convey, sell, transfer and assign to Buyer all right, title and interest in and to the Purchased Assets free and clear of all Liens other than the Permitted Liens and those other matters, if any, as may be approved in writing by Buyer prior to the Closing Date.

#### 9.10 Assignment of Indemnification and Other Rights

Each Seller shall have executed and delivered to Buyer the Assignment of Indemnification Rights, pursuant to which each Seller will assign to Buyer the right to pursue an indemnity, warranty, subrogation, contribution, or other similar claims under any indemnity agreement, purchase contract, or other agreement of or arising by law against any vendor, supplier, OEM manufacturer, insurer, or others in favor of Seller relating to the presence of any harmful or hazardous materials in, on, or otherwise escaped from any of the Purchased Assets.

#### 9.11 Release of Seller Liens

Buyer shall have received reasonably satisfactory evidence of the release of any Liens arising by or through either Seller on the Purchased Assets as security for revenue or general

obligation bonds issued by either Seller or any other indebtedness against either Seller or any Purchased Asset.

9.12 Hurricane City Release

Seller shall have obtained from Hurricane City the Hurricane City Release, together with such other documents, releases, conveyances, or assurances as Buyer may reasonably determine desirable or necessary to clear title in and to the 69 kV Transmission Line from any lien, encumbrance, or right of or arising through Hurricane City for Hurricane City or any third party to modify, make use of, or otherwise claim any future right with respect to the 69 kV Transmission Line.

9.13 Termination of Service Agreement with Hurricane/UAMPS

Sellers shall have obtained, in written and enforceable form, the termination and complete satisfaction of all of Seller's obligations and all rights, interest, claims, or contractual rights of any other party with respect to any portion of the System or the Purchased Assets arising under the agreement known as "Hildale Interconnect Agreement Among Utah Associated Municipal Power Systems ("UAMPS"), The City of Hurricane, Utah, and the City of Hildale, Utah."

9.14 Approval of Legal Matters by Buyer's Counsel

All legal matters in connection with the matters herein provided for or the transactions contemplated hereby and all papers and documents in connection therewith shall be reasonably satisfactory in form and substance to counsel for Buyer and there shall have been furnished to such counsel such municipal and other records and information as counsel for Buyer may reasonably have requested for such purpose.

9.15 Receipt of Other Documents

Buyer shall have received the following:

- (a) The documents and instruments contemplated by Section 3.2;
- (b) certified copies of the resolutions of the governing body of each Seller authorizing, approving, and directing the execution and performance of this Agreement, the Related Agreements and the transactions contemplated hereby;
- (c) one or more certificates as to the incumbency of each Authorized Officer of each Seller who has signed this Agreement, any Related Agreement or any certificate, document or instrument delivered pursuant to this Agreement or any Related Agreement; and
- (d) instruments of transfer, sufficient to transfer personal property interests that are included in the Purchased Assets but not otherwise transferred by the Bills of Sale, Special Warranty Deed and assignments referred to in Section 9.10 above, properly executed and acknowledged in the form customarily used in commercial transactions in Utah.

## ARTICLE 10. SELLER'S CONDITIONS TO CLOSING

The obligations of Sellers to consummate the transactions contemplated hereby shall be subject to the fulfillment at or prior to the Closing of the following conditions, unless each Seller waives in writing such fulfillment.

### 10.1 Performance of Agreement

Buyer shall have performed in all material respects its agreements and obligations contained in this Agreement required to be performed on or prior to the Closing.

### 10.2 Accuracy of Representations and Warranties

The representations and warranties of Buyer set forth in Article 5 of this Agreement shall be true and correct in all material respects as of the date of this Agreement (unless the inaccuracy or inaccuracies which would otherwise result in a failure of this condition have been cured as of the Closing) and as of the Closing as if made as of such time.

