

# Exhibit A

*EXECUTION COPY*

**SECOND AMENDED AND RESTATED JOINT OWNERSHIP AGREEMENT**

**BY AND AMONG**

**PUBLIC SERVICE COMPANY OF COLORADO**

**AND**

**INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION**

**AND**

**HOLY CROSS ELECTRIC ASSOCIATION, INC.**

**COMANCHE UNIT 3 PROJECT**

## TABLE OF CONTENTS

	<u>Page</u>
<b>ARTICLE 1    DEFINITIONS .....</b>	<b>2</b>
<b>ARTICLE 2    OWNERSHIP AND NON-PSCO PARTY ENTITLEMENTS; ACKNOWLEDGMENTS .....</b>	<b>11</b>
2.1    Ownership Interests and Facility Percentage Share.....	11
2.2    Power and Benefit Entitlement .....	12
2.3    Common Facilities. ....	12
2.4    Other Property Rights .....	13
2.5    [Intentionally omitted.] .....	13
2.6    Acknowledgment of Satisfaction of PPA Obligation .....	13
<b>ARTICLE 3    OBLIGATIONS AND COVENANTS OF THE PARTIES .....</b>	<b>13</b>
3.1    Execution of Other Agreements.....	13
3.2    Payment Obligations .....	13
3.3    Government Approvals.....	14
3.4    Real Property Rights .....	15
3.5    Interconnection to Transmission System .....	15
3.6    Financing.....	15
3.7    Due Diligence .....	15
3.8    Environmental Review.....	15
3.9    Availability of Personnel and Resources .....	16
3.10    Several Obligations.....	16
3.11    Independent Covenants and Obligations .....	16
3.12    Liability.....	16
3.13    No Adverse Distinction.....	17
<b>ARTICLE 4    DECISION TO PROCEED; CONDITIONS TO CLOSING DATE; OTHER TERMS OF SALE .....</b>	<b>17</b>
4.1    [Intentionally omitted.] .....	17
4.2    [Intentionally omitted.] .....	17
4.3    [Intentionally omitted.] .....	17
4.4    Conditions Precedent to Closing Date. ....	17
4.5    Timing and Location of Closing; Closing Deadline .....	19
4.6    Extension of Closing Deadline. ....	20
4.7    Failure to Close .....	20
4.8    Waiver of Partition Rights .....	22
4.9    No Warranty by PSCo .....	22
<b>ARTICLE 5    CONSTRUCTION AND OPERATION .....</b>	<b>22</b>
5.1    PSCo Supervision. ....	22
5.2    Construction Agreements.....	23
5.3    Cooperation.....	23
<b>ARTICLE 6    E&amp;O COMMITTEE AND AUDIT COMMITTEE .....</b>	<b>24</b>
6.1    E&O Committee. ....	24
6.2    Audit Committee.....	24

<b>ARTICLE 7</b>	<b>PAYMENT PROCEDURES</b>	25
7.1	Invoices	25
7.2	Payments	25
7.3	Non-Payment	26
7.4	Billing Disputes	26
7.5	Invoice Adjustments	26
<b>ARTICLE 8</b>	<b>TAXES</b>	26
8.1	Section 761 Election	27
8.2	General Tax Matters	27
<b>ARTICLE 9</b>	<b>FACILITY EXPANSION AND MODIFICATION</b>	27
9.1	Consent	28
9.2	Costs	28
<b>ARTICLE 10</b>	<b>INSURANCE AND LOSSES</b>	28
10.1	Insurance Coverage	28
10.2	Terms of Insurance Coverages	30
10.3	Event of Loss and Event of Total Loss	31
10.4	Allocation of Loss Proceeds and Condemnation Awards	32
<b>ARTICLE 11</b>	<b>RETIREMENT OF THE FACILITY</b>	33
11.1	Retirement of Facility	33
11.2	Retirement of Common Facilities	33
11.3	Retirement Costs	34
11.4	Termination of Agreement	34
<b>ARTICLE 12</b>	<b>TRANSFERS OF OWNERSHIP INTERESTS; RIGHT OF FIRST REFUSAL</b>	34
12.1	Restriction on Transfers	34
12.2	Merger, Consolidation, Etc.	35
12.3	Transfers by Non-PSCo Parties	35
12.4	Transfer by PSCo to Affiliate	35
12.5	Right of First Refusal	36
12.6	Non-PSCo Party Acknowledgment	37
<b>ARTICLE 13</b>	<b>LIENS AND SECURITY INTERESTS</b>	37
13.1	Restriction on Liens	37
13.2	Security Interests	38
13.3	Lien of the PSCo Indenture	38
13.4	Interpretation of PSCo Indenture and Project Agreements	38
13.5	Consent To Assignment	38
<b>ARTICLE 14</b>	<b>EVENTS OF DEFAULT AND REMEDIES</b>	39
14.1	PSCo Defaults and Non-PSCo Party Remedies	39
14.2	Non-PSCo Party Defaults and PSCo Remedies	40
14.3	Remedies Not Exclusive	43
14.4	Disputes	43
<b>ARTICLE 15</b>	<b>FORCE MAJEURE</b>	43
15.1	Force Majeure Excuse	43
15.2	Force Majeure Exclusions	44
15.3	Records	44

<b>ARTICLE 16 INDEMNIFICATION .....</b>	<b>44</b>
16.1 General Indemnification .....	44
16.2 PSCo Environmental Indemnification .....	45
16.3 Non-PSCo Party Indemnification .....	46
16.4 Indemnification Against Liens.....	47
16.5 Indemnification Procedure.....	47
<b>ARTICLE 17 ACCESS TO INFORMATION; CONFIDENTIALITY.....</b>	<b>47</b>
17.1 Access to Information .....	48
17.2 Confidentiality .....	48
17.3 Press Releases .....	49
<b>ARTICLE 18 DISPUTE RESOLUTION.....</b>	<b>49</b>
18.1 General.....	49
18.2 Dispute Resolution.....	49
18.3 Continued Performance .....	49
<b>ARTICLE 19 MISCELLANEOUS PROVISIONS.....</b>	<b>49</b>
19.1 Representations and Warranties.....	50
19.2 Binding Effect and Benefit of This Agreement .....	50
19.3 Further Assurances.....	50
19.4 Severability .....	50
19.5 Amendments .....	50
19.6 Choice of Law; Jurisdiction and Venue.....	50
19.7 Counterparts .....	50
19.8 Notices .....	50
19.9 Joint Preparation .....	51
19.10 Liability.....	51
19.11 Term and Effectiveness; Entire Agreement; Prior Agreements .....	51
19.12 Brokers .....	52
19.13 Survival .....	52
19.14 Rules of Construction .....	52

#### Schedules

- 1 Description of Facility Site
- 2 Description of Facility
- 3 Description of Project Costs
- 4 Government Approvals
5. Description of New Common Facilities
- 6 Scheduling Protocol
7. Air Permit Costs
8. Project Cost Estimates

#### Exhibits

- A Form of Bill of Sale
- B Form of Bargain and Sale Deed

This SECOND AMENDED AND RESTATED JOINT OWNERSHIP AGREEMENT (as amended, supplemented or modified from time to time, the "Agreement") is entered into as of May 31, 2006 by and among Public Service Company of Colorado, a Colorado corporation, having its principal place of business at 1225 17th Street, Denver, CO 80202 (together with its successors and permitted assigns in such capacity, "PSCo"), Intermountain Rural Electric Association, a Colorado corporation, having its principal place of business at 5496 North U.S. Highway 85, Sedalia, CO 80135 (together with its successors and permitted assigns in such capacity, "IREA"), and Holy Cross Electric Association, Inc. (d/b/a Holy Cross Energy), a Colorado corporation, having its principal place of business at 3799 Highway 82, Glenwood Springs, CO 81602 (together with its successors and permitted assigns in such capacity, "Holy Cross"). Each of PSCo, IREA and Holy Cross is at times referred to individually herein as a "Party" and collectively as the "Parties."

#### RECITALS:

**WHEREAS**, the Colorado Public Utilities Commission on January 21, 2005 issued to PSCo a certificate of public convenience and necessity (the "Facility CPCN") to construct and own an approximately 750 MW pulverized coal-fired electric generating facility (as further described in Schedule 2, the "Facility") on the site of its existing Comanche Station, located southeast of Pueblo, Colorado (the "Existing Facility");

**WHEREAS**, PSCo and IREA have entered into (i) that certain Joint Ownership Agreement (the "Original JOA"), (ii) that certain Operations and Maintenance Agreement (the "Original O&M Agreement"), (iii) that certain Common Facilities Agreement (the "Original Common Facilities Agreement") and (iv) that certain Property Rights Agreement (the "Original Property Rights Agreement"), each dated as of April 8, 2005;

**WHEREAS**, PSCo and IREA have entered into a Second Amended and Restated Power Purchase Agreement, dated April 8, 2005 (the "IREA PPA"), to provide for backup power service and certain other services;

**WHEREAS**, the Original JOA has been amended by PSCo and IREA pursuant to (i) that certain Letter Agreement, dated as of August 18, 2005, and (ii) that certain Letter agreement, dated as of October 19, 2005;

**WHEREAS**, PSCo and IREA have entered into (i) that certain First Amended and Restated Joint Ownership Agreement (the "First Amended and Restated JOA"), (ii) that certain First Amended and Restated Operations and Maintenance Agreement (the "First Amended and Restated O&M Agreement"), (iii) that certain First Amended and Restated Common Facilities Agreement (the "First Amended and Restated Common Facilities Agreement") and (iv) that certain First Amended and Restated Property Rights Agreement (the "First Amended and Restated Property Rights Agreement"), each dated as of April 4, 2006;

**WHEREAS**, PSCo and Holy Cross are parties to that certain Amended Power Supply Agreement, dated February 6, 1992, as amended as of January 1, 2004, and as further

clarified by that certain Letter Agreement, dated June 1, 1995 (the "Holy Cross PSA"), pursuant to which PSCo sells electricity to Holy Cross;

**WHEREAS**, pursuant to Section 5.6 of the Holy Cross PSA, Holy Cross has the option to participate as an owner in certain generation construction projects undertaken by PSCo;

**WHEREAS**, PSCo and Holy Cross shall enter into an amendment and restatement of the Holy Cross PSA to provide for backup power service and certain other services;

**WHEREAS**, PSCo, IREA and Holy Cross desire to enter into this Agreement;

**WHEREAS**, PSCo, IREA and Holy Cross intend to simultaneously enter into an amendment and restatement of the First Amended and Restated Common Facilities Agreement, the First Amended and Restated O&M Agreement and the First Amended and Restated Property Rights Agreement; and

**WHEREAS**, the Parties have set forth in this Agreement the terms and conditions by which they may elect to proceed with the Project (as defined below) and jointly own the Facility, the Facility Site (as defined below) and the New Common Facilities (as defined below).

**NOW, THEREFORE**, in consideration of the premises set forth above, and for other good and valuable consideration the receipt and sufficiency of which the Parties hereby acknowledge, the Parties hereto, intending to be legally bound, mutually agree as follows:

## **ARTICLE 1 DEFINITIONS**

Except as otherwise expressly provided elsewhere in this Agreement, each capitalized term used in this Agreement has the meaning assigned it in this Article 1.

"Affiliate" means, with respect to any Party, any entity which is a direct or indirect parent or subsidiary of such Party or which directly or indirectly (i) owns or controls such Party, (ii) is owned or controlled by such Party, or (iii) is under common ownership or control with such Party.

"Agreement" has the meaning set forth in the Preamble.

"Air Permit Costs" means the expenditures incurred by PSCo in connection with certain upgrades to the air quality control system of the Existing Facility necessary to expedite a final non-appealable air permit for the Facility from the Colorado Department of Public Health and Environment.

"Audit Committee" has the meaning set forth in Section 6.2.

“Bankruptcy Event” means, with respect to any entity, such entity: (i) voluntarily files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it by its creditors and such petition is not dismissed within sixty (60) calendar days of the filing or commencement; (ii) makes an assignment or any general arrangement for the benefit of creditors; (iii) otherwise becomes insolvent, however evidenced; (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets; or (v) is generally unable to pay its debts as they fall due.

“Business Day” means any day on which commercial banks are not authorized or required to close in Denver, Colorado. For the avoidance of doubt, Saturday and Sunday shall not be Business Days.

“Carrying Costs” means, in respect of any Project Costs paid by a Non-PSCo Party pursuant to Sections 3.2.1 or 4.4.1(a), an amount equal to the product of (a) the average outstanding amount of such Project Costs as of the first and last days of each month commencing with the month in which the first such Project Costs were incurred and ending with the month in which such Party’s respective Closing Date occurs and (b) a percentage for each such month equal to one-twelfth of the Default Interest Rate.

“Claims” has the meaning set forth in Section 16.1.

“Closing Date” means, with respect to each Non-PSCo Party, the date on which the conditions set forth in Section 4.4 are achieved and such Non-PSCo Party purchases its Ownership Interests.

“Closing Deadline” has the meaning provided in Section 4.5.

“Code” has the meaning set forth in Section 8.1.

“Commercial Operation Date” means the date the Facility produces commercial amounts of Energy and has passed all acceptance tests under the Construction Agreements, and care and custody of the Facility is accepted by the Operator.

“Common Facilities” means certain equipment, systems, facilities, structures, improvements and other property used in the commercial operation of both the Facility and the Existing Facility, comprising the Existing Common Facilities and New Common Facilities.

“Common Facilities Agreement” means that certain Second Amended and Restated Common Facilities Agreement among the Parties, dated as of the date hereof, which sets forth certain rights and obligations of the Parties with respect to Existing Common Facilities.

“Confidential Information” has the meaning set forth in Section 17.2.1.



“Construction Agreements” means the agreement or agreements to be entered into between PSCo and one or more contractors for the design and engineering of, procurement of materials and equipment for, and construction of (i) the Facility, (ii) the New Common Facilities and (iii) upgrades to the Existing Common Facilities.

“Construction Costs” means those Project Costs relating to the design and engineering of, procurement for, and construction of the Project, including costs incurred pursuant to the Construction Agreements, as generally described in Part B of Schedule 3.

“Coordinating Committee” means a committee composed of one (1) senior executive appointed by each Party for the purpose of conducting informal dispute resolution, in accordance with Section 18.2, of matters referred to it by the E&O Committee or the Audit Committee.

“Default Interest Rate” means, for any applicable day, the per annum prime lending rate published in *The Wall Street Journal* under “Money Rates” on that day, or for any day on which *The Wall Street Journal* is not published, the rate appearing in the most recently published edition, plus two percentage points (200 basis points). In no event shall the Default Interest Rate exceed the maximum rate permitted by applicable Laws.

“Delivery Point” means the point of interconnection between the Facility and the electrical transmission network of PSCo, located at the high side of the generator step-up transformer associated with the Facility.

“Dispute” has the meaning set forth in Section 18.1.

“E&O Committee” has the meaning set forth in Section 6.1.1.

“Easements” mean, with respect to each Party, such Party's easement rights as expressly provided in the Project Agreements or in the Bargain and Sale Deed delivered by PSCo on a Closing Date.

“Effective Date” means the date hereof, except with respect to any right or obligation as between PSCo and IREA which has arisen before the date hereof under the Original JOA, for which the Effective Date shall be April 8, 2005, and under the First Amended and Restated JOA, for which the Effective Date shall be April 4, 2006.

“Energy” means the net measured amount of electric energy generated by the Facility and delivered to the Delivery Point for any period.

“Environmental Claims” has the meaning set forth in Section 16.2.1.

“Environmental Law” means any and all Laws, now or hereafter in effect, and any judicial or administrative judgment, relating to pollution or protection of human health or the environment, including without limitation, laws relating to Releases or threatened Releases of Hazardous Materials or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of Hazardous Materials.

“Event of Default” means, as applicable, a PSCo Default or a Non-PSCo Party Default.

“Event of Loss” means any loss of, destruction or damage to, or taking of any part of the Facility Assets or the Existing Common Facilities.

“Event of Total Loss” means: (i) all or substantially all of the Facility Assets or the Existing Common Facilities shall be damaged to the extent of being completely or substantially completely destroyed; (ii) any damage to the Facility Assets or the Existing Common Facilities that results in an insurance settlement with respect thereto on the basis of a total loss or an agreed constructive or a compromised total loss of the Facility Assets or the Existing Common Facilities; or (iii) all or substantially all of or a material portion of the Facility Assets or the Existing Common Facilities has been taken by exercise of eminent domain or a similar right or power by a Governmental Authority or a Governmental Authority shall order the Facility Assets or the Existing Common Facilities to cease to operate permanently.

“Existing Common Facilities” means those Common Facilities owned by PSCo, as more fully described in Schedule 2 to the Common Facilities Agreement.

“Existing Facility” has the meaning set forth in the first Recital.

“Facility” has the meaning set forth in the first Recital.

“Facility Assets” means and consists of:

- (a) the Facility;
- (b) the Energy and capacity produced by the Facility;
- (c) the New Common Facilities;
- (d) the Facility Site;
- (e) the benefits of any manufacturer's or materialmen's warranties and licenses, to the extent provided in Section 5.2; and
- (f) inventories of spare parts, scrubber additives and materials and supplies for use in connection with the start up and operation of the Facility.

“Facility CPCN” has the meaning set forth in the first Recital.

“Facility Ownership Interest” has the meaning set forth in Section 2.1.

“Facility Percentage Share” has the meaning set forth in Section 2.1.

“Facility Site” means the parcel of real estate on which the Facility will be constructed and situated, all as generally described in Schedule 1.

"Financing Documents" means the loan and credit agreements, mortgages, deeds of trust, notes, bonds, indentures (including, without limitation, the PSCo Indenture), security agreements, lease financing agreements, interest rate exchanges or swap agreements and other documents relating to the acquisition, development, bridge, construction and/or the permanent financing for the Project, including any credit enhancement, credit support, working capital financing, or refinancing documents, any intercreditor agreements or arrangements, and any and all amendments, modifications or supplements to the foregoing that may be entered into from time to time with Affiliates or third parties.

"First Amended and Restated Common Facilities Agreement" has the meaning set forth in the fifth Recital.

"First Amended and Restated JOA" has the meaning set forth in the fifth Recital.

"First Amended and Restated O&M Agreement" has the meaning set forth in the fifth Recital.

"First Amended and Restated Project Agreements" means the First Amended and Restated Common Facilities Agreement, the First Amended and Restated JOA, the First Amended and Restated O&M Agreement and the First Amended and Restated Property Rights Agreement.

"First Amended and Restated Property Rights Agreement" has the meaning set forth in the fifth Recital.

"First Meeting Deadline" has the meaning set forth in Section 18.2.

"Force Majeure" has the meaning set forth in Section 15.1.

"Government Approval" means any authorization, consent, approval, license, lease, ruling, permit, tariff, rate, certification, concession, grant, franchise, exemption, variance, order, judgment, decree, publication, declaration or registration issued by any Governmental Authority, including without limitation that related to any Environmental Law.

"Governmental Authority" means any authority, official or representative of the government of any nation or of any state or political subdivision thereof, whether foreign or domestic, having jurisdiction over the Parties, the Facility Assets, the contractor(s) under any Construction Agreement, the Operator, or their respective subcontractors or suppliers, including, without limitation, any city, municipality, township, and county, and any person or entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to any such government.

"Hazardous Material" means the wastes described in 42 U.S.C. Section 6921(b)(3)(A)(i)-(iii), and all substances defined as Hazardous Substances, Oils, Pollutants or Contaminants in the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.5, or defined as such by, or regulated as such under, any Environmental Law.

"Holy Cross" has the meaning set forth in the Preamble.

"Holy Cross PSA" has the meaning set forth in the sixth Recital.

"Industrial Remediation Standard" means a numerical standard that defines the concentrations of Hazardous Materials that may be permitted to remain in any environmental media at an industrial facility after an investigation, remediation or containment of a Release or threatened Release of Hazardous Materials.

"Interconnection Agreement" means the agreement to be executed by Colorado Resource Development on behalf of PSCo Generation and the Transmission Planning group of PSCo providing for the electrical interconnection of the Facility to the electrical transmission system of PSCo, as any such agreement may be amended, modified or supplemented from time to time.

"Internal Costs" means those internal costs for labor, development, counsel, advisors and Affiliates and other third party costs incurred by a Party in connection with entering into this Agreement and the other Project Agreements. For the avoidance of doubt, Pre-Construction Costs shall not be considered Internal Costs.

"IREA" has the meaning set forth in the Preamble.

"IREA PPA" has the meaning set forth in the third Recital.

"Law" means any statute, regulation, ordinance, rule, Government Approval, agreement, directive, guideline, policy, requirement, or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing by, any Governmental Authority, whether now or hereafter in effect (including any Environmental Law).

"Lender" means the bank(s), underwriter(s), institution(s) and/or corporate entity(ies) (including Affiliates), together with any trustee (including, without limitation, the trustee under the PSCo Indenture), depository bank or agent, providing construction or permanent debt financing or refinancing or other credit to any Party, which such Party uses for purposes of developing, constructing, operating and owning such Party's ownership interest in the Facility Assets.

"Lien" means any mortgage, deed of trust, pledge, security interest, encumbrance, easement, lease, reservation, restriction, servitude, charge or similar right and any other lien of any kind, including, without limitation, any conditional sale or other title retention agreement, any lease in the nature thereof, any filing of, or agreement to give, any financing statement under the Uniform Commercial Code of any jurisdiction, and any defect, irregularity, exception or limitation in record title.

"Local Approvals" means all approvals and permits PSCo determines are necessary or desirable to (i) annex the Facility Site into the City of Pueblo, Colorado, if necessary, (ii) establish the Facility Site as a valid legal parcel, through subdivision of the Facility Site or, in

PSCo's discretion, through the receipt of a subdivision exemption and (iii) construct and operate the Facility and, as applicable, the Common Facilities, including without limitation, any special use permits, zoning amendments or other permits or approvals pursuant to any applicable local ordinances or regulations.

"New Common Facilities" means those Common Facilities co-owned by the Parties, as more fully described in Schedule 5.

"New Common Facilities Ownership Interest" has the meaning set forth in Section 2.3.1.

"Non-Performing Party" has the meaning set forth in Section 15.1.

"Non-PSCo Party" means IREA, Holy Cross and each Person other than PSCo that from time to time becomes a Party to this Agreement in accordance with its terms and conditions.

"Non-PSCo Party Default" has the meaning given to it in Section 14.2.1.

"Notice To Proceed Date" has the meaning set forth in the primary Construction Agreement providing for construction of the Facility.

"O&M Agreement" means that certain Second Amended and Restated Operations and Maintenance Agreement, dated as of the date hereof, among the Parties, which sets forth the respective rights and obligations of the Parties and the Operator with respect to the operation of the Facility and the Common Facilities.

"Operator" means PSCo in its capacity as operator of the Facility and the Common Facilities under the O&M Agreement.

"Original Common Facilities Agreement" has the meaning set forth in the second recital.

"Original JOA" has the meaning set forth in the second recital.

"Original O&M Agreement" has the meaning set forth in the second recital.

"Original Project Agreements" means the Original JOA, the Original O&M Agreement, the Original Common Facilities Agreement and the Original Property Rights Agreement.

"Original Property Rights Agreement" has the meaning set forth in the second recital.

"Owner" means each Party that has title to Ownership Interests.

"Ownership Interests" means collectively, with respect to each Party, such Party's Facility Ownership Interest and its New Common Facilities Ownership Interest.

"Party" has the meaning set forth in the Preamble.

"Permitted Encumbrances" means, in respect of any property:

- (a) Liens for taxes, assessments and other governmental charges or requirements which are not delinquent or which are being contested in good faith by appropriate proceedings;
- (b) mechanics', workmen's, repairmen's, materialmen's, warehousemen's and carrier's Liens, Liens or privileges of any employees of a Party for salary or wages earned, but not yet payable, and other Liens, including without limitation Liens for worker's compensation awards, arising in the ordinary course of business for charges or requirements which are not delinquent or which are being contested in good faith and by appropriate proceedings;
- (c) easements, leases, reservations or other rights of others in, on, over, and/or across, and laws, regulations and restrictions affecting, and defects, irregularities, exceptions and limitations in title to property or any part thereof; provided, however, that such easements, leases, reservations, rights, laws, regulations, restrictions, defects, irregularities, exceptions and limitations do not in the aggregate materially impair the use of the property considered as a whole for the purposes for which it is held;
- (d) Liens in respect of attachments, judgments or awards arising out of judicial or administrative proceedings (i) in an amount not exceeding the amount permitted under clause (c)(i) of the definition of "Permitted Liens" in the PSCo Indenture as of the date hereof or (ii) with respect to which the Party in question shall (X) in good faith be prosecuting an appeal or other proceeding for review and with respect to which such Party shall have secured a stay of execution pending such appeal or other proceeding or (Y) have the right to prosecute an appeal or other proceeding for review;
- (e) minor defects and irregularities in title to such property, which do not in the aggregate materially impair the value of such property or the use of such property for the purposes for which it is held;
- (f) Permitted Liens as defined under the PSCo Indenture as of the date hereof;
- (g) rights and interests of any Party arising out of or relating to the common ownership or joint use of the Facility Assets and Existing Common Facilities pursuant to this Agreement and the other Project Agreements; and
- (h) Liens created or permitted to exist by a Party on such Party's Ownership Interests and Easements if and to the extent that the enforcement of such Liens would not adversely affect the interests of any other Party in any material respect, including, without limitation, any Liens arising in connection with the Financing Documents, subject to Sections 3.6.1 and 13.2.

“Person” means any individual, partnership, joint venture, firm, corporation, association, trust or other entity, or any Governmental Authority.

“Phase 1 ESA” has the meaning set forth in Section 3.8.1.

“Pre-Construction Costs” means all costs, expenses and fees incurred by PSCo in connection with pre-construction activities for the Project, as generally described in Part A of Schedule 3. For the avoidance of doubt, Pre-Construction Costs shall not include any Internal Costs or Air Permit Costs.

“Project” means the Facility, the Facility Site, the New Common Facilities and the upgrades to the Existing Common Facilities.

“Project Agreements” means all agreements between the Parties relating to the ownership, development, construction or operation of the Facility and Common Facilities, including this Agreement, the O&M Agreement, the Property Rights Agreement and the Common Facilities Agreement, but excluding the Financing Documents.

“Project Costs” means all costs incurred by the Parties directly related to, or necessary and appropriate for the procurement and preparation of the Facility Site; development, design, engineering, procurement and construction of the Facility, the New Common Facilities and the upgrades to the Existing Common Facilities; and the initial inventories allocable to the Facility for spare parts, scrubber additives and materials and supplies for use in connection with the start-up and operation of the Facility, including Pre-Construction Costs, Construction Costs and Water Resource Costs. For the avoidance of doubt, Project Costs shall not include any Internal Costs or Air Permit Costs.

“Property” means the entire real estate parcel, including structures and appurtenances thereto, owned by PSCo that currently contains the entire Comanche generating station, including the Existing Facility and the Existing Common Facilities, and will contain the Project, the Facility, Facility Site, the Facilities Assets and the New Common Facilities.

“Property Rights Agreement” means that certain Second Amended and Restated Property Rights Agreement, dated as of the date hereof, among the Parties, which sets forth the respective rights and obligations of the Parties with respect to the areas of Property on which the Common Facilities are located.

“Prudent Utility Practice” means the practices, methods, conduct and actions (including, but not limited to, the practices, methods, conduct and acts engaged in or approved by a significant portion of the power industry) that, at a particular time, in the exercise of reasonable judgment at the time a decision was made, could have been expected to accomplish the desired result in a manner consistent with applicable Law, standards, reliability, safety, environmental protection, economy, good business practices and expedition. Prudent Utility Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather is a spectrum of possible practices, methods or acts which can fall within this description. In applying the standard of Prudent

Utility Practice to any matter under this Agreement, equitable consideration shall be given to the circumstances, requirements and obligations of each of the Parties.

“PSCo” has the meaning set forth in the Preamble.

“PSCo Default” has the meaning given to it in Section 14.1.1.

“PSCo Indenture” means PSCo's indenture, dated as of October 1, 1993, as amended and supplemented, and any successor thereto.

“PSCo Loan” has the meaning set forth in Section 7.3.2.

“Release” means any release, spill, emission, discharge, leaking, pumping, injection, deposit, disposal, dispersal, leaching or migration into the indoor or outdoor environment (including, without limitation, ambient air, surface water, groundwater and surface or subsurface strata) or into or out of any property, including the movement of Hazardous Materials through or in the air, soil, surface water, groundwater or property.

“Remaining Parties” has the meaning set forth in Section 12.5.1.

“Total Facility Percentage Share” means, as to any Party, the ratio of such Party's name plate capacity entitlement (measured in megawatts) in the Facility to the aggregate name plate capacity (measured in megawatts) of the Facility and the Existing Facility, which ratio shall be recalculated by the E&O Committee (i) upon the Commercial Operation Date to reflect any adjustment to the name plate capacity of the Facility arising through commissioning and testing, (ii) upon the retirement of either unit of the Existing Facility and (iii) upon any permanent derate or upgrade to the capacity (measured in megawatts) of the Facility or the Existing Facility. As of the date of this Agreement, the name plate capacity of the Facility shall be deemed to be 750 megawatts and the aggregate name plate capacity of the Facility and the Existing Facility shall be deemed to be 1410 megawatts.

“Water Resource Costs” means certain costs, expenses and fees incurred by PSCo in connection with procuring necessary water resources for the Project, as generally described in Part C of Schedule 3. For the avoidance of doubt, Water Resource Costs shall not include any Internal Costs.

“Withdrawing Party” means a Non-PSCo Party that is withdrawing from this Agreement, the other Project Agreements and the Project pursuant to one of the provisions for withdrawal set forth in this Agreement.

## ARTICLE 2 OWNERSHIP AND NON-PSCO PARTY ENTITLEMENTS; ACKNOWLEDGMENTS

2.1 Ownership Interests and Facility Percentage Share. From and after each Closing Date, PSCo and each Non-PSCo Party that has purchased Ownership Interests



will jointly own the Facility Assets, other than New Common Facilities, as tenants in common with undivided interests therein. Each Party's ownership interest in New Common Facilities shall be as set forth in Section 2.3.1. Each such Party's undivided ownership interest in the Facility Assets other than the New Common Facilities (its "Facility Ownership Interest") will be equal to that portion of the Facility Assets that corresponds to the percentage set forth across from its name in the following table (its "Facility Percentage Share"):

<u>Party</u>	<u>Percentage Share</u>
PSCo	66 2/3%
IREA	25 1/3%
Holy Cross	8%

Each Party's Facility Percentage Share shall also establish the allocation to such Party of (i) any Project Costs that such Party shall be obligated to pay in accordance with this Agreement, (ii) the electrical capacity and Energy from the Facility, as described in Section 2.2, (iii) excess cash distributions and (iv) proceeds from an asset sale (other than a sale of all or part of a single Party's Facility Ownership Interest), liquidation, or dissolution, in each case in this clause (iv) relating to the Facility Assets other than the New Common Facilities.

## 2.2 Power and Benefit Entitlement.

2.2.1 From and after the Commercial Operation Date until the termination of this Agreement, each Party shall be entitled to a percentage of the Available Net Generating Capability (as defined in Schedule 6) and associated Energy, ancillary services, emissions allowances, by-products and other benefits from the Facility equal to its Facility Percentage Share. Additional terms and conditions of each Non-PSCo Party's entitlement to Available Net Generating Capability and Energy from the Facility are as set forth in the Scheduling Protocol attached as Schedule 6 and in such Non-PSCo Party's power purchase agreement with PSCo, as amended or amended and restated from time to time.

2.2.2 Prior to the Commercial Operation Date, PSCo shall sell Energy produced by the Facility and shall apply the proceeds of such sales towards the payment of Project Costs. Each Party shall receive a credit towards its obligation to make payments for Project Costs under this Agreement in an amount equal to its Facility Percentage Share of such proceeds. PSCo will reflect such credit in the next invoice for Project Costs following the receipt of such sale proceeds.

## 2.3 Common Facilities.

2.3.1 New Common Facilities. From and after each Closing Date, PSCo and each Non-PSCo Party that has purchased Ownership Interests will jointly own the New Common Facilities as tenants in common with undivided interests therein. Each such Party's undivided ownership interest in the New Common Facilities (its "New Common Facilities Ownership Interest") will initially be equal to the same percentage as its Facility Percentage

Share and, upon the fifteenth (15<sup>th</sup>) anniversary of the Commercial Operation Date, shall automatically be adjusted to a percentage interest that is equal to such Non-PSCo Party's Total Facility Percentage Share. The Non-PSCo Parties shall take all actions and execute all bills of sale, deeds and other certificates and documents as directed by PSCo in connection with the adjustment in such Non-PSCo Party's New Common Facilities Ownership Interest. Any Party's allocation of any proceeds from an asset sale (other than a sale of all or part of a single Party's New Common Facilities Ownership Interest), liquidation, or dissolution, in each case relating solely to New Common Facilities shall be based on such Party's New Common Facilities Ownership Interest.

2.3.2 Existing Common Facilities. Each Non-PSCo Party shall be entitled to use and enjoy the benefits of the Existing Common Facilities pursuant to and in accordance with the Common Facilities Agreement.

2.4 Other Property Rights. Each Non-PSCo Party shall be entitled to access areas of the Property on which the Common Facilities are located pursuant to and in accordance with the Property Rights Agreement.

2.5 [Intentionally omitted.]

2.6 Acknowledgment of Satisfaction of PPA Obligation. By executing this Agreement, each Non-PSCo Party acknowledges and agrees that PSCo has fulfilled its obligation under its power purchase agreement with each Non-PSCo Party to provide to such Non-PSCo Party an option to participate in the ownership of the Facility.