### 10.3 Officers' Certificate

Sellers shall have received from Buyer an officers' certificate, executed on Buyer's behalf by an Authorized Officer of Buyer dated the Closing Date and stating that the conditions in Sections 10.1 and 10.2 above have been met.

### 10.4 Approvals

All Approvals required to consummate the transactions contemplated by this Agreement shall have been obtained.

### 10.5 No Restraint

There shall be no:

(a) injunction, restraining order or order of any nature issued by any court of competent jurisdiction or Governmental Body directing that the transactions contemplated hereby shall not be consummated as herein provided;

(b) suit, action or other proceeding by or before any court or Governmental Body pending or threatened (pursuant to a written notification), wherein such complainant seeks the restraint or prohibition of the consummation of the transactions contemplated hereby or otherwise constrains consummation of the transactions contemplated hereby on the terms contemplated herein; or

(c) action taken, or Law enacted, promulgated or deemed applicable to the transactions contemplated hereby, by or before any court or Governmental Body which would render the purchase and sale of the System and related Purchased Assets illegal or which would threaten the imposition of any material penalty or material economic detriment upon Seller if such transactions were consummated; provided, that the parties will use their reasonable efforts to

litigate against, and to obtain the lifting of, any such injunction, restraining or other order, restraint, prohibition, action, suit, law or penalty.

10.6 Comprehensive Franchise Agreement

Buyer shall have executed and delivered to each Seller the Comprehensive Franchise Agreement, and the Comprehensive Franchise Agreement shall be binding and enforceable in accordance with its terms.

10.7 Assumption Document

Buyer shall have executed and delivered to Seller(s) an Assumption Document evidencing Buyer's assumption of the Assumed Liabilities, if any.

10.8 Bondholder Approval; Release of Liabilities

(a) Bondholder(s) and or any trustee(s) for such Bondholder(s) shall evidence approval of this Agreement and the transaction(s) contemplated hereby by delivering written consent to Sellers, with a copy to Buyer, in form and substance satisfactory to each Seller.

(b) Each Seller shall have received release(s) from the other Seller and from the Bondholders (or the Trustee) in form and substance satisfactory to each Seller releasing such Seller from any and all current and future debts and liabilities for any of the System Indebtedness, unless otherwise agreed in writing between such Seller and the Bondholders, but *provided further, however that:* (i) upon Sellers' execution and delivery of any of the instruments contemplated pursuant to Section 9.9 above, for purposes of this Agreement, the condition of this Section 10.8(b) shall be deemed entirely, irrevocably, and unconditionally satisfied and/or waived without any recourse whatsoever to Buyer or to any of the Purchased Assets; and (ii) in no event shall Buyer be obligated directly or indirectly, for any portion of the System Indebtedness except and solely to the extent that Buyer expressly agrees in writing prior to the Closing to assume any portion thereof.

10.9 Approval of Legal Matters by Seller's Counsel

All legal matters in connection with the matters herein provided for or the transactions contemplated hereby and all papers and documents in connection therewith shall be reasonably satisfactory in form and substance to counsel for Sellers and there shall have been furnished to such counsel such corporate and other records and information as counsel for Sellers may have requested for such purpose.

10.10 Receipt of Other Documents

Sellers shall have received the following:

(a) certified copies of the resolutions of Buyer's board of directors respecting this Agreement, the Related Agreements and the transactions contemplated hereby, together with certified copies of any shareholder, partner, member or other owner resolutions which are necessary to approve the execution and delivery of this Agreement and the Related Agreements and/or the performance of the obligations of Buyer hereunder and thereunder;

(b) one or more certificates as to the incumbency of each officer of Buyer who has signed this Agreement, any Related Agreement or any certificate, document or instrument delivered pursuant to this Agreement or any Related Agreement;

(c) a good standing certificate for Buyer from the Department of Commerce of the State of Utah, dated as of a date not earlier than 15 Business Days prior to the Closing Date; and

(d) copies of all third party and governmental consents, permits and authorizations that Buyer has received in connection with the transactions contemplated hereby.