### **ARTICLE 3 OBLIGATIONS AND COVENANTS OF THE PARTIES**

3.1 Execution of Other Agreements. On April 8, 2005, PSCo and IREA executed and delivered each of the following agreements, in addition to the Original JOA: (i) the Original O&M Agreement; (ii) the Original Common Facilities Agreement; (iii) the Original Property Rights Agreement; and (iv) the IREA PPA. On April 4, 2006, PSCo and IREA executed and delivered each of the following agreements, in addition to the First Amended and Restated JOA: (i) the First Amended and Restated O&M Agreement; (ii) the First Amended and Restated Common Facilities Agreement; and (iii) the First Amended and Restated Property Rights Agreement. On the Effective Date, PSCo, IREA and Holy Cross shall execute and deliver each of the following agreements in addition to this Agreement: (i) the O&M Agreement, (ii) the Common Facilities Agreement and (iii) the Property Rights Agreement. If applicable, PSCo and Holy Cross shall execute and deliver an amendment and restatement to the Holy Cross PSA.

3.2 Payment Obligations.

3.2.1 Project Costs. Each Party shall be responsible for its Facility Percentage Share of all Project Costs. On the Effective Date for each Non-PSCo Party, such Non-PSCo Party shall pay to PSCo an amount equal to such Non-PSCo Party's Facility

Percentage Share of Project Costs incurred by PSCo up to such Effective Date, together with Carrying Costs. It is hereby acknowledged that IREA has previously performed the obligation in the preceding sentence. From and after each Non-PSCo Party's respective Effective Date, PSCo shall invoice such Non-PSCo Party for its share of Project Costs in accordance with Article 7. Each Party shall be responsible for and bear its own Internal Costs.

3.2.2 Air Permit Costs. The aggregate amount of Air Permit Costs payable by each Non-PSCo Party is set forth in Schedule 7. Each Non-PSCo Party shall pay its Air Permit Costs in equal monthly payments, as set forth in Schedule 7, over two (2) consecutive years, commencing on January 1, 2006; provided, that for Holy Cross, PSCo will include all accrued but unpaid Air Permit Costs, plus interest thereon calculated at the Default Interest Rate, in the first invoice it delivers to Holy Cross and Holy Cross shall pay such accrued and unpaid Air Permit Costs and interest in accordance with Section 7.2. PSCo shall invoice each Non-PSCo Party for its monthly payment of Air Permit Costs in accordance with Article 7.

3.2.3 Facility Site Purchase Price. As consideration for the purchase of its undivided ownership interest in the Facility Site, each Non-PSCo Party shall pay to PSCo on its Closing Date an amount equal to the product of (i) two thousand dollars (\$2,000.00), multiplied by (ii) the number of acres (including fractions thereof) comprising the Facility Site, multiplied by (iii) such Non-PSCo Party's Facility Percentage Share.

### 3.3 Government Approvals.

3.3.1 Each Party shall use commercially reasonable efforts to obtain any Government Approvals required to execute, deliver and perform its obligations under this Agreement and the other Project Agreements and to purchase and own its Ownership Interests. PSCo shall use commercially reasonable efforts to obtain all Government Approvals necessary for the development, design, engineering, construction, testing and commissioning of the Project (other than any Government Approvals required to be obtained by the Non-PSCo Parties under this Section).

3.3.2 Each Party shall use commercially reasonable efforts to support the efforts of the other Parties to obtain the Government Approvals required to be obtained by (i) PSCo to develop, design, engineer, permit, construct, test and commission the Project, (ii) any Party to sell or purchase Ownership Interests pursuant to Article 2 and/or (iii) by PSCo to operate the Project.

3.3.3 If a Party participates in any proceedings relating to Government Approvals required to be obtained by another Party, such Party shall use commercially reasonable efforts (i) to support the issuance of all such Government Approvals that are consistent with this Agreement and the other Project Agreements and (ii) to oppose the efforts of any other Person to adversely affect any Party's rights under this Agreement or the other Project Agreements. For the avoidance of doubt, the transmission of Energy from the

Delivery Point and wholesale purchases of power and energy under the IREA PPA and the Holy Cross PSA shall not be within the scope of this Section 3.3.3.

3.4 Real Property Rights. PSCo shall be solely responsible for obtaining all real property rights necessary to develop, construct, own and operate the Facility. PSCo will sell by bargain and sale deed to each Non-PSCo Party an undivided ownership interest in the Facility Site as provided in this Agreement and will provide to each Non-PSCo Party the rights set forth in the Property Rights Agreement with respect to the areas of Property on which the Common Facilities are located.

3.5 Interconnection to Transmission System. PSCo shall cause the Facility to be interconnected to PSCo's electric transmission system pursuant to the Interconnection Agreement.

3.6 Financing.

3.6.1 Each Party shall be responsible for securing financing for the purchase of its respective Ownership Interests and its respective share of Project Costs, Air Permit Costs and other costs payable by such Party under the Project Agreements. The Parties agree to work together in good faith to coordinate the attainment and documentation of such financing, including, but not limited to, an inter-creditor agreement, if necessary. Each Non-PSCo Party's financing arrangements shall be subject to PSCo's prior review and approval, pursuant to commercially reasonable standards, which approval shall not be unreasonably withheld. Such PSCo consent right shall apply to any secured financing that a Non-PSCo Party proposes to enter into after its Closing Date if (i) the Lien of such proposed financing would attach to such Non-PSCo Party's Ownership Interests and other rights under the Project Agreements and (ii) the Lender under such financing does not already have a Lien attaching to such Non-PSCo Party's Ownership Interests or rights under the Project Agreements to which PSCo has given its consent.

3.6.2 The Parties acknowledge that they shall incur Internal Costs, prior to any Purchase Closing Date, and that such responsibilities shall not be excused because of a Party's inability to obtain financing to fund the purchase of its Ownership Interests and the payment of its respective share of Project Costs, Air Permit Costs and other costs payable by such Party of the Project Agreements on a timely basis.

3.7 Due Diligence. Each Non-PSCo Party shall be obligated to conduct its due diligence of the Project in a commercially reasonable manner. PSCo shall use commercially reasonable efforts to respond to reasonable due diligence requests from the Non-PSCo Parties. Each Non-PSCo Party shall conduct its due diligence prior to the Closing Date or, if earlier, the Closing Deadline.

3.8 Environmental Review.

3.8.1 Each Non-PSCo Party acknowledges and agrees that: (i) Environmental Resources Management, a reputable environmental consultant hired by PSCo,

conducted a Phase 1 environmental site assessment of the Facility Site (the "Phase 1 ESA") and submitted a report of its conclusions, dated as of June 17, 2005 (the "Phase 1 ESA Report"); (ii) it has received a copy of the Phase 1 ESA Report; (iii) the Phase 1 ESA was performed in a manner consistent with ASTM E 1527-00 Standard Practice for Environmental Site Assessments: Phase 1 Environmental Site Assessment Process; (iv) the Phase 1 ESA Report concludes that no recognized environmental conditions were identified during the performance of the Phase 1 ESA; and (v) no further environmental site assessments for the Facility Site or other areas of the Property shall be required under this Agreement. The costs of conducting the Phase 1 ESA shall be deemed a Project Cost.

3.8.2 Confidential Treatment. The Parties acknowledge and agree that the Phase 1 ESA and any documents, drawings, reports, data or correspondence relating to either environmental site assessment or otherwise provided pursuant to this Section 3.8 shall be considered Confidential Information, whether or not marked as confidential, and shall be subject to the restrictions of Section 17.2.

3.9 Availability of Personnel and Resources. Each Party shall make available, at all reasonable times and locations, the personnel and resources necessary to complete such Party's responsibilities under this Agreement and the other Project Agreements to which it is a Party.

3.10 Several Obligations. The obligations of the Parties are several and not joint. Any intent to create by this Agreement, or by any grant, lease or license related hereto, an association, joint venture, trust or partnership, or to impose upon or grant to any Party trust or partnership rights or obligations, is expressly disclaimed and negated by each Party hereto.

3.11 Independent Covenants and Obligations. The covenants and obligations contained in this Agreement are to be deemed to be independent covenants, not dependent covenants, and the obligation of any Party to keep and perform all of the covenants and obligations assumed by or imposed upon it hereunder is not conditioned upon the performance by any other Party of all or any of the covenants and obligations to be kept and performed by it.

3.12 Liability. Subject to Article 16 and Section 19.10.1, from and after the Closing Date, all risk, loss and damage arising out of the ownership, construction, operation, maintenance or retirement of any portion of the Facility Assets (other than New Common Facilities) will be borne by PSCo and each Non-PSCo Party that has achieved its Closing Date in proportion to their respective Facility Percentage Shares and, with respect to New Common Facilities, will be borne in proportion to their New Common Facilities Ownership Interests. If any Party, by reason of joint liability, is required to make any payment or incur any obligation that is (i) with respect to the Facility Assets (other than New Common Facilities) in excess of its Facility Percentage Share or (ii) with respect to New Common Facilities, in excess of its New Common Facilities Ownership Interest, the other Parties shall indemnify and reimburse such Party proportionately to the extent of any such excess in accordance with the procedures set forth in Section 16.4, unless and to the extent that the

Party whose liability exceeds its Facility Percentage Share or its New Common Facilities Ownership Interest, as the case may be, incurred such liability as a result of its own gross negligence or willful misconduct. In the case of any conflict between the terms and conditions of this Agreement and any other related agreement in regard to environmental duties, indemnification or liabilities (regardless of the specificity in the other agreement), the terms of this Agreement shall control.

3.13 No Adverse Distinction. In performing its respective obligations under this Agreement, neither PSCo nor any other Party shall make any adverse distinction between the Facility and any other generating unit or common facilities in which it has an interest solely because of its co-ownership in the Facility Assets with the other Parties.

#### **ARTICLE 4 DECISION TO PROCEED; CONDITIONS TO CLOSING DATE; OTHER TERMS OF SALE**

4.1 [Intentionally omitted.]

4.2 [Intentionally omitted.]

4.3 [Intentionally omitted.]

4.4 Conditions Precedent to Closing Date.

4.4.1 PSCo Conditions. PSCo's obligation to sell an ownership interest in the Facility Assets to any Non-PSCo Party is subject to satisfaction of the following conditions, except to the extent waived in writing by PSCo in its sole discretion:

(a) the payment to PSCo by such Non-PSCo Party of any Project Costs invoiced to, but unpaid by, such Non-PSCo Party as of the Closing Date with accrued Carrying Costs;

(b) the payment to PSCo by such Non-PSCo Party of any Air Permit Costs due and payable but unpaid by such Non-PSCo Party as of the Closing Date, together with interest accrued at the Default Interest Rate;

(c) the payment to PSCo by such Non-PSCo Party of the price for its Facility Percentage Share of the Facility Site as specified in Section 3.2.3;

(d) the execution by the acquiring Party and its Lenders of all of its Financing Documents on terms and conditions reasonably satisfactory to PSCo and the initial disbursement of funds to such Non-PSCo Party under its Financing Documents;

(e) PSCo's receipt of all Local Approvals necessary for the Project as of the Closing Date and the time period for appeal of all such Local Approvals shall have expired without contest;

(f) executed releases from all holders of Liens (other than Permitted Encumbrances) on the Facility Assets, releasing from such Liens such Ownership Interests and Easements that, in each case, will be conveyed to such Non-PSCo Party;

(g) such Non-PSCo Party's representations and warranties in this Agreement shall be deemed to be made again as of the Closing Date and shall be true and correct in all material respects;

(h) such Non-PSCo Party shall have performed and complied with all agreements, covenants and conditions required in this Agreement to be performed or complied with by it prior to or on the Closing Date and no Non-PSCo Party Default shall have occurred and be continuing under this Agreement;

(i) such Non-PSCo Party shall have provided to PSCo a certificate of its president or chief executive officer, dated as of the Closing Date, certifying that: (i) the conditions set forth in this Section 4.4.1 for which such Non-PSCo Party is responsible have been fulfilled in accordance with its terms and (ii) except as previously disclosed in writing, there are no actions, suits or proceedings pending or threatened against or affecting such Non-PSCo Party before any court or administrative body or agency which might materially and adversely affect such Non-PSCo Party's ability to perform its obligations under this Agreement or under the other Project Agreements;

(j) an opinion or opinions of counsel to such Non-PSCo Party, dated as of such Closing Date, in form and substance reasonably satisfactory to PSCo;

(k) receipt by PSCo of the Government Approvals listed in Part A of Schedule 4, in each case on terms and conditions satisfactory to PSCo; and

(l) PSCo's acquisition of any additional water or water rights as may be necessary to provide an adequate supply of water to support the construction of the Project and the operation of the Facility and the Common Facilities together with the Existing Facility; and

(m) such other documents (other than certifications, opinions of counsel and releases) as PSCo may reasonably request in connection with the sale and acquisition of such Non-PSCo Party's Ownership Interests.

4.4.2 Non-PSCo Party Conditions. Each Non-PSCo Party's obligation to acquire Ownership Interests is subject to satisfaction at or prior to such Non-PSCo Party's Closing Date of the following conditions, except to the extent waived in writing by such Non-PSCo Party in its sole discretion:

(a) a bill of sale executed by PSCo for the Facility Ownership Interest (other than with respect to the Facility Site) and New Common Facilities Ownership Interest being transferred to such acquiring Party, substantially in the form of Exhibit A;

(b) a bargain and sale deed executed by PSCo for the ownership interest in the Facility Site transferred to such Non-PSCo Party, substantially in the form of Exhibit B;

(c) executed releases from all holders of Liens (other than Permitted Encumbrances) on the Facility Assets, releasing from such Liens such Ownership Interests and Easements that, in each case, will be conveyed to such Non-PSCo Party;

(d) [Intentionally omitted.];

(e) the execution by the acquiring Party and its Lenders of all of its Financing Documents and the initial disbursement of funds to such Non-PSCo Party under its Financing Documents;

(f) an opinion or opinions of counsel to PSCo, dated as of such Closing Date, in form and substance reasonably satisfactory to such Non-PSCo Party;

(g) copies of Government Approvals listed in Part B of Schedule 4;

(h) PSCo shall have completed the Phase 1 ESA pursuant to Section 3.8 and shall have provided a copy of the results (including supporting documentation) of such environmental site assessments to such Non-PSCo Party;

(i) PSCo's representations and warranties in this Agreement shall be deemed to be made again as of the Closing Date and shall be true and correct in all material respects;

(j) PSCo shall have performed and complied with all agreements, covenants and conditions required in this Agreement to be performed or complied with by it prior to or on the Closing Date and no PSCo Default shall have occurred and be continuing under this Agreement;

(k) PSCo shall have provided to such Non-PSCo Party a certificate of its president, chief executive officer or other duly authorized executive officer, dated as of the Closing Date, certifying that: (i) the conditions set forth in this Section 4.4.2 for which PSCo is responsible have been fulfilled in accordance with its terms and (ii) except as previously disclosed in writing, there are no actions, suits or proceedings pending or threatened against or affecting PSCo before any court or administrative body or agency which might materially and adversely affect PSCo's ability to perform its obligations under this Agreement or under the other Project Agreements; and

(l) such other documents (other than certifications, opinions of counsel and releases) as such Non-PSCo Party may reasonably request in connection with the acquisition of such Non-PSCo Party's Ownership Interests.

4.5 Timing and Location of Closing; Closing Deadline. The Closing Date for IREA took place on April 14, 2006. The Closing Date for Holy Cross shall be a mutually acceptable date on or following the date on which the conditions set forth in Sections 4.4.1



and 4.4.2 have either been satisfied or waived by the Party for whose benefit such conditions exist. The closing for Holy Cross shall take place at PSCo's offices in Denver, Colorado at a time mutually acceptable to PSCo and each acquiring Party. Except as expressly provided in Section 4.6, the Closing Date for Holy Cross shall not occur later than September 1, 2006 (the "Closing Deadline").

#### 4.6 Extension of Closing Deadline.

4.6.1 By PSCo. If the Closing Date for Holy Cross does not occur by the Closing Deadline because PSCo is unable to obtain (i) a Local Approval as provided in Section 4.4.1(e), (ii) a Governmental Approval as provided in Section 4.4.1(k) or (iii) an indenture defeasance or lien release as provided in Section 4.4.1(f), PSCo shall deliver written notice to Holy Cross describing the condition precedent(s) that cannot be satisfied and an estimate, to PSCo's best knowledge, of the time period that will be necessary to satisfy such conditions precedent. As soon as reasonably practicable thereafter, PSCo will provide written notice to Holy Cross of the date on which such conditions precedent will be or have been satisfied or waived by PSCo. The Closing Deadline will be extended until the date that is five (5) Business Days after the date on which such conditions have been satisfied.

4.6.2 By a Non-PSCo Party. Notwithstanding any waiver of the condition precedent in Section 4.4.1(d) by PSCo, if Holy Cross is unable to reach financial close and funding under its Financing Documents (including the receipt of the "lien accommodation," as such term is defined in 7 C.F.R. §1717.851, or approval of the purchase of Ownership Interests, in each case from the United States of America, acting through the Rural Utilities Service, an agency of the United States Department of Agriculture, and its successors and assigns, pursuant to 7 C.F.R. Part 1717 (Subpart R) Lien Accommodations and Subordinations for 100 Percent Private Financings), as provided in Section 4.4.1(d) or Section 4.4.2(e), by the Closing Deadline, Holy Cross may deliver written notice to each other Party describing the condition precedent(s) that cannot be satisfied and an estimate, to Holy Cross's best knowledge, of the time period that will be necessary to satisfy such conditions precedent. As soon as reasonably practicable thereafter, Holy Cross will provide written notice to each other Party of the date on which such conditions precedent will be or have been satisfied. The Closing Deadline for Holy Cross will be extended until the date that is five (5) Business Days after the date on which such conditions have been satisfied.