## ARTICLE 11. TERMINATION

### 11.1 Termination

This Agreement and the transactions contemplated hereby that have not been consummated may be terminated:

(a) at any time, by mutual written consent of Sellers and Buyer; or

(b) by any party upon notice to the others if there has been (i) a material default or material breach under this Agreement by one or more other part(ies) which is not cured by the earlier of the Closing Date or the date 30 days after receipt by the other party of notice from the terminating party specifying with particularity such breach or default, *provided, however*, that to the extent any Party has Knowledge of any material default or breach which would, with the giving of notice, give rise to any right to terminate this Agreement, such Party shall immediately notify the other Party of the nature of such default or breach and, failing which, to the extent any Party does not give such notice without delay, the breach and/or default shall be deemed waived solely for purpose of this subsection 11.1(b); or (ii) a fraudulent act by the other party with respect to this Agreement; or

(c) by any party upon notice to the others if (i) the Closing shall not have occurred by the Termination Date or (ii) (A) in the case of termination by either Seller, the conditions set forth in Article 10 for the Closing cannot reasonably be satisfied despite the use of commercially reasonable efforts as set forth in Section 6.1 by the Termination Date and (B) in the case of termination by Buyer, the conditions set forth in Article 9 for the Closing cannot be satisfied despite the use of commercially reasonable efforts as set forth in Section 6.1 by the Termination Date, unless in either of the cases described in clause (A) or (B), the failure of the condition is the result of the material breach, material default or fraudulent act under this Agreement by the party seeking to terminate. Each party's right of termination hereunder is in addition to any other rights it may have hereunder or otherwise; or

(d) by Buyer pursuant to the terms of Section 3.7.

## 11.2 Effect of Termination

If there has been a termination pursuant to Section 11.1(a) or 11.1(c), then this Agreement shall be deemed terminated, and all further obligations of the parties hereunder shall terminate, except that the obligations set forth in Sections 6.3, 6.4 and 11.2, and in Article 12 and Article 13 shall survive. In the event of such termination of this Agreement, there shall be no liability for damages on the part of a party to another under and by reason of this Agreement or the transactions contemplated hereby except as set forth in Article 12. If there has been a termination pursuant to Section 11.1(b), the obligations set forth in Section 6.3, 6.4, and 11.2, and in Article 12 and Article 13 shall survive, and the remedies for which shall not be limited by the provisions of this Agreement.

## ARTICLE 12. SURVIVAL AND REMEDIES; INDEMNIFICATION

### 12.1 Survival

Except as may be otherwise expressly set forth in this Agreement, the representations, warranties, covenants and agreements of Buyer and Sellers set forth in this Agreement, or in any writing required to be delivered in connection with this Agreement, shall survive the Closing Date.

### 12.2 Exclusive Remedy

Absent fraud or unless otherwise specifically provided herein, the sole exclusive remedy for damages of a party hereto for any breach of the representations, warranties, covenants and agreements of any other party contained in this Agreement shall be the remedies contained in this Article 12.

### 12.3 Indemnity by Sellers

(a) Each Seller shall indemnify and defend Buyer and its shareholders, directors, officers, employees, contractors and agents (each one an "Indemnified Person") and hold them harmless from and against any and all claims, demands, suits, losses, liabilities, damages and expenses, including reasonable attorneys' fees and costs of investigation, litigation, arbitration, settlement and judgment (collectively "Losses"), which any such Indemnified Person may sustain or suffer or to which such Indemnified Person may become subject as a result of:

- (i) the inaccuracy of any representation or the breach of any representation or warranty made by the indemnifying Seller in Article 4 hereof;
- (ii) The indemnifying Seller's payment or non-payment of any liabilities of such Seller to the city of Hurricane, Utah or to UAMPS, or to the Bondholders, or to UEP, and/or any other consultants or agents retained by such Seller in connection with the transactions contemplated hereby; and
- (iii) if the Closing occurs, the failure of the indemnifying Seller to pay, discharge or perform as and when due, any of the Excluded Liabilities.

(b) The indemnification obligations of Sellers provided above shall, in addition to the qualifications and conditions set forth in Sections 12.5 and 12.6, be subject to the following qualifications:

(i) Buyer shall not be entitled to indemnity for breaches of representations and warranties under clause (a)(i) unless notice to the indemnifying Seller of such claim specifying the basis thereof is made, or an action at law or in equity with respect to such claim is served, before the fifth anniversary of the Closing Date, except that such time limitation shall not apply to breaches of the representations and warranties contained in Sections 4.1, 4.2, 4.3, 4.4, and 4.5; and

(ii) Buyer shall not be entitled to indemnity under clauses (a)(i)-(iii) above except for out-of-pocket Losses actually suffered or sustained by it and such indemnity shall not include Losses in the nature of consequential damages, punitive damages, lost profits, diminution in value, damage to reputation or the like, except that the provisions of this clause (b)(ii) shall not apply to a breach of Section 6.4.

#### 12.4 Indemnity by Buyer

(a) Buyer shall indemnify and defend each Seller and its officers, employees, contractors and agents, and hold them harmless from and against any and all Losses which they may sustain or suffer or to which they may become subject as a result of:

(i) the inaccuracy of any representation or the breach of any representation or warranty made by Buyer in this Agreement;

(ii) the nonperformance or breach of any covenant or agreement made or undertaken by Buyer in this Agreement;

(iii) if the Closing occurs, the failure of Buyer to pay, discharge or perform as and when due, any of the Assumed Liabilities; and

(iv) any Losses incurred by Seller as a result of access to the Purchased Assets prior to Closing granted by Seller to Buyer in accordance with the provisions of Section 7.1 and customer information provided by Seller to Buyer pursuant to Section 7.2;

(b) The indemnification obligations of Buyer provided above shall be subject to the following qualifications, in addition to the qualifications and conditions set forth in Sections 12.5 and 12.6 below:

(i) Seller shall not be entitled to indemnity for breaches of representations and warranties under clause (a)(i) unless notice to Buyer of such claim specifying the basis thereof is made, or an action at law or in equity with respect to such claim is served, before the fifth anniversary of the Closing Date, except that such time limitation shall not apply to breaches of the representations and warranties contained in Sections 5.1, 5.2, 5.3, 5.4 and 5.7; and

(ii) Sellers and each of them shall not be entitled to indemnity under clauses (a)(i)-(iv) above except for out-of-pocket Losses actually suffered or sustained by each of them and such indemnity shall not include Losses in the nature of consequential damages, punitive damages, lost profits, diminution in value, damage to reputation or the like, except that the provisions of this clause (b)(ii) shall not apply to a breach of Section 6.4.

#### 12.5 Further Qualifications Respecting Indemnification

The right of a Person indemnified pursuant to this Agreement (an “Indemnitee”) to indemnity hereunder shall be subject to the following additional qualifications:

(a) The Indemnitee shall promptly upon its discovery of facts or circumstances giving rise to a claim for indemnification, including receipt by it of notice of any demand, assertion, claim, action or proceeding, judicial, governmental or otherwise, by any third party (such third party actions being collectively referred to herein as “Third Party Claims”), give notice thereof to the indemnifying party (the “Indemnitor”), such notice in any event to be given within 30 days from the date the Indemnitee obtains actual knowledge of the basis or alleged basis for the right of indemnity or such shorter period as may be necessary to avoid material prejudice to the Indemnitor.

(b) In computing Losses, such amounts shall be computed net of any related recoveries to which the Indemnitee is entitled under insurance policies, or other related payments received or receivable from third parties, and net of any tax benefits actually received by the Indemnitee or for which it is eligible, taking into account the income tax treatment of the receipt of indemnification.