#### 4.7 Failure to Close

##### 4.7.1 Failure by a Non-PSCo Party.

(a) Until February 28, 2007, Holy Cross may elect to withdraw from the Project and the Project Agreements by delivering written notice to PSCo. If Holy Cross withdraws solely because it is unable to reach financial close and funding under its Financing Documents (including the receipt of the "lien accommodation," as such term is defined in 7 C.F.R. §1717.851, or approval of the purchase of Ownership Interests, in each case from the United States of America, acting through the Rural Utilities Service, an agency of the United

States Department of Agriculture, and its successors and assigns, pursuant to 7 C.F.R. Part 1717 (Subpart R) Lien Accommodations and Subordinations for 100 Percent Private Financings) on or before February 28, 2007 and the failure to achieve such financial close is not in whole or in part due to a Non-PSCo Party Event of Default attributable to Holy Cross, PSCo shall reimburse Holy Cross as follows. If PSCo receives Holy Cross's written notice of withdrawal on or prior to the Closing Deadline, PSCo shall, within thirty (30) days of the date of such notice, reimburse to Holy Cross one hundred percent (100%) of the Project Costs and, if applicable, any Air Permit Costs previously paid to PSCo by Holy Cross, in each case with interest thereon at the Default Interest Rate. If PSCo receives Holy Cross's written notice of withdrawal after the Closing Deadline, PSCo shall, within thirty (30) days of the date of such notice, reimburse to Holy Cross ninety percent (90%) of the Project Costs and, if applicable, any Air Permit Costs previously paid to PSCo by Holy Cross, in each case with interest thereon at the Default Interest Rate.

(b) If, for any reason other than a PSCo Event of Default or a Holy Cross's withdrawal pursuant to Section 4.7.1(a), Holy Cross fails to satisfy all of the conditions precedent to its Closing Date for which it is responsible, as set forth in Section 4.4.1, by the Closing Deadline and the Closing Deadline is not extended pursuant to Section 4.6, PSCo, in its reasonable discretion, may require Holy Cross to withdraw from this Agreement.

(c) If Holy Cross withdraws pursuant to this Section 4.7, it shall promptly take all actions and execute all certificates and documents as directed by PSCo to withdraw from this Agreement and the other Project Agreements. From and after the date of any withdrawal under this Section 4.7, as determined by PSCo, Holy Cross shall have no further rights or obligations under this Agreement or the other Project Agreements other than (i) the payment of any amounts due and unpaid under this Agreement as of such date, (ii) those obligations that survive termination of this Agreement pursuant to Section 19.13, (iii) the reimbursement to Holy Cross of any amounts payable and unpaid as of such date pursuant to Section 4.7.1(a) and (iv) such obligations as expressly indicated in another Project Agreement. Except to the extent provided in the preceding sentence, if Holy Cross withdraws pursuant to Section 4.7 it shall not be entitled to reimbursement of any amounts previously paid by Holy Cross and shall have no claims against PSCo, any remaining Non-PSCo Parties or the Facility Assets as a result of such withdrawal. Holy Cross shall be deemed to have forfeited its rights under its respective power purchase agreement to participate in the ownership of the Facility Assets.

**4.7.2 Failure by PSCo.** If PSCo fails to satisfy all of the conditions precedent to its Closing Date for which it is responsible, as set forth in Section 4.4.2, by the Closing Deadline and the Closing Deadline is not extended pursuant to Section 4.6, PSCo shall be deemed to be in default of its obligations under this Agreement.

**4.7.3 Failure Following Extension of Closing Deadline.** If, following an extension of the Closing Deadline under Section 4.6, the Closing Date for Holy Cross is delayed beyond February 28, 2007 for reasons other than a PSCo Event of Default, PSCo shall have the right to cause Holy Cross to withdraw from this Agreement and the other Project Agreements by delivering written notice to Holy Cross. Effective as of the date of

such written notice, Holy Cross shall be deemed to have withdrawn from this Agreement and the other Project Agreements. The procedures for the withdrawal of Holy Cross shall be as set forth in Section 4.7.1(c).

4.8 Waiver of Partition Rights. The Parties expressly waive, release, and renounce for the term of this Agreement for themselves, their successors, transferees and assigns, all rights as tenants in common in the Facility Assets to partition in kind or by sale and division of the proceeds all or any part of the Facility Assets and agree that during the term of this Agreement they will not exercise any right they might otherwise have at law or in equity to partition the Facility Assets.

4.9 No Warranty by PSCo. The Ownership Interests of each Non-PSCo Party in the Facility Site and the other property included in the Facility Assets that are in existence as of the Closing Date are to be sold “as is” and “where is.” PSCo makes no representation or warranty whatsoever in this Agreement, expressed, implied or statutory, including, without limitation, any representation or warranty as to the value, quantity, condition, salability, obsolescence, merchantability, fitness or suitability for use or working order of any of the Facility Assets, nor does PSCo represent or warrant that the use or operation of the Facility Assets will not violate patent, trademark or service mark rights of any third parties. Except to the extent of the indemnity provided in Section 16.2, the provisions of this Section 4.9 shall govern over any conflicting provisions of this Agreement. Notwithstanding the foregoing, each Non-PSCo Party shall be entitled to rely upon any representation or warranty made by PSCo to it in writing either in this Agreement or in any certificate delivered by PSCo to it in connection with its purchase of Ownership Interests from PSCo, and upon all manufacturers’ and vendors’ warranties and all patent, trademark and service mark rights running to PSCo in connection with the property included in the Facility Assets. PSCo, in consultation with the Non-PSCo Parties through the E&O Committee, shall determine whether and how to enforce (including by way of renegotiation and settlement) any such warranty and patent, trademark or service mark right.

## **ARTICLE 5 CONSTRUCTION AND OPERATION**

### **5.1 PSCo Supervision.**

5.1.1 General. PSCo shall be responsible for the overall supervision, oversight and management of the construction of the Facility, the New Common Facilities and the upgrades to the Existing Common Facilities in accordance with the Construction Agreements and shall act as Operator of the Facility and the Common Facilities under the O&M Agreement. PSCo may, in its reasonable discretion, delegate all or a portion of its responsibilities, duties and obligations under this Agreement with respect to the construction of the Facility, the New Common Facilities and the upgrades to the Existing Common Facilities to one or more contractors or Affiliates. PSCo may delegate its responsibilities, duties and obligations under this Agreement with respect to the operation of the Facility and the Common Facilities in the manner provided in Section 15.2.2 of the O&M Agreement. PSCo shall perform its responsibilities, duties and obligations under the Construction

Agreements in accordance with Prudent Utility Practice, applicable Law and Government Approvals and for the benefit of the Parties.

5.1.2 Limitation on PSCo Authority. PSCo shall not have the authority, unless agreed to in writing by each other Party, to: (i) change the fundamental nature of the Facility as a coal-fired electric generation plant and its business of generating electric power; or (ii) knowingly make an adverse distinction against one Party in favor of another in the absence of a Non-PSCo Party Default by the Party adversely affected; provided, that any right of first refusal or consent right granted to PSCo, or the exercise thereof by PSCo, with respect to the sale or transfer of any Non-PSCo Party's Ownership Interests and/or its rights under the Project Agreements in the event of either (i) a Bankruptcy Event affecting such Non-PSCo Party or (ii) a foreclosure by a Non-PSCo Party's Lenders on such Non-PSCo Party's Ownership Interests and rights under the Project Agreements shall not be deemed to constitute a breach of this Section 5.1.2 or any other provision of the Project Agreements.

5.2 Construction Agreements. PSCo shall enter into the Construction Agreements and shall perform its obligations and exercise or enforce its benefits, rights and remedies under the Construction Agreements. PSCo agrees to enforce any manufacturer's or materialmen's warranties that are provided under the Construction Agreements in accordance with Prudent Industry Practice and each Non-PSCo Party shall be entitled to enjoy the benefits of such warranties. The Non-PSCo Parties shall be entitled to enjoy their respective Facility Percentage Share of the benefits of liquidated damages that PSCo receives under the Construction Agreements; provided, that if PSCo elects to use such liquidated damages to pay for Project Costs, each Non-PSCo Party's Facility Percentage Share of such liquidated damages will be deemed to have been a payment towards Project Costs by such Non-PSCo Party. The Non-PSCo Parties agree that they shall be excluded as parties to the Construction Agreements and shall not be entitled to independently exercise or enforce any of PSCo's benefits, rights or remedies under the Construction Agreements.

5.3 Cooperation. Each Non-PSCo Party shall cooperate with and assist PSCo promptly, as and when reasonably requested by PSCo, in the performance of its duties, responsibilities and obligations under this Agreement, the Construction Agreements and the O&M Agreement, including executing and delivering documents, certificates or instruments necessary for PSCo to perform such duties, responsibilities and obligations.

**ARTICLE 6**  
**E&O COMMITTEE AND AUDIT COMMITTEE**

**6.1     E&O Committee.**

6.1.1 Composition. Within thirty (30) days after the first Closing Date, the Parties shall establish a committee (the "E&O Committee") composed of one (1) member appointed by each Party. Each Party shall designate an alternate E&O Committee member who may attend and participate in meetings of the E&O Committee if the original member is unavailable. Each Party may, at its option, designate a new member to represent it on the E&O Committee following the Commercial Operation Date.

6.1.2 Function. The E&O Committee shall perform the functions expressly provided for in this Agreement and in the other Project Agreements. The E&O Committee shall discuss (i) material decisions and actions undertaken or proposed to be undertaken by PSCo and events concerning the construction of the Project during the construction period and (ii) material decisions and actions undertaken or proposed to be undertaken by PSCo, as Operator, and events concerning the operation and maintenance of the Facility and the Common Facilities and discretionary capital expenditures with respect to the Facility and the Common Facilities following the Commercial Operation Date. The PSCo member shall make data, documents and pertinent information regarding the Facility and the Common Facilities available to each Non-PSCo Party, routinely or at such Non-PSCo Party's request, as may be reasonably practicable, without impairing PSCo's ability to perform its obligations under this Agreement or the other Project Agreements.

6.1.3 Meetings. The E&O Committee will hold regular meetings at least once each calendar quarter on such dates that are predetermined by the E&O Committee, unless waived by unanimous agreement of the E&O Committee. Any matters relating to the Facility Assets and the Existing Common Facilities may be discussed at a regular meeting. Any member of the E&O Committee may call a special meeting by giving written notice to the other members stating the proposed time, place and purpose(s) of the special meeting not earlier than thirty (30) days but not later than seven (7) days before the date of such special meeting. Any member of the E&O Committee may waive notice of a special meeting by his or her presence at such meeting. Unless otherwise agreed by all of the E&O Committee members, the business to be transacted at such special meeting shall be limited to that stated in the notice. Meetings of the E&O Committee may be held by telephone conference.

6.2     Audit Committee. Within thirty (30) days after the first Closing Date, the Parties shall establish a committee (the "Audit Committee"), composed of one (1) member appointed by each Party. Each Party shall designate an alternate Audit Committee member who may attend and participate with full authority in meetings of the Audit Committee if the original member is unavailable. The Audit Committee's responsibilities will include: (i) establishing accounting and other financial procedures as may be appropriate to assist each Party in performing its obligations under this Agreement and the other Project Agreements to which it is a party; (ii) establishing accounting and other financial procedures as may be necessary for regulatory reporting or compliance with Financing Documents; (iii)

reviewing accounting, financial and internal control aspects of the Facility Assets and the Existing Common Facilities; (iv) advising and making recommendations to the E&O Committee and the Coordinating Committee on matters involving auditing and financial transactions; and (v) performing other tasks the E&O Committee assigns to it. The Audit Committee shall hold regular meetings in advance of each meeting of the E&O Committee, and such additional meetings required to perform its duties as the Audit Committee members may agree to from time to time.

## **ARTICLE 7 PAYMENT PROCEDURES**

7.1 Invoices. Beginning with the first month after the execution of this Agreement and each month thereafter, PSCo shall prepare and deliver to each Non-PSCo Party no later than the 20<sup>th</sup> day of each month, an invoice setting forth in reasonable detail (together with reasonable supporting information) the aggregate amount of such Non-PSCo Party's Facility Percentage Share of Project Costs, allocated for each category of Project Cost, as incurred during the preceding month. From and after January 1, 2006, and until each Non-PSCo Party has paid its respective Air Permit Costs, such invoices shall also include such Non-PSCo Party's monthly Air Permit Costs as set forth in Schedule 7. PSCo shall certify in each invoice that (i) the amounts set forth in such invoice relate to actual Project Costs and, if applicable, Air Permit Costs, (ii) PSCo has paid or will pay its share of such Project Costs and, if applicable, Air Permit Costs, (iii) PSCo has no reason to believe that such invoice contains any errors or inaccuracies and (iv) PSCo has investigated the progress of the work and, to PSCo's best knowledge, the amounts set forth in such invoice are commensurate with the progress of the work during the billing period set forth in such invoice.

7.2 Payments. Each Non-PSCo Party shall pay the amounts required in the invoice it receives from PSCo pursuant to Section 7.1 on or before the date that is thirty (30) days after the date of such invoice or, if later, the date specified in such invoice. Each Non-PSCo Party shall make all payments to PSCo by wire transfer in immediately available funds, and no later than 10:00 am Mountain Time on the date of payment, by wire transfer to the following account:

Public Service Company of Colorado  
Wells Fargo Bank West, N.A., San Francisco, CA  
Bank account number: 101-0004305  
Bank routing number: 121-000-248

In addition, each Non-PSCo Party shall send, or shall cause its Lender(s) to send, an email confirmation to Michael.Boyle@XCELENERGY.COM indicating the amount of the wire payment made to PSCo on such date. PSCo may, at its discretion, change such wiring instructions or such contact information for email confirmation by providing written notice of such change to the Non-PSCo Parties.

### 7.3 Non-Payment

7.3.1 Notice of Late Costs and Expenses. If any Non-PSCo Party fails to pay any amounts pursuant to Section 7.2 when due and payable under this Agreement ("Late Payments"), then PSCo shall notify each other Party of such Late Payments. Such notice shall set forth in reasonable detail the name of the non-paying Party, the amount of the Late Payments and the date on which such Late Payments were due and payable.

7.3.2 PSCo Loans. PSCo may, but shall not be obligated to, advance to the non-paying Party all or a portion of such Late Payments by paying such Late Payments directly to the account or accounts specified in the applicable invoice. PSCo shall provide written notice of any such advances to the non-paying Party. All such advances shall constitute loans from PSCo to the non-paying Party (a "PSCo Loan") and shall bear interest at the Default Interest Rate, starting from the date the PSCo Loan is made through and including the date on which the PSCo Loan and all accrued interest is repaid in full to PSCo. All PSCo Loans shall be immediately due and payable. PSCo shall have the right, in addition to the other rights and remedies granted under this Agreement or available to it at law or in equity, to take any action that PSCo may deem appropriate to obtain payment of any PSCo Loan and interest thereon and any costs and expenses incurred by or on behalf of PSCo to collect same, including reasonable attorneys fees.

7.3.3 If PSCo, in its sole discretion, elects not to advance a PSCo Loan pursuant to Section 7.3.2, then PSCo shall be entitled, in addition to any other rights and remedies granted under this Agreement or available to it at law or in equity, to take any action that PSCo may deem appropriate to obtain payment from such non-paying Party of such Late Payments and any costs and expenses incurred by or on behalf of PSCo to collect same, including reasonable attorneys fees.

7.4 Billing Disputes. All payments by the Parties pursuant to this Article 7 shall be without prejudice to their rights to dispute any amounts pursuant to Article 18. If a Party disputes the existence or extent of any obligation to make any payment under this Article 7, it shall nevertheless make payment in full of all amounts when due and initiate dispute resolution procedures in accordance with Article 18.

7.5 Invoice Adjustments. PSCo shall adjust the invoices that it prepares and delivers to the Non-PSCo Parties pursuant to Section 7.1 in the event of (i) manifest error or an error which is not disputed by any of the Parties in an invoice; (ii) the final resolution of a billing dispute pursuant to Article 18; or (iii) any other facts or circumstances under this Agreement that justify an adjustment to the amount of costs and expenses to be paid by the Parties. Any overpayments or underpayments to PSCo resulting from such invoice adjustments will be subtracted from or added to the next invoice, as applicable.

## ARTICLE 8 TAXES

8.1 Section 761 Election. For tax purposes, the Parties intend that their ownership of the Facility shall be as tenants in common with undivided interests in the Facility and, accordingly, the Parties shall take any and all actions as may be necessary or appropriate to receive treatment as tenants in common with undivided interests in the Facility. The Parties do not intend to create, and this Agreement shall not be construed to create, a partnership, corporation or an association for profit between the Parties hereto. Each Party hereby elects to be excluded from the application of all of the provisions of Subchapter K, Chapter 1, Subtitle A of the Internal Revenue Code of 1986, as amended (the "Code") as permitted under Section 761 of the Code and the regulations promulgated thereunder. Each Party agrees to provide evidence of such election as may be required by the Internal Revenue Service, including any returns, statements or data which may be required under the regulations. No Party shall give any notices or take any action inconsistent with the above election. In making the foregoing election, each Party states that the income derived by such Party from operations hereunder can be adequately determined without the computation of partnership taxable income.