(c) The indemnification shall not apply to Losses to the extent that they are caused by the negligence or willful misconduct of the Indemnitee.

#### 12.6 Procedures Respecting Third Party Claims

In providing notice to the Indemnitor of any Third Party Claim (the “Claim Notice”), the Indemnitee shall provide the Indemnitor with a copy of such Third Party Claim or other documents received and shall otherwise make available to the Indemnitor all relevant information material to the defense of such claim within the Indemnitee’s possession. The Indemnitor shall have the right, by notice given to the Indemnitee within 15 days after the date of the Claim Notice, to assume and control the defense of the Third Party Claim that is the subject of such Claim Notice, including the employment of counsel selected by the Indemnitor after consultation with the Indemnitee, and the Indemnitor shall pay all expenses of, and the Indemnitee shall cooperate fully with the Indemnitor in connection with, the conduct of such defense. The Indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such Third Party Claim, but the fees and expenses of such counsel shall be borne by the Indemnitee unless the Indemnitor shall agree otherwise; provided, however, if the named parties to any such proceeding (including any impleaded parties) include both the Indemnitee and the Indemnitor, the Indemnitor requires that the same counsel represent both the Indemnitee and the Indemnitor, and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests

between them, then the Indemnitee shall have the right to retain its own counsel at the cost and expense of the Indemnitor. If the Indemnitor shall have failed to assume the defense of any Third Party Claim in accordance with the provisions of this Section, then the Indemnitee shall have the absolute right to control the defense of such Third Party Claim, and, if and when it is finally determined that the Indemnitee is entitled to indemnification from the Indemnitor hereunder, the fees and expenses of Indemnitee's counsel shall be borne by the Indemnitor, provided that the Indemnitor shall be entitled, at its expense, to participate in (but not control) such defense. The Indemnitor shall have the right to settle or compromise any such Third Party Claim for which it is providing indemnity so long as such settlement does not impose any obligations on the Indemnitee (except with respect to providing releases of the third party). The Indemnitor shall not be liable for any settlement effected by the Indemnitee without the Indemnitor's consent except where the Indemnitee has assumed the defense because Indemnitor has failed or refused to do so. The Indemnitor may assume and control, or bear the costs, of any such defense subject to its reservation of a right to contest the Indemnitee's right to indemnification hereunder, provided that it gives the Indemnitee notice of such reservation within 15 days of the date of the Claim Notice.

#### 12.7 Contract Damages

Each party shall be entitled to contract damages for a breach of the other party's obligations hereunder.

### **ARTICLE 13. GENERAL PROVISIONS**

#### 13.1 Entirety of Agreement; Amendments

This Agreement (including the Schedules and Exhibits hereto), the Related Agreements and the other documents and instruments specifically provided for in this Agreement and the Related Agreements contain the entire understanding between the parties concerning the subject matter of this Agreement and such other documents and instruments and, except as expressly provided for herein, supersede all prior understandings and agreements, whether oral or written, between them with respect to the subject matter hereof and thereof. There are no representations, warranties, agreements, arrangements or understandings, oral or written, between the parties hereto relating to the subject matter of this Agreement and such other documents and instruments which are not fully expressed herein or therein. This Agreement may be amended or modified only by an agreement in writing signed by each of the parties hereto. All Exhibits and Schedules attached to or delivered in connection with this Agreement are integral parts of this Agreement as if fully set forth herein.

#### 13.2 Successors and Assigns

The rights under this Agreement shall not be assignable or transferable nor the duties delegable by either party without the prior consent of the other, and nothing contained in this Agreement, express or implied, is intended to confer upon any Person, other than the parties hereto, their permitted successors-in-interest and permitted assignees and any Person benefiting

from the indemnities provided herein, any rights or remedies under or by reason of this Agreement unless so stated to the contrary.

13.3 Notices

All notices, requests, demands, waivers, consents and other communications hereunder shall be in writing, shall be delivered either in person, by telegraphic, facsimile or other electronic means, by overnight air courier or by mail, and shall be deemed to have been duly given and to have become effective (a) upon receipt if delivered in person or by telegraphic, facsimile or other electronic means, (b) one Business Day after having been delivered to an air courier for overnight delivery or (c) three Business Days after having been deposited in the U.S. mails as certified or registered mail, return receipt requested, all fees prepaid, directed to the parties or their permitted assignees at the following addresses (or at such other address as shall be given in writing by a party hereto):

If to Sellers, addressed to:

Hildale City  
\_\_\_\_\_  
\_\_\_\_\_

Attn:

Facsimile:

Colorado City  
\_\_\_\_\_  
\_\_\_\_\_

Attn:

Facsimile:

If to Buyer, addressed to:

Garkane Energy Cooperative, Inc.  
P.O. Box 465  
Loa, Utah 84747  
Attn: Carl R. Albrecht  
Facsimile: (435) 836-2795

with a copy to counsel for Buyer:

Deseret Power Electric Cooperative  
10714 South Jordan Gateway  
South Jordan, Utah 84095  
Attn: David F. Crabtree  
Facsimile: (801) 619-6598

13.4 Attorneys' Fees

In any litigation or other proceeding relating to this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees.

13.5 Severability

Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be valid, binding and enforceable under applicable Law, but if any provision of this Agreement is held to be invalid, void (or voidable) or unenforceable under applicable Law, such provision shall be ineffective only to the extent held to be invalid, void (or voidable) or unenforceable, without affecting the remainder of such provision or the remaining provisions of this Agreement.

13.6 Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

13.7 Captions and Paragraph Headings

Captions and paragraph headings used herein are for convenience only and are not a part of this Agreement and shall not be used in construing it.

13.8 Waiver

The failure of a party to insist, in any one or more instances, on performance of any of the terms, covenants and conditions of this Agreement shall not be construed as a waiver or relinquishment of any rights granted hereunder or of the future performance of any such term, covenant or condition, but the obligations of the parties with respect thereto shall continue in full force and effect. No waiver of any provision or condition of this Agreement by a party shall be valid unless in writing signed by such party or operational by the terms of this Agreement. A waiver by one party of the performance of any covenant, condition, representation or warranty of the other party shall not invalidate this Agreement, nor shall such waiver be construed as a waiver of any other covenant, condition, representation or warranty. A waiver by any party of the time for performing any act shall not constitute a waiver of the time for performing any other act or the time for performing an identical act required to be performed at a later time.

13.9 Governing Law

This Agreement shall be governed in all respects, including validity, interpretation and effect, by the laws of the State of Utah applicable to contracts made and to be performed wholly within the State of Utah by residents of the State of Utah. Any action or proceeding arising under this Agreement shall be adjudicated in Kane County, Utah.

13.10 ARS Ann. § 38-511

**Arizona Rev. Stat. Ann. 38-511 applies to this contract as if fully set forth herewith, which allows cancellation of this contract, within three years after its execution if any person significantly involved in initiating, negotiating, securing, drafting, or creating the**

**contract on behalf of the state, its political subdivisions or any of the departments or agencies of either is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or consultant to any other party of the contract with respect to the subject matter of the contracts. Sellers will provide to Buyer notarized, sworn affidavits from each person significantly involved in initiating, negotiating, securing, drafting, or creating the contract on behalf of the state of Arizona, its political subdivisions or any of the departments or agencies stating that they and their actions are in full compliance with Arizona Rev. Stat. Ann. 38-511.**

13.11 Time Is of the Essence

Time is hereby expressly made of the essence with respect to each and every term and provision of this Agreement. The parties acknowledge that each will be relying upon the timely performance by the other of its obligations hereunder as a material inducement to each party's execution of this Agreement.

*[Signature Page Follows]*