## 8.2 General Tax Matters

8.2.1 To the extent possible, each Party shall separately report to all applicable taxing authorities, file returns with respect to, be responsible for and pay all taxes (excluding any sales or use taxes) or assessments applicable to its Ownership Interests in the Facility Assets.

8.2.2 Except as otherwise expressly provided in any Project Agreement, if any taxes, assessments or payments in lieu of taxes are levied or assessed in a manner other than as specified in Section 8.2.1, the Audit Committee shall establish equitable practices and procedures for the apportionment among the Parties of such taxes and assessments and the payment thereof. In the event that any Non-PSCo Party (i) makes any payment under a Project Agreement with respect to a payment in lieu of taxes or other tax abatement arrangement (a "Tax Arrangement") for which PSCo has primary responsibility and (ii) such Non-PSCo Party ultimately is not entitled to enjoy its respective share of the benefits associated with such Tax Arrangement, PSCo shall reimburse all or a portion of such payments to such Non-PSCo Party on a pro rata basis to the extent that the benefits of such Tax Arrangement are not made available to such Non-PSCo Party.

8.2.3 Except to the extent expressly provided in Section 2.2 of the Property Rights Agreement, PSCo shall have sole responsibility for the payment of real property taxes relating to those portions of the Property other than the Facility Site. PSCo shall have the sole responsibility and authority with respect to (i) the contesting of any real property taxes relating to those portions of the Property other than the Facility Site and (ii) the negotiation, administration, enforcement or contesting of any payment in lieu of taxes agreement or other tax abatement arrangement that may relate to the Property.

## ARTICLE 9 FACILITY EXPANSION AND MODIFICATION



9.1 Consent. Following the Commercial Operation Date, no major expansions or modifications to the Facility or the New Common Facilities, other than any major expansion or modification that is required for the ongoing operation of the Facility or the New Common Facilities or for compliance with laws directly affecting the operation of the Facility or New Common Facilities (any such expansion, a "Major Expansion"), shall be made without the prior written approval of each of the Parties, except as provided in the next sentence. If PSCo desires to make a Major Expansion but there is not unanimous approval among the Parties, PSCo may proceed with such Major Expansion at its sole cost and expense so long as such Major Expansion is not reasonably likely to have a material adverse effect on the operation or maintenance of the Facility. For the purposes of this Section 9.1, the following shall be deemed a material adverse effect on the operation and maintenance of the Facility: (i) any reduction in the capacity and Energy available to any Non-PSCo Party that persists for thirty (30) consecutive days or more, (ii) a reduction in the capacity and Energy available to any Non-PSCo Party that exceeds ten percent (10%) of such Non-PSCo Party's Facility Percentage Share of the capacity and Energy output of the Facility for seven (7) consecutive days or more or (iii) at any time, a twenty-five percent (25%) reduction in such entitlement; provided, that if PSCo performs such Major Expansion while the capacity and Energy of the Facility is otherwise reduced by an amount or for the period of time specified above as a result of scheduled maintenance or an event of Force Majeure, a material adverse effect on the operation or maintenance of the Facility shall not be deemed to have occurred. The Ownership Interests of the Parties funding the additional amount shall be increased, and any non-funding Party's Ownership Interests shall be recalculated to be equal to the ratio of (i) all Project Costs paid by such non-funding Party to (ii) the aggregate Project Costs, including costs associated with any Major Expansion. Notwithstanding the foregoing, in the event a Major Expansion to the Facility is required by applicable Law or by the Financing Documents, a Non-PSCo Party's election not to fund all or any portion of its allocated cost of such Major Expansion shall be considered a failure to make a payment for purposes of Article 14. For the avoidance of doubt, Major Expansions shall not be included in the annual budget prepared by the Operator under the O&M Agreement and shall be undertaken solely pursuant to this Article 9.

9.2 Costs. If, under Section 9.1, the Parties agree to effect any Major Expansion to all or any portion of the Facility or the New Common Facilities, each Party shall pay (a) with respect to the Facility, its Facility Percentage Share of the costs and expenses associated therewith and (b) with respect to the New Common Facilities, its New Common Facilities Ownership Interest of the costs and expenses associated therewith, unless otherwise agreed by the Parties.

## ARTICLE 10 INSURANCE AND LOSSES

### 10.1 Insurance Coverage.

10.1.1 On or prior to the Notice To Proceed Date and until the Commercial Operation Date, PSCo shall obtain, or cause to be obtained, insurance coverage for the Facility Assets and the Existing Common Facilities with the specific policies, amounts,

deductibles and risks as are consistent with PSCo's customary practices for construction projects similar to the Facility and consistent with Prudent Utility Practice. PSCo shall also reasonably satisfy itself that all contractors, subcontractors, engineers and equipment suppliers or manufacturers under the Construction Agreements have adequate insurance coverage and limits for workers' compensation, public liability, contractors' liability and such other hazards as PSCo shall deem appropriate. PSCo, at its option, may provide for an owner-controlled insurance program that is consistent with Prudent Utility Practice. The aggregate cost of all insurance procured pursuant to this Section 10.1.1 and all uninsured losses shall be considered a Construction Cost and as such shall be apportioned among the Parties in accordance with each Party's respective Facility Percentage Share.

10.1.2 From and after the Commercial Operation Date, PSCo shall maintain, or cause to be carried and maintained, insurance in respect of the Facility Assets and the Existing Common Facilities with the specific policies, amounts, deductibles and risks as are consistent with PSCo's customary practices for operating facilities similar to the Facility and consistent with Prudent Utility Practice. PSCo shall promptly provide copies of all insurance policies or certificates of insurance and make available notices with respect thereto to the Non-PSCo Parties for insurance carried by PSCo pursuant to this Section 10.1.

10.1.3 Each Non-PSCo Party may also maintain at its own cost and expense additional or other insurance, including but not limited to delay in startup insurance (but, subject to Section 10.1.4, excluding property insurance), which it deems necessary or advisable to protect its Ownership Interests in the Facility Assets or Easements, provided that such additional insurance does not reduce or diminish in any way the coverage of the insurance procured and maintained by PSCo pursuant to this Section 10.1.

10.1.4 Following the Commercial Operation Date, if and to the extent PSCo fails to maintain property insurance on the Facility Assets at replacement value, each Non-PSCo Party may obtain separate excess property insurance covering its Ownership Interests, provided that such additional insurance does not reduce or diminish in any way the coverage of the insurance procured and maintained by PSCo pursuant to this Section 10.1. It is acknowledged that the aggregate value of property insurance maintained collectively by the Parties may not exceed the replacement value of the Facility Assets. If a Non-PSCo Party obtains and maintains property insurance pursuant to this Section 10.1.4, it shall be exclusively obligated to pay all premiums and expenses associated with such insurance and PSCo will have no liability in connection with such insurance. If, and for so long as, the separate insurance obtained by a Non-PSCo Party does not cover all of its Ownership Interests, such Non-PSCo Party will continue to contribute towards the payment of premiums under the insurance policies that PSCo maintains, as provided in Article 13 of the O&M Agreement. If, and for so long as, the separate insurance obtained by a Non-PSCo Party covers all of its Ownership Interests, (i) such Non-PSCo Party shall not be responsible for any portion of the premiums or other expenses under PSCo's insurance policies, (ii) such Non-PSCo Party and its Lenders shall not be named as additional insureds or as loss payees on PSCo's insurance policies and (iii) notwithstanding anything to the contrary contained in Section 10.4.1, such Non-PSCo Party shall be obligated to pay, or cause to be paid, any loss proceeds received by such Non-PSCo Party under such separate insurance policies to PSCo.

for use in connection with the repair, reconstruction or completion of the Facility Assets, unless (A) such Non-PSCo Party shall have previously contributed its applicable share for such repair, reconstruction or completion and is receiving loss proceeds by way of reimbursement for prior expenditures or (B) such Non-PSCo Party is withdrawing from the Project pursuant to Section 10.3.3.

## 10.2 Terms of Insurance Coverages.

10.2.1 Each Non-PSCo Party acknowledges and agrees that it will not be named as an additional insured on any insurance policy obtained and maintained by or on behalf of PSCo with respect to such Non-PSCo Party's interests in the Existing Common Facilities. With respect to insurance policies to be obtained by contractors under the major Construction Agreements (i.e., the Construction Agreements for the steam turbine generator, the boiler facility, the air quality control facility and the balance of plant), PSCo shall use commercially reasonable efforts to cause such insurance coverages to provide the same rights as described in Sections 10.2.2 and 10.2.3 for, respectively, property policies and third party liability policies to each Non-PSCo Party that has purchased its Ownership Interests and such Non-PSCo Party's Lenders. PSCo, on behalf of the Non-PSCo Parties and any other additional insureds or loss payees, shall be solely responsible for pursuing claims and/or negotiating settlements in respect of claims under the insurance coverages that PSCo maintains or that are provided under the Construction Agreements.

10.2.2 With respect to first party property insurance policies that PSCo itself procures and maintains on the Facility Assets pursuant to Section 10.1, PSCo shall cause each Non-PSCo Party that has purchased its Ownership Interests and such Non-PSCo Party's Lenders to be named as additional insureds to the extent of their respective interests and shall cause such policies to: (i) provide at least thirty (30) days written notice to such Non-PSCo Party and its Lenders from the insurer prior to the cancellation or termination of, or any material change in, any insurance coverages obtained by PSCo for the Facility Assets, provided that for purposes of this sentence, "material change" shall mean a material change in the terms of such policy; and (ii) permit a waiver of subrogation in favor of such Non-PSCo Party and its Lenders. In addition, PSCo shall cause its first party property insurance policies covering the Facility Assets to name CoBank ACB, acting as agent for IREA's Lenders, as loss payee to the extent of its interests. If requested by Holy Cross, PSCo shall cause its first party property insurance policies covering the Facility Assets to name one of Holy Cross's Lenders to act as agent for all of Holy Cross's Lenders as loss payee to the extent of its interests.

10.2.3 With respect to third party liability insurance policies that PSCo itself procures and maintains on the Facility Assets pursuant to Section 10.1, PSCo shall cause each Non-PSCo Party that has purchased its Ownership Interests and such Non-PSCo Party's Lenders to be named as additional insureds to the extent of their respective interests and shall cause such policies to: (i) provide at least thirty (30) days written notice to such Non-PSCo Party and its Lenders from the insurer prior to the cancellation of any insurance coverages obtained by PSCo for the Facility Assets, and (ii) permit a waiver of subrogation in favor of such Non-PSCo Party and its Lenders. In addition, PSCo shall cause its third party liability

policies covering the Facility Assets to name CoBank ACB, acting as agent for IREA's Lenders, as loss payee to the extent of its interests. If requested by Holy Cross, PSCo shall cause its third party liability policies covering the Facility Assets to name one of Holy Cross's Lenders to act as agent for all of Holy Cross's Lenders as loss payee to the extent of its interests.

### 10.3 Event of Loss and Event of Total Loss.

10.3.1 Except as provided in Sections 10.3.2 and 10.3.3, if at any time after the first Closing Date an Event of Loss or an Event of Total Loss occurs, and PSCo provides written notice to the other Parties that it elects to have the affected Facility Assets or Existing Common Facilities repaired or reconstructed or construction of the affected Facility Assets completed, as applicable, then PSCo shall oversee and manage the repair, reconstruction or completion of construction of the Facility Assets or Existing Common Facilities, as the case may be. PSCo shall prepare, or cause to be prepared, and promptly deliver to the other Parties an estimate of the total costs and schedule for such repair, reconstruction or completion. Subject to the right to receive loss proceeds under Section 10.4.1 and the credit provided under Section 10.4.4, each Party that has purchased Ownership Interests shall pay its Facility Percentage Share of all costs incurred by or on behalf of PSCo for such repair, reconstruction or completion of any Facility Assets and shall pay its Total Facility Percentage Share of all costs incurred by or on behalf of PSCo for such repair, reconstruction or completion of any Existing Common Facilities.

10.3.2 If at any time after the first Closing Date an Event of Loss or an Event of Total Loss occurs, and after PSCo consults with and provides written notice to the other Parties that it elects not to have the Facility Assets and Existing Common Facilities repaired or reconstructed or construction of the Facility Assets completed, then the Facility shall be retired and the provisions of Article 11 shall apply, but only if there has been (i) an Event of Total Loss or (ii) an Event of Loss with respect to which the cost to repair, reconstruct or complete construction of the Facility exceeds by more than fifty million dollars (\$50,000,000) the aggregate amount of loss proceeds and/or condemnation awards which the Parties have received or PSCo reasonably anticipates they will receive. In the case of an Event of Loss that does not meet the preceding criteria, PSCo shall consult with the other Parties through the E&O Committee whether or not to retire the Facility pursuant to Section 11.1. If, following such consultation, PSCo decides to retire the Facility, then the Facility shall be retired and the provisions of Section 10.4.2 and Article 11 shall apply. If, following such consultation, PSCo elects to repair, reconstruct or complete construction of the Facility Assets and, if applicable, the Existing Common Facilities, then the provisions of Section 10.3.1 shall apply.

10.3.3 If, in the circumstances described in clauses (i) or (ii) of the first sentence of Section 10.3.2, PSCo elects to repair, reconstruct or complete the Facility Assets and, if applicable, the Existing Common Facilities, each other Party may elect, by written notice delivered to PSCo within ninety (90) days of the date of PSCo's election to repair, reconstruct or complete the Facility Assets and, if applicable, the Existing Common Facilities, to sell its Ownership Interests and relinquish its Easements to PSCo for an amount

equal to the sum of (i) the salvage value of such Non-PSCo Party's Ownership Interests (excluding the portion of such Ownership Interests that are the subject of the insurance claim(s) arising out of the Event of Loss or Event of Total Loss), as determined by an independent appraiser or other Person reasonably agreed to by PSCo and the relevant Non-PSCo Party, (ii) such Non-PSCo Party's Facility Percentage Share of any loss proceeds received under PSCo's property insurance policies with respect to such Event of Loss or Event of Total Loss, to the extent such Non-PSCo Party was an additional insured or loss payee on PSCo's insurance policies at the time of the Event of Loss or Event of Total Loss and (iii) the aggregate amount of Construction Costs paid by such Non-PSCo Party for upgrades to Existing Common Facilities. The sale of a Non-PSCo Party's Ownership Interests and relinquishment of its Easements pursuant to this Section 10.3.3 shall take place on a date no earlier than thirty (30) days and no later than sixty (60) days after notice of such election at a time and place mutually acceptable to PSCo and the selling Party. From and after the date for such sale of Ownership Interests, relinquishment of Easements and withdrawal from the Project Agreements, the withdrawing Party shall have no further rights or obligations under this Agreement or any of the other Project Agreements (other than the payment of any amounts due and unpaid under this Agreement or the other Project Agreements as of such date and those obligations that survive termination of this Agreement pursuant to Section 19.13) and shall be deemed to have forfeited its rights, if any, under its respective power purchase agreement to participate in the Facility.

#### 10.4 Allocation of Loss Proceeds and Condemnation Awards.

10.4.1 If the Facility Assets will be repaired, reconstructed or completed following an Event of Loss or an Event of Total Loss, then each Party shall pay, or cause to be paid, any loss proceeds or condemnation awards received by such Party to PSCo for use in connection with the repair, reconstruction or completion of the Facility Assets and, if applicable, the Existing Common Facilities unless such Party shall have previously paid for such repair, reconstruction or completion and is receiving loss proceeds or condemnation awards by way of reimbursement for prior expenditures. With respect to insurance obtained and maintained by a Non-PSCo Party pursuant to Section 10.1.3, such Non-PSCo Party shall not be required to contribute any loss proceeds from such insurance policies to the repair, reconstruction or completion of the Facility Assets.

10.4.2 If the Facility Assets are not repaired, reconstructed or completed following an Event of Loss or an Event of Total Loss, then any loss proceeds or condemnation awards received by the Parties in connection with such Event of Loss or Event of Total Loss shall be paid to, or retained by, each of the Parties consistent with its respective Ownership Interests. Each Party shall pay, or cause to be paid, to one or more of the other Parties any loss proceeds or condemnation awards it receives that exceed its Ownership Interests in any of the Facility Assets.

10.4.3 If the Existing Common Facilities are not repaired, reconstructed or completed following an Event of Loss or an Event of Total Loss in accordance with Section 10.3.2, then any loss proceeds or condemnation awards received by PSCo in connection with such Event of Loss or Event of Total Loss shall be retained by PSCo. However, PSCo shall

make a separate payment or payments to each Non-PSCo Party in an amount equal to the product of such Non-PSCo Party's Total Facility Percentage Share multiplied by, as applicable, (i) the amount of any loss proceeds that PSCo receives under its insurance policies or (ii) the amount of any condemnation award that PSCo receives, in each case to the extent allocable to Existing Common Facilities; provided, that in no event shall such payment exceed the aggregate amount of Construction Costs paid by such Non-PSCo Party for upgrades to Existing Common Facilities. PSCo shall make the payment described in the preceding sentence promptly after it receives any such insurance proceeds or condemnation award.

10.4.4 If the Existing Common Facilities are repaired, reconstructed or completed following an Event of Loss or an Event of Total Loss and any Non-PSCo Party does not, or is not entitled to elect to, withdraw from the Project pursuant to Section 10.3.3, such Non-PSCo Party shall receive a credit towards its obligation under Section 10.3.1 to make payments for the repair, reconstruction or completion of such Existing Common Facilities in an amount equal to the product of such Non-PSCo Party's Total Facility Percentage Share multiplied by, as applicable, (i) the amount of any loss proceeds that PSCo receives under its insurance policies or (ii) the amount of any condemnation award that PSCo receives, in each case to the extent allocable to Existing Common Facilities.

## **ARTICLE 11**

### **RETIREMENT OF THE FACILITY**

11.1 Retirement of Facility. Except as provided in Section 10.3.2, the decision to retire the Facility permanently shall be determined by PSCo in consultation with the Non-PSCo Parties and shall be conducted in a commercially reasonable manner and in accordance with Prudent Utility Practice. The retirement of the Facility shall not commence sooner than six (6) months after the decision to retire the Facility, unless continued operation of the Facility is inconsistent with Prudent Utility Practice. PSCo shall conduct the retirement of any Facility Assets in a manner consistent with Prudent Utility Practice.

#### 11.2 Retirement of Common Facilities.

11.2.1 If at the time the Facility is retired pursuant to Section 11.1 both units of the Existing Facility have been retired, then the Common Facilities shall be retired together with, and in the same manner as, the Facility.

11.2.2 If one or both units of the Existing Facility have not been retired on or prior to the date that retirement of the Facility is completed, PSCo shall have the exclusive right to continue to operate the Common Facilities to support the operation of the Existing Facility and shall have the sole obligation to pay any costs relating to operating, maintaining, improving, insuring and retiring such Common Facilities. In addition, PSCo shall purchase each Non-PSCo Party's New Common Facilities Ownership Interest for a price based on the net book value of the New Common Facilities as of the purchase date, as determined by the E&O Committee. In the event PSCo purchases a Non-PSCo Party's New Common Facilities Ownership Interest, the selling Non-PSCo Party shall take all actions and execute all bills of

sale, deeds and other certificates and documents as directed by PSCo to transfer its New Common Facilities Ownership Interest back to PSCo.

11.3 Retirement Costs. Subject to the indemnification provisions herein, each Party shall be responsible for paying a portion of all costs and expenses prudently incurred to retire permanently the Facility Assets from service, including decommissioning, dismantling, demolishing and removal of equipment, facilities and structures, security, maintenance, disposing of debris, abandonment and all other costs and expenses prudently incurred to retire permanently such Facility Assets from service, in accordance with the following allocation principles. To the extent that any Party is required by applicable legal or accounting standards to establish reserves for such retirement costs, each Party shall be responsible for establishing and funding such reserves for itself as may be required by the legal or accounting standards applicable to such Party.

11.3.1 Subject to the indemnification provisions herein, each Party shall pay its Facility Percentage Share of such retirement costs for the Facility or the Facility Site, less its Facility Percentage Share of the net proceeds from any sale of retired equipment, facilities and structures incorporated into the Facility or the Facility Site.

11.3.2 Subject to the indemnification provisions herein, if any New Common Facilities are retired on or prior to the fifteenth (15th) anniversary of the Commercial Operation Date, each Party shall pay its Facility Percentage Share of the retirement costs of such New Common Facilities, less its Facility Percentage Share of the net proceeds from any sale of such New Common Facilities. From and after the fifteenth (15th) anniversary of the Commercial Operation Date, each Party shall pay its Total Facility Percentage Share of the retirement costs of any New Common Facilities, less its Total Facility Percentage Share of the net proceeds from any sale of such New Common Facilities.

11.3.3 Subject to the indemnification provisions herein, each Party shall pay its Total Facility Percentage Share of such retirement costs for any Existing Common Facilities, less its Total Facility Percentage Share of the net proceeds from any sale of any such retired Existing Common Facilities.

11.4 Termination of Agreement. Effective as of the date that is thirty (30) days after the successful completion of the permanent retirement of the Facility in accordance with the terms and conditions of this Article 11, this Agreement shall automatically terminate and each of the Parties shall be released from all of its obligations under this Agreement other than those obligations arising prior to such termination and those obligations which survive termination of this Agreement pursuant to Section 19.13.

## **ARTICLE 12**

### **TRANSFERS OF OWNERSHIP INTERESTS; RIGHT OF FIRST REFUSAL**

12.1 Restriction on Transfers. Except as expressly provided in this Article 12 or in Article 13 with respect to collateral assignments but subject to Section 12.6, no Party shall directly or indirectly transfer, sell or assign any portion of its Ownership Interests,

Easements or rights and obligations under the Project Agreements to any Person without the written consent of each other Party, such consent not to be unreasonably withheld. No Non-PSCo Party shall be permitted to sell its Ownership Interests without also assigning its Easements to the purchaser of such Ownership Interests or assign its Easements without also selling its Ownership Interests to the assignee of such Easements. No Non-PSCo Party shall be permitted to make any partial assignment of its Ownership Interests and Easements. Any attempt to transfer Ownership Interests in violation of this Article 12 shall be null and void and of no effect. Notwithstanding anything to the contrary stated in or implied by Section 12.5, the consent requirement provided in this Section 12.1 shall continue to apply even if the Remaining Parties have elected not to exercise their right of first refusal to purchase the Transfer Share.

12.2 Merger, Consolidation, Etc. Each Party may, without the prior consent of any other Party, directly or indirectly transfer, sell or assign its Ownership Interests, Easements and rights and obligations under the Project Agreements to any corporation or other entity into which or with which the Party making the transfer, sale or assignment is merged or consolidated or to which such Party transfers substantially all of its assets.

12.3 Transfers by Non-PSCo Parties.

12.3.1 Each Non-PSCo Party may, without the consent of any other Party, (i) directly or indirectly transfer and assign all (but not part) of its Ownership Interests and/or its rights and obligations under any Project Agreement to a wholly owned subsidiary of such Non-PSCo Party if (a) such wholly owned subsidiary transferee or assignee assumes all of such Non-PSCo Party's obligations with respect to the Facility Assets or such Project Agreement(s), as the case may be and (b) such wholly owned subsidiary has the financial and operational capacity, including creditworthiness, to perform its obligations under the Project Agreement(s) or (ii) directly or indirectly transfer and assign its Ownership Interests and/or assign all (but not part) of its rights under any Project Agreement to a wholly owned subsidiary of such Non-PSCo Party if after such transfer or assignment such Non-PSCo Party retains all of the contractual obligations associated with such assigned Ownership Interests and rights under the Project Agreements. Upon any transfer or assignment under clause (i) of the preceding sentence, the Non-PSCo Party shall be relieved of its obligations under such Project Agreement(s) with the exception of any liabilities incurred prior to such transfer or assignment.

12.3.2 Holy Cross may, without the consent of any other Party, directly or indirectly transfer and assign all (but not part) of its Ownership Interests and Easements, including its rights and obligations under the Project Agreements to a separate entity wholly owned by Holy Cross and Yampa Valley Electric Association, Inc. ("Yampa") if such entity has the financial and operational capacity, including creditworthiness, to perform its obligations under the Project Agreement(s).

12.4 Transfer by PSCo to Affiliate. PSCo may, without the consent of any Non-PSCo Party, (i) directly or indirectly transfer and assign its Ownership Interests and/or its rights and obligations under any Project Agreement to an Affiliate if (a) such Affiliate



transferee or assignee assumes all of PSCo's obligations with respect to the Facility Assets or such Project Agreement(s), as the case may be, (b) such Affiliate has the financial and operational capacity, including creditworthiness, to perform its obligations under the Project Agreement(s) and (c) following such assignment, the Owners will continue to enjoy economic benefits substantially similar to those that PSCo, acting in its reasonable discretion, would have provided in similar circumstances, including market conditions, had there been no such assignment or (ii) directly or indirectly transfer and assign its Ownership Interests and/or assign its rights under any Project Agreement to an Affiliate if after such transfer or assignment PSCo retains all of the contractual obligations associated with such assigned Ownership Interests and rights under the Project Agreements. Upon any transfer or assignment under clause (i) of the preceding sentence, PSCo shall be relieved of its obligations under such Project Agreement(s) with the exception of any liabilities incurred prior to such transfer or assignment; provided, however, that for the avoidance of doubt, a partial delegation of Operator's responsibilities pursuant to Section 15.2.2 of the O&M Agreement shall not relieve Operator of its obligations under the O&M Agreement.

#### 12.5 Right of First Refusal.

12.5.1 Except with respect to transfers permitted under Sections 12.2, 12.3 and 12.4 and conditional assignments to Lenders permitted under Section 13.2, should any Party desire to sell, transfer, assign, convey or otherwise dispose of its entire Ownership Interests and Easements (the "Transfer Share") to any other Person, including any other Party (the "Proposed Transferee"), the other Parties (the "Remaining Parties") shall have the rights of first refusal, as provided in this Section 12.5, to purchase such Transfer Share, and the transferring Party shall not dispose of the Transfer Share except as provided in this Section 12.5. No Non-PSCo Party may seek to transfer less than one hundred percent (100%) of its Ownership Interests and Easements.

12.5.2 At least six (6) months prior to its intended date to dispose the Transfer Share, and after receipt by it of a bona fide written offer, which it desires to accept, from the Proposed Transferee, who shall be a buyer ready, willing and able to purchase the Transfer Share upon expiration of the notice periods specified in this Section 12.5.2, the Party desiring to dispose of the Transfer Share shall serve a written notice of intent to transfer upon the Remaining Parties. Such notice shall contain the approximate proposed date of disposition of the Transfer Share and the terms and conditions under which such Party would sell the Transfer Share to the Remaining Parties, which shall be at least as favorable to the Remaining Parties as the terms and conditions offered by the Proposed Transferee.

12.5.3 Each Remaining Party desiring to purchase all of the Transfer Share shall provide a written notice of intent to purchase to the Party desiring to dispose the Transfer Share and the other Remaining Parties within ninety (90) days after receipt of the notice of intent to transfer under Section 12.5.2.

12.5.4 If the Remaining Parties signify their intention under Section 12.5.3 to purchase in the aggregate more than the entire Transfer Share, then each Remaining Party shall have the right to purchase a portion of the Transfer Share not in excess of the ratio of its

Ownership Interests to the aggregate Ownership Interests of the Remaining Parties who have served a notice of intent to purchase under Section 12.5.3

12.5.5 If in their notices of intent to purchase served under Section 12.5.3 the Remaining Parties signify an intention to purchase less than the entire Transfer Share, the Remaining Parties shall have an additional sixty (60) days after receipt of the last notice of intent to purchase under Section 12.5.3 to indicate their intention to purchase the entire Transfer Share in accordance with Section 12.5.4.

12.5.6 If and when intention to purchase the entire Transfer Share is indicated by written notices of intent to purchase from the Remaining Parties, disposal of the Transfer Share shall be effected by the selling Party to the Remaining Parties in accordance with their respective notices of intent to purchase, subject to all required Government Approvals and release of any Liens imposed on the Transfer Share by or through the selling Party.

12.5.7 If the Remaining Parties fail to indicate their intention to purchase the entire Transfer Share, the selling Party may sell the entire Transfer Share to the Proposed Transferee on the terms and conditions stated in its bona fide written offer, but subject to the consent requirement contained in Section 12.1.

12.5.8 Any disposition of a Transfer Share, whether to any one or more Remaining Parties or to a Proposed Transferee, shall be subject to all of the benefits and burdens of the covenants and obligations applicable to the Transfer Share provided in this Agreement. Any such Proposed Transferee shall assume and agree in a written agreement delivered to each Remaining Party the obligations of the selling Party under this Agreement and each other Project Agreement to which the selling Party is a party.

12.5.9 The selling Party shall be responsible for the cost of obtaining any Government Approvals and releases of Liens required for a conveyance of a Transfer Share.

12.6 Non-PSCo Party Acknowledgment. Each Non-PSCo Party hereby acknowledges that if any other Non-PSCo Party is affected by a Bankruptcy Event or has its Ownership Interests foreclosed upon by its Lenders, such first Non-PSCo Party's right of first refusal under Section 12.5 shall not apply to any sale of any such other Non-PSCo Party's Ownership Interests and/or transfer of any such other Non-PSCo Party's rights under the Project Agreements that takes place as a result of such Bankruptcy Event or Lender foreclosure.

### **ARTICLE 13**

#### **LIENS AND SECURITY INTERESTS**

13.1 Restriction on Liens. Except for Permitted Encumbrances, no Party may create or permit to exist a Lien in respect of its Ownership Interests or Easements without the prior written consent of the other Parties, such consent not to be unreasonably withheld or delayed. Except for Permitted Encumbrances, but subject to Section 16.4, no

Party may take any action that would cause or permit a Lien to exist on any other Party's Ownership Interests without such other Party's prior written consent.

13.2 Security Interests. Subject to Section 3.6.1, each Party shall have the right to assign its interest under this Agreement and the other Project Agreements and its Ownership Interests and Easements as collateral security for its obligations to any Lender at any time and from time to time to convey a form of security interest including a mortgage of its interest in the Facility Site. Any such conveyance shall be subject to all of the terms and conditions of this Agreement, including Section 13.3, and the other Project Agreements to which such Party is a party. Subject to such terms and conditions, any Lender, any successor or assign thereof, and any receiver or trustee in bankruptcy, reorganization or receivership of a Party may succeed to and acquire all rights of a Party pursuant to this Agreement without the consent of the other Party.

13.3 Lien of the PSCo Indenture. Each Party expressly acknowledges and agrees that (i) items (a), (c), (d) and (f) in the definition of Facility Assets, (ii) the Existing Facility and (iii) the Existing Common Facilities are and shall remain subject to the Lien of the PSCo Indenture and that the requirements of the PSCo Indenture shall apply to the Facility Assets, the Existing Facility and the Existing Common Facilities; provided, however, that the Ownership Interests and Easements of the Non-PSCo Parties shall be released from the Lien of the PSCo Indenture pursuant to Section 4.4.2(c).

13.4 Interpretation of PSCo Indenture and Project Agreements. PSCo acknowledges and agrees that, except with respect to the definition of Permitted Encumbrances, if and to the extent the Project Agreements (i) obligate PSCo to comply with a standard of conduct that is higher than or more stringent than the requirement contained in the PSCo Indenture with regard to the same issue or (ii) impose requirements in addition to or above and beyond those imposed in the PSCo Indenture, then, in both such cases, PSCo shall at all times comply with the standard of conduct required in the Project Agreements.

13.5 Consent To Assignment. Each Party hereby agrees to execute a consent to the collateral assignment of each other Party's rights under this Agreement and any other Project Agreement, as appropriate, to the relevant Lenders and agrees that such consents shall include without limitation, as applicable, agreements: (i) to afford the Lenders a reasonable opportunity to remedy any default or any other event or occurrence giving any party the right to terminate or suspend this Agreement or any other Project Agreement; (ii) in the event of a foreclosure or bankruptcy-related sale of a Party's Ownership Interests or its rights under any Project Agreement, to accept the purchaser of such interest as the successor of such Party under this Agreement and any other Project Agreement to which such Party is a party; provided, that (A) such purchaser assumes all of the obligations of such Party, (B) such purchaser has the financial and operating capacity, including creditworthiness, to perform such Party's obligations under the Project Agreements and (C) PSCo shall have a right of first refusal, and its rights under Section 12.1 shall apply, with respect to such sale or transfer; and (iii) in the event of an acceleration of the loans under the Financing Documents, that the Parties, at the request of the Lenders, enter into a replacement agreement substantially similar to this Agreement and any other Project Agreement to which such Party

is a party with the Lenders or their designee. It is expressly acknowledged by PSCo and IREA that as of the Closing Date for IREA, PSCo has discharged its obligations under this Section 13.5, with respect to IREA's financing of the purchase of its Ownership Interests and its contribution towards Project Costs and Air Permit Costs, by entering into a consent and agreement with IREA and its Lenders (the "IREA Financing Consent"). If IREA refinances in the future and such refinancing is contingent upon PSCo entering into a consent to assignment, PSCo shall use commercially reasonable efforts to enter into a consent to assignment so long as it includes terms and conditions substantially similar to those contained in the IREA Financing Consent. Upon the Closing Date for PSCo and Holy Cross, and the execution by PSCo, Holy Cross and its Lenders of a financing consent (the "Holy Cross Financing Consent"), PSCo shall be deemed to have discharged its obligations under this Section 13.5 with respect to Holy Cross' financing of the purchase of its Ownership Interests and its contribution towards Project Costs and Air Permit Costs. If Holy Cross refinances in the future and such refinancing is contingent upon PSCo entering into a consent to assignment, PSCo shall use commercially reasonable efforts to enter into a consent to assignment so long as it includes terms and conditions substantially similar to those contained in the Holy Cross Financing Consent.

## **ARTICLE 14**

### **EVENTS OF DEFAULT AND REMEDIES**

#### **14.1 PSCo Defaults and Non-PSCo Party Remedies.**

14.1.1 PSCo Defaults. The following shall each constitute an event of default by PSCo under this Agreement (a "PSCo Default"):

- (a) failure by PSCo to pay in full any amount due and payable hereunder, where such failure is not cured within fifteen (15) days after written notice of such failure;
- (b) a Bankruptcy Event affecting PSCo;
- (c) a material breach of a representation or warranty provided by PSCo under this Agreement;
- (d) failure by PSCo to observe or perform any of the material terms or conditions set forth in this Agreement, other than those described in clause (a) through (c) above, and such failure is not cured within thirty (30) days after written notice thereof from one or more non-defaulting Parties; provided, that if such failure cannot reasonably be cured within the thirty (30) day period, and if PSCo has commenced and is diligently pursuing such cure and provides the other Parties with adequate assurance of due performance to protect the non-defaulting Parties against loss arising from any failure to perform, the cure period shall be extended to not more than one hundred and twenty (120) days after the written notice of default, as shall be necessary for PSCo to cure the failure with all due diligence and dispatch; and
- (e) an Event of Default by PSCo under any other Project Agreement.

14.1.2 Non-PSCo Party Remedy. In the event of a PSCo Default, any Non-PSCo Party may protect its interests by pursuing remedies through mediation or litigation. In addition, if PSCo fails to cure such PSCo Default within one hundred eighty (180) days after the commencement of such PSCo Default, any Non-PSCo Party may, upon written notice to PSCo, elect to withdraw from the Facility Assets and the Project Agreements; provided, that no Non-PSCo Party shall be entitled to withdraw if it has materially contributed to any PSCo Default. The withdrawal of any Non-PSCo Party under this Section 14.1.2 shall occur on the date (the "Withdrawal Date") and at the time and place mutually agreed to by PSCo and the Withdrawing Party or Parties. The Withdrawal Date shall not be earlier than sixty (60) days or later than ninety (90) days after the date on which such Withdrawing Party gives written notice of its election to withdraw. If more than one Non-PSCo Party elects to withdraw from the Facility Assets and the Project Agreements, then the Parties shall use commercially reasonable efforts to have each withdrawal occur on the same Withdrawal Date. If a withdrawal pursuant to this Section 14.1.2 occurs prior to the Commercial Operation Date, PSCo will reimburse to the Withdrawing Party an amount equal to one hundred percent (100%) of the Project Costs paid by Withdrawing Party prior to the date of such withdrawal. If a withdrawal pursuant to this Section 14.1.2 occurs on or after the Commercial Operation Date, PSCo will (i) pay each Withdrawing Party on the Withdrawal Date an amount equal to the sum of (A) the product of (1) the appraised value of the Facility Assets (other than New Common Facilities), multiplied by (2) such Non-PSCo Party's Facility Ownership Interest and (B) the product of (1) the appraised value of the New Common Facilities, multiplied by (2) such Non-PSCo Party's New Common Facilities Ownership Interest and (ii) reimburse to such Non-PSCo Party the aggregate amount of Construction Costs paid by such Non-PSCo Party for upgrades to Existing Common Facilities. PSCo shall hire an independent appraiser reasonably acceptable to the Withdrawing Party and experienced in appraising assets of this type to conduct an appraisal of the Facility Assets. The results of such appraisal shall form the basis of the amount PSCo shall pay to the Withdrawing Party. In the case of any withdrawal under this Section 14.1.2, the Withdrawing Party shall take all actions and execute all bills of sale, deeds, certificates or other documentation as directed by PSCo to withdraw from this Agreement and the other Project Agreements and to convey its Ownership Interests to PSCo upon such withdrawal.

#### 14.2 Non-PSCo Party Defaults and PSCo Remedies.

14.2.1 Non-PSCo Party Defaults. The following shall each constitute an event of default by a Non-PSCo Party under this Agreement (a "Non-PSCo Party Default"):

- (a) failure by a Non-PSCo Party to pay in full any amount due hereunder, where such failure is not cured within fifteen (15) days after written notice of such failure, unless PSCo elects to advance a PSCo Loan in the amount of such non-payment;
- (b) a Bankruptcy Event affecting such Non-PSCo Party;
- (c) a material breach of a representation or warranty provided by such Non-PSCo Party under this Agreement;

(d) failure by such Non-PSCo Party to observe or perform any of the material terms or conditions set forth in this Agreement, other those described in clause (a), (b) or (c) above, and such failure is not cured within thirty (30) days after written notice thereof from one or more non-defaulting Parties; provided, that if such failure cannot reasonably be cured within the thirty (30) day period, and if the defaulting Non-PSCo Party has commenced and is diligently pursuing such cure and provides the other Parties with adequate assurance of due performance to protect the non-defaulting Parties against loss arising from any failure to perform, the cure period shall be extended to not more than one hundred and twenty (120) days after the written notice of default, as shall be necessary for such Non-PSCo Party to cure the failure with all due diligence and dispatch; and

(e) an Event of Default by such Non-PSCo Party under any other Project Agreement.

#### 14.2.2 PSCo Remedies.

(a) Before the Closing Date. If a Non-PSCo Party Default occurs prior to the Closing Date for such Non-PSCo Party, then in addition to any other rights and remedies PSCo may have at law or in equity PSCo shall have the right to give written notice to such Party that its Non-PSCo Party Default shall be deemed to be a withdrawal from this Agreement and each other Project Agreement; provided, that PSCo shall not be entitled to exercise this remedy if it has materially contributed to any Non-PSCo Party Default. The Withdrawing Party receiving such notice shall be deemed as having withdrawn from this Agreement and each other Project Agreement and the remaining Parties shall be entitled to complete the development and construction of the Facility Assets exclusive of the Withdrawing Party. The Withdrawing Party shall assign to PSCo, at no cost to PSCo, all of such Withdrawing Party's Ownership Interests and its right, title and interest in any Project Agreements to which it is a party. The Withdrawing Party shall have no claim against the Facility Assets or any remaining Party for any Project Costs or Air Permit Costs paid by the Withdrawing Party prior to the date of its withdrawal. Notwithstanding anything herein to the contrary, a Withdrawing Party shall be bound by the following: (i) the Withdrawing Party shall remain fully obligated to perform all of its obligations under this Agreement which were incurred prior to and including the day of withdrawal, including the obligation to pay its share of Project Costs and, if applicable, Air Permit Costs; and (ii) the Withdrawing Party shall use commercially reasonable efforts to ensure that its withdrawal is done in such a way which will not have any adverse impact on the Facility Assets.

(b) Prior to Commercial Operation Date. If a Non-PSCo Party Default occurs after the Closing Date for such Non-PSCo Party but prior to the Commercial Operation Date, then PSCo shall have the right to give written notice to such Non-PSCo Party declaring a Non-PSCo Party Default, in which case, and without relieving the defaulting Non-PSCo Party of its liability for its Non-PSCo Party Default, (i) PSCo shall pay such defaulting Non-PSCo Party's share of Project Costs and Air Permit Costs to complete or cause the completion of the development and construction of the Facility Assets without additional payments by the defaulting Non-PSCo Party and (ii) the defaulting Non-PSCo Party's Facility Percentage Share shall thereafter be equal to the ratio of the Project Costs

and Air Permit Costs previously paid by the defaulting Party to the total Project Costs and Air Permit Costs, and the defaulting Non-PSCo Party's Ownership Interests shall coincidentally reduce automatically as and to the extent that Project Costs and Air Permit Costs are thereafter paid by the non-defaulting Parties; provided, that PSCo shall not be entitled to exercise this remedy if it has materially contributed to any Non-PSCo Party Default. PSCo's Facility Percentage Share and Ownership Interests shall automatically and proportionately increase as the defaulting Party's Facility Percentage Share and Ownership Interests decrease. The defaulting Non-PSCo Party shall thereafter execute any bills of sale, deeds, certificates or other documentation as PSCo may direct to evidence the re-allocation of Ownership Interests. Upon such readjustment of Ownership Interests, the Event of Default shall be deemed to have been cured.

(c) Following Commercial Operation Date.

(1) Payment Default. If the basis of a Non-PSCo Default is solely a failure to make any payment required hereunder following the Commercial Operation Date (a "Payment Default"), the remedy set forth in Section 14.2.2(c)(2) below shall not be available and PSCo shall have the right, but not the obligation, to cause a reduction in the Ownership Interests of the defaulting Non-PSCo Party as provided below. Upon the occurrence of a Payment Default, PSCo shall be entitled to deliver written notice to the defaulting Party setting forth the date on which the transfer of Ownership Interests shall occur (the "Adjustment Date") and the amount by which the defaulting Non-PSCo Party's Ownership Interests shall be reduced (the "Adjustment Amount"), which shall be equal to the greater of (i) the amount not paid by the defaulting Non-PSCo Party or (ii) any PSCo Loans made pursuant to Section 7.3.2 or, if applicable, Section 9.4.2 of the O&M Agreement to cover such non-payment, plus in either case interest accrued thereon at the Default Interest Rate through and including the Adjustment Date. Thereafter, the Ownership Interests of the defaulting Non-PSCo Party shall be equal to a ratio the numerator of which shall be the aggregate amount of Project Costs, Air Permit Costs and any amounts under the other Project Agreements paid by the defaulting Non-PSCo Party, less the Adjustment Amount, and the denominator of which shall be the aggregate amount of Project Costs, Air Permit Costs and any amounts under the other Project Agreements paid by all of the Parties. PSCo's Facility Percentage Share and Ownership Interests shall automatically and proportionately increase as the defaulting Non-PSCo Party's Facility Percentage Share and Ownership Interests decrease. The defaulting Party shall execute any bills of sale, deeds, certificates or other documentation as PSCo may direct to evidence the re-allocation of Ownership Interests. Upon such readjustment of Ownership Interests, the Event of Default shall be deemed to have been cured.

(2) Other Default. If a Non-PSCo Party Default other than a failure to make a payment required hereunder occurs after the Commercial Operation Date, PSCo shall have the right to give written notice to such Non-PSCo Party declaring a Non-PSCo Party Default, in which case, and without relieving the defaulting Party of its liability for its Non-PSCo Party Default, the defaulting Non-PSCo Party shall not be permitted to participate in meetings of the E&O Committee or the Audit Committee until such Non-PSCo Party Default is cured. In addition, if the defaulting Non-PSCo Party fails to cure such Non-

PSCo Party Default within ninety (90) days after the commencement of such Non-PSCo Party Default, PSCo may, upon written notice to the defaulting Non-PSCo Party, elect to purchase the Ownership Interests of such defaulting Non-PSCo Party. The purchase price payable by PSCo for the Ownership Interests of such defaulting Non-PSCo Party shall be equal to the sum of (i) the product of (A) the appraised value of the Facility Assets (other than New Common Facilities), multiplied by (B) such Non-PSCo Party's Facility Ownership Interest and (ii) the product of (A) the appraised value of the New Common Facilities, multiplied by (B) such Non-PSCo Party's New Common Facilities Ownership Interest. PSCo shall hire an independent appraiser reasonably acceptable to the defaulting Non-PSCo Party and experienced in appraising assets of this type to conduct an appraisal of the Facility Assets. The results of such appraisal shall form the basis of the amount PSCo shall pay to the defaulting Non-PSCo Party. The defaulting Non-PSCo Party shall take all actions and execute all bills of sale, deeds, certificates or other documentation as directed by PSCo to withdraw from this Agreement and the other Project Agreements and to convey its Ownership Interests to PSCo upon such withdrawal and to eliminate such Non-PSCo Party's Easements as of the date of such withdrawal.

14.3 Remedies Not Exclusive. Subject to the following sentence, upon the occurrence of any Event of Default, the non-defaulting Parties shall be entitled to exercise all remedies available to them at law or in equity, including specific performance, it being agreed that monetary damages may not be an adequate remedy for the breach of the Parties' obligations hereunder. Notwithstanding any remedies otherwise available to the non-defaulting Parties at law or in equity that may be pursued in accordance with Article 18, in the event of a breach or default by any Party, it is the Parties' intention that this Agreement may be terminated only pursuant to its express terms.

14.4 Disputes. Any Dispute between or among the Parties under this Article 14 shall be resolved exclusively pursuant to and in accordance with the terms and conditions of Article 18. The Parties acknowledge and agree that with respect to any Event of Default, the occurrence or continuation of which is subject to a good faith dispute under Article 18, the date on which any remedy under Section 14.1.2 or Section 14.2.2, as applicable, is to take effect shall be deferred until the Dispute has been resolved in all material respects in accordance with the terms and conditions of Article 18.

## **ARTICLE 15**

### **FORCE MAJEURE**

15.1 Force Majeure Excuse. No Party to this Agreement shall be responsible or liable for, or deemed in breach of this Agreement for, any delay or failure in the performance of its respective obligations under this Agreement (except for obligations to pay money) to the extent such delay or failure is due solely to circumstances beyond the reasonable control of the Party experiencing such delay or failure (such Party being referred to as the "Non-Performing Party"), including, but not limited to, (a) acts of God, unusually severe weather conditions (including, but not limited to, floods, freezes, blizzards, hurricanes, tornadoes, earthquakes, mud slides, lightening and the like), war or riot or insurrection, requirements or actions or failures to act by governmental authorities preventing



or delaying performance, fire, acts of terrorism or of the public enemy, sabotage, civil disturbance or unrest, strikes and labor disputes, and (b) damage or breakdown of necessary facilities or equipment (such causes being referred to as “Force Majeure”), provided that:

(a) The Non-Performing Party gives the other Party written notice within forty eight (48) hours after learning of the Force Majeure condition, with details further describing the particulars of the occurrence to be supplied not later than ten (10) days after the occurrence of such condition;

(b) The suspension of performance is of no greater scope and of no longer duration than is necessitated by the Force Majeure condition;

(c) The Non-Performing Party uses its commercially reasonable efforts to remedy the condition of Force Majeure;

(d) The Non-Performing Party uses its commercially reasonable efforts to remedy its inability to perform; and

(e) When the Non-Performing Party is able to resume performance of its obligations under this Agreement, that Party shall give the other Party written notice to that effect.

15.2 Force Majeure Exclusions. The term Force Majeure shall not include (i) any negligent or intentional act, error or omission, or failure to comply with any applicable Law or any breach of or default under this Agreement, in any such instance by the Non-Performing Party or its contractors, (ii) the unavailability of equipment which reasonably could have been avoided by operating or maintenance practices in accordance with Prudent Utility Practice, (iii) labor strikes or slowdowns of the Non-Performing Party’s employees, and (iv) changes in market conditions that affect the cost of energy or capacity or any necessary wheeling or transmission arrangements.

15.3 Records. Each Party shall retain records of events it claims as Force Majeure and of its efforts to remedy the effects of such events and, upon request, shall make those records available to the other Party.

## **ARTICLE 16 INDEMNIFICATION**

16.1 General Indemnification. Subject to Article 14 of the O&M Agreement, each Party shall indemnify, defend and hold harmless the other Parties and their respective agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any and all liabilities, damages, losses, demands, penalties, interest, injunctive relief, fines, claims, actions, suits, judgments, settlements, and reasonable costs, fees, expenses and disbursements (including reasonable legal fees) and expenses and costs of investigation arising out of any claim brought by a third party, including any proceeding, investigation or inquiry initiated by or with a Governmental Authority in connection with this Agreement or the other Project Agreements (collectively, “Claims”) that are asserted against, imposed upon

or incurred by such other Parties due directly to the indemnifying Party's gross negligence or willful misconduct; provided, that any indemnification for Claims arising out of the presence or Release of Hazardous Materials on the Property or the violation of any Environmental Law shall be exclusively as provided under Section 16.2. For the purposes of this Section 16.1, a member of any Non-PSCo Party acting on its own behalf or on behalf of such Non-PSCo Party shall be deemed a third party with respect to Claims against PSCo.

## 16.2 PSCo Environmental Indemnification

16.2.1 Property other than Facility Site. PSCo shall indemnify, defend and hold harmless the Non-PSCo Parties and their respective agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any Claims, including costs of environmental investigation, response or remediation (collectively, "Environmental Claims") incurred by such Non-PSCo Parties arising out of (i) the presence or Release of any Hazardous Material on any area of the Property other than the Facility Site, including all land and facilities associated with the Existing Facility, and on neighboring properties to the extent caused by Hazardous Material on such areas of the Property and (ii) any violation of any Environmental Law to the extent related to such areas of Property, except to the extent the Party seeking indemnification has contributed to such presence or Release of Hazardous Material or violation of Environmental Law; provided, that for the avoidance of doubt, PSCo shall have no indemnity liability with respect to indirect or consequential costs or damages, including without limitation increases in Project Costs or delays in construction of the Facility Assets, to the extent caused by (i) the presence or Release of Hazardous Materials at or under areas other than the Facility Site or (ii) any violation of Environmental Law arising from areas and conditions other than the Facility Site; provided, further, that to the extent such presence or Release of Hazardous Material is attributable to a third party contractor of PSCo involved in the construction of the Facility Assets and PSCo has retained and monitored such contractor in a manner that is consistent with Prudent Utility Practice, PSCo's indemnity obligation under this Section 16.2.1 shall be limited to such Non-PSCo Party's Facility Percentage Share of any amount PSCo receives from such contractor as a direct result of the contractor's Release of Hazardous Material or violation of Environmental Law.

## 16.2.2 Facility Site.

(a) If Hazardous Materials are discovered in the soil, surface water and/or groundwater at or under the Facility Site at any time and such Hazardous Materials are conclusively determined to have been present at or under the Facility Site at the time the Phase I ESA was conducted, PSCo shall indemnify, defend and hold harmless the Non-PSCo Parties and their respective agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any Environmental Claims to the extent arising from the presence of such Hazardous Materials; provided, that for the avoidance of doubt, PSCo shall have no indemnity liability with respect to indirect or consequential costs or damages, including without limitation increases in Project Costs or delays in construction of the Facility Assets, to the extent caused by Hazardous Materials or violations of Environmental Law disclosed or discovered in connection with the Phase I ESA.

(b) If any Hazardous Materials are Released on the Facility Site at any time and such Hazardous Materials are conclusively determined to have been Released on the Facility Site after the date on which the Phase 1 ESA was completed, PSCo shall indemnify, defend and hold harmless the Non-PSCo Parties and their respective agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any Environmental Claims to the extent arising from the presence or Release of such Hazardous Materials at levels exceeding the applicable Industrial Remediation Standard and to the extent due directly to PSCo's gross negligence or willful misconduct; provided, that for the avoidance of doubt, PSCo shall have no indemnity liability with respect to indirect or consequential costs or damages, including without limitation increases in Project Costs or delays in construction of the Facility Assets, to the extent caused by such presence or Release of Hazardous Materials or such violations of Environmental Law. To the extent such presence or Release of Hazardous Material at levels above the applicable Industrial Remediation Standard is attributable to a third party contractor of PSCo and PSCo has retained and monitored such contractor in a manner that is consistent with Prudent Utility Practice, PSCo's indemnity obligation under this Section 16.2.2(b) shall be limited to such Non-PSCo Party's Facility Percentage Share of any amount PSCo receives from such contractor as a direct result of the contractor's Release of Hazardous Material or violation of Environmental Law.

(c) PSCo shall indemnify, defend and hold harmless the Non-PSCo Parties and their respective agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any Environmental Claims arising out of any violation of any Environmental Law that (i) relates directly to the Facility Site, (ii) occurs (whether discovered or not) prior to such Non-PSCo Party's Closing Date and (iii) is not otherwise accounted for in Section 16.2.2(a) or Section 16.2.2(b) above. PSCo shall further indemnify, defend and hold harmless the Non-PSCo Parties and their respective agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any Environmental Claims arising out of any violation of any Environmental Law that (i) relates directly to the Facility Site, (ii) occurs following such Non-PSCo Party's Closing Date and (iii) is not otherwise accounted for in Section 16.2.2(a) or Section 16.2.2(b) above to the extent due directly to PSCo's gross negligence or willful misconduct. Anything to the contrary in this Section 16.2.2(c) notwithstanding, PSCo shall have no indemnity liability with respect to indirect or consequential costs or damages, including without limitation increases in Project Costs or delays in construction of the Facility Assets, to the extent caused by such presence or Release of Hazardous Materials or such violations of Environmental Law. To the extent any violation of Environmental Laws described in this Section 16.2.2(c) is attributable to a third party contractor of PSCo and PSCo has retained and monitored such contractor in a manner that is consistent with Prudent Utility Practice, PSCo's indemnity obligation under this Section 16.2.2(c) shall be limited to such Non-PSCo Party's Facility Percentage Share of any amount PSCo receives from such contractor as a direct result of the contractor's Release of Hazardous Material or violation of Environmental Law.

16.3 Non-PSCo Party Indemnification. Each Non-PSCo Party shall indemnify, defend and hold harmless PSCo and its agents, employees, officers, directors, attorneys, Affiliates and Lenders from and against any Environmental Claims incurred by

PSCo arising out of (i) the presence or Release of any Hazardous Material on any area of the Property, including all land and facilities associated with the Existing Facility, and on neighboring properties to the extent caused by Hazardous Material on such areas of the Property or (ii) any violation of any Environmental Law, in each case to the extent due directly to the gross negligence or willful misconduct of such Non-PSCo Party.

16.4 Indemnification Against Liens. Each Party shall indemnify the other Parties against any and all liabilities, damages, losses, demands, penalties, interest, injunctive relief, fines, claims, actions, suits, judgments, settlements, and reasonable costs, fees, expenses and disbursements (including reasonable legal fees) and expenses and costs of investigation actually incurred by such other Parties and arising out of any claim brought by a third party, including any proceeding, investigation or inquiry initiated by or with a Governmental Authority, against such other Parties as a result of (i) Permitted Encumbrances that are not directly related to the Project and (ii) Liens, other than Permitted Encumbrances, against any such other Party's Ownership Interests or Easements to which such other Parties have not consented to in writing.

16.5 Indemnification Procedure. If any Party or its agents, employees, officers, directors, Affiliates or Lenders (collectively, an "Indemnified Party") receives notice or has knowledge of any Claim that may result in a claim for indemnification by such Indemnified Party against any other Party (an "Indemnifying Party") pursuant to this Article 16, such Indemnified Party shall as promptly as possible give the Indemnifying Party notice of the Claim, including a reasonably detailed description of the facts and circumstances relating to such Claim, a complete copy of all notices, pleadings and other papers related thereto, and in reasonable detail the basis for its claim for indemnification. Failure to provide prompt notice, information and documentation to the Indemnifying Party shall not relieve the Indemnifying Party from its obligation to respond to or defend the Indemnified Party against such Claim unless such failure materially diminishes the Indemnifying Party's ability to respond to or to defend the Indemnified Party against the Claim. The Indemnifying Party, upon its acknowledgment in writing of its obligation to indemnify the Indemnified Party in accordance with this Article 16, shall be entitled to assume the defense or to represent the interest of the Indemnified Party with respect to such Claim, which shall include the right to select and direct legal counsel and other consultants, appear in proceedings on behalf of such Indemnified Party and to propose, accept or reject offers of settlement, all at its sole cost. If and to the extent that any such settlement is reasonably likely to involve injunctive, equitable or prospective relief or materially and adversely affect the Indemnified Party's business or operations other than as a result of money damages or other money payments, then such settlement will be subject to the reasonable approval of the Indemnified Party. The Indemnified Party may retain its own legal counsel and other consultants and participating in its own defense at its own cost and expense. The Parties shall cooperate with each other in any notification to insurers.

## ARTICLE 17

### ACCESS TO INFORMATION; CONFIDENTIALITY

17.1 Access to Information. Each Party shall provide to each other Party access to data, documents, and any other information pertinent to the Facility Assets and Existing Common Facilities in order to permit the other Party to perform an adequate due diligence review of the Facility Assets and Existing Common Facilities after the date of this Agreement until the Closing Date for such Party and consistent with the obligations set forth in Section 3.7. Following the Closing Date, access to data, documents and information shall be requested and provided through the E&O Committee.

17.2 Confidentiality.

17.2.1 No Party nor any of its Affiliates, agents or advisors shall (a) reveal to any third party any non-public information, including any of the Project Agreements, concerning the Facility Assets or Existing Common Facilities, the other Parties, the other Parties' Affiliates or this Agreement (collectively, "Confidential Information"); or (b) use any Confidential Information in any manner which may directly or indirectly injure the Facility Assets or Existing Common Facilities, the other Parties, or the other Parties' Affiliates. Notwithstanding the foregoing, and subject to Sections 17.2.2 and 17.2.3 below, a Party may disclose Confidential Information (i) if required by applicable Law, (ii) to any Lender or prospective Lender or other entities, including but not limited to consultants, attorneys and third-parties, necessary to develop, finance or refinance the Facility Assets or (iii) to any entity with which such Party has entered into formal discussions concerning the purchase of such Party's Ownership Interests. Any Party may disclose to any and all Persons, without limitation of any kind, the tax treatment and tax structure of the transactions contemplated by this Agreement and all materials of any kind (including opinions or other tax analyses) that are provided to it relating to such tax treatment and tax structure. In addition, each Party acknowledges that it has no proprietary or exclusive rights to the tax treatment or tax structure of the transactions contemplated by this Agreement or any tax matter or tax idea related to such transactions. However, each Party shall keep confidential any such information relating to the tax treatment or tax structure of the transactions contemplated by this Agreement that is required to be kept confidential to the extent necessary to comply with any applicable federal or state securities laws.

17.2.2 The Parties shall ensure that, prior to any disclosure of Confidential Information to a third party pursuant to Section 17.2.1, all third parties assume the obligations and undertakings of this Article 17. This restriction shall cease to be binding with respect to Confidential Information which has become available as a matter of public record through no act or omission of such Party or its Affiliates, agents or advisors, or to the extent such Confidential Information was in possession of such Party or its Affiliates prior to its earliest receipt from another Party. In the event this Agreement terminates without the Closing Date occurring, then all data, plans, proposals, materials and other Confidential Information furnished hereunder shall be returned to the Party from whom received, with an appropriate assurance that all copies have been destroyed. The obligations established pursuant to this Section 17.2.2 shall survive any termination of this Agreement and the withdrawal of a Party for a period of two (2) years.

17.2.3 Each Party agrees that if it becomes subject to a subpoena or other Law to disclose any Confidential Information of one of the other Parties, it will provide such other Party with prompt notice so that such other Party may seek a protective order or other appropriate remedy. If such protective order or other appropriate remedy is denied or otherwise not obtained, the Party required to furnish the information shall furnish only that portion of the Confidential Information which is, in the opinion of its counsel, legally compelled, and will cooperate with the other Party and its counsel to enable the other Party to attempt to obtain a protective order or other reliable assurance that confidential treatment will be accorded the Confidential Information to be disclosed.

17.3 Press Releases. Each Non-PSCo Party agrees that prior to its Closing Date it shall not, without PSCo's prior written consent, issue a press release or have any contact with or respond to the news media with any information with respect to this Agreement, any other Project Agreement or the Project.

## **ARTICLE 18 DISPUTE RESOLUTION**

18.1 General. The dispute resolution procedures set forth in this Article 18 shall govern the resolution of any dispute, claim or controversy arising out of, under or relating to this Agreement or any other Project Agreement ("Dispute"), unless otherwise provided in this Agreement or mutually agreed to by the Parties. Resolution of any Dispute hereunder shall be by the Coordinating Committee or, upon failure to timely reach a resolution in such manner, litigation, all as provided in this Article 18.

18.2 Dispute Resolution. Upon a Party's written notification to the other Parties of a Dispute, which notification must include a written explanation of the Dispute and the material particulars of the notifying Party's position as to the Dispute, the Coordinating Committee shall meet not later than seven (7) days thereafter ("First Meeting Deadline") to attempt in good faith to resolve the Dispute and to produce written terms of settlement for the Dispute (a "Settlement Agreement"). A Settlement Agreement executed by each member of the Coordinating Committee shall serve as conclusive evidence of the resolution of such Dispute. If the Coordinating Committee members do not produce and execute the Settlement Agreement within fourteen (14) days after the date of the first meeting or within a longer period agreed to by each Coordinating Committee member, then any Party may, upon written notice to each other Party, pursue all of its rights and remedies provided at law or equity or otherwise in this Agreement.

18.3 Continued Performance. During the pendency of any Dispute, each Party shall continue to perform all of its respective obligations under this Agreement and all other Project Agreements.

## **ARTICLE 19 MISCELLANEOUS PROVISIONS**

19.1 Representations and Warranties. Each Party represents and warrants that (i) it is an entity duly organized, validly existing and in good standing under the Laws of the jurisdiction in which it is organized and is qualified to do business in all jurisdictions where it is required to be qualified, (ii) it has the necessary power and authority to enter into and perform its obligations under this Agreement, (iii) it has duly authorized the person(s) signing this Agreement to execute this Agreement on its behalf, (iv) upon execution, this Agreement will be a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms; and (v) the execution and delivery of this Agreement and its performance by such Party will not violate, result in a breach of or conflict with any Law applicable to such Party, its organizational documents or the terms of any other agreement binding on such Party.

19.2 Binding Effect and Benefit of This Agreement. This Agreement shall be binding upon, and shall inure to the benefit of, the Parties hereto and their respective heirs, executors, administrators, successors and assigns.

19.3 Further Assurances. In furtherance of the terms and conditions of this Agreement, each of the Parties shall collaborate in good faith with each other in order to achieve the performance of their respective obligations hereunder.

19.4 Severability. If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions hereof shall not in any way be affected or impaired thereby.

19.5 Amendments. Except to the extent provided in Section 2.5, this Agreement may not be amended, supplemented or otherwise modified unless done so in a writing signed by the Parties, and no provision hereof shall be deemed waived unless such waiver is in writing and signed by the waiving Party.

19.6 Choice of Law; Jurisdiction and Venue. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF COLORADO, EXCLUDING ANY CHOICE OF LAW PROVISIONS THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANOTHER STATE. JURISDICTION AND VENUE WITH RESPECT TO ANY ACTION BROUGHT BEFORE A COURT OF LAW IN CONNECTION WITH THIS AGREEMENT SHALL LIE IN ANY APPROPRIATE COURT SITUATED IN THE STATE OF COLORADO.

19.7 Counterparts. This Agreement may be executed in any number of counterparts, and all of which when taken together shall constitute one and the same instrument. The Parties hereto may execute this Agreement by signing any such counterpart.

19.8 Notices. Any and all notices and other communications required or permitted to be given pursuant to this Agreement shall be in writing and shall be deemed given (i) upon personal delivery, or (ii) upon the sender's receipt of electronic confirmation of transmission, if sent by telex or facsimile, or (iii) upon receipt if sent by U.S. mail or courier. The Parties designate the following addresses for purposes of the foregoing (unless

a Party elects to amend its address in a signed writing to the other Party setting forth such change):

If to PSCo:                      Director, Strategic Planning and Resource Acquisition  
Public Service Company of Colorado  
1099 18<sup>th</sup> Street, Suite 3000  
Denver, CO 80202

If to IREA:                      General Manager  
5496 North U.S. Highway 85  
P.O. Drawer A  
Sedalia, CO 80135

If to Holy Cross:              Chief Executive Officer  
Holy Cross Electric Association, Inc.  
3799 Highway 82  
P.O. Drawer 2150  
Glenwood Springs, CO 81602

19.9 Joint Preparation. This Agreement shall be considered for all purposes as having been prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of the negotiation, drafting or execution of this Agreement.

19.10 Liability.

19.10.1 No Consequential Damages. Notwithstanding any other provision of this Agreement, in no event shall the Parties or any of their Affiliates, by reason of any of their respective acts or omissions relating to the development, negotiation, design, or financing of the Facility Assets or relating to any of their obligations under this Agreement, be liable, whether in contract, tort, misrepresentation, warranty, negligence, strict liability or otherwise, for any special, indirect, incidental, consequential or punitive damages arising out of or in connection with this Agreement, or the performance or breach thereof.

19.10.2 Non-Recourse. Each Party acknowledges and agrees that in no event shall any partner, shareholder, owner, officer, director, trustee, agent, or employee of a Party or an affiliate of a Party be personally liable to the other Party or any third party for any payments, obligations or performance due under this Agreement, or any breach or failure of performance of such Party hereunder, and the sole recourse for payment or performance of the obligations under this Agreement shall be only against a Party and its assets.

19.11 Term and Effectiveness; Entire Agreement; Prior Agreements. This Agreement shall be effective as of the date hereof and shall remain in full force and effect for so long as any Non-PSCo Party holds any Ownership Interest, unless earlier terminated in accordance with the terms hereof. This Agreement supersedes the Original JOA and the First Amended and Restated JOA and, together with the other Project Agreements, constitutes a



complete integration of the agreement between the Parties with respect to the subject matter of this Agreement and such other Project Agreements, except and to the extent that the IREA PPA and the Holy Cross PSA contain express provisions relating to the Project Agreements; provided, however, that nothing in this Agreement shall affect the rights or obligations of PSCo and IREA accrued with respect to the period prior to the date hereof under the Original Project Agreements or the First Amended and Restated Project Agreements, irrespective of whether such Original Project Agreements or First Amended and Restated Project Agreements have been amended and restated as of the date hereof. Except with respect to the matters contained in the other Project Agreements, this Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and reflects all prior agreements and commitments with respect to the Parties' respective rights and obligations set forth herein. Except as provided above, there exist no other understandings, terms or conditions, written or oral, related to the rights and obligations established by this Agreement, and no Party has relied on any representation, express or implied, not contained herein.

19.12 Brokers. No Party has employed any financial advisor, broker, or finder or incurred any liability for any financial advisory, brokerage, finder's or similar fee or commission in connection with the Facility Assets or the transactions contemplated by this Agreement.

19.13 Survival. The provisions of Articles 7, 14, 16, 17 and 18 and Sections 3.8.2, 3.9, 3.10, 3.11, 4.7, 4.8, 10.3.3, 10.4.2, 10.4.3, 11.4, 19.6, 19.10, 19.13 and 19.14, including the rights and obligations of the Parties therein provided, shall survive the termination or expiration of this Agreement, the withdrawal of any Party from this Agreement, and the performance by the Parties of their obligations hereunder.

19.14 Rules of Construction. The following rules of construction shall be followed when interpreting this Agreement:

19.14.1 titles and headings are inserted for convenience of reference only and shall not be used for the purposes of construing or interpreting this Agreement;

19.14.2 words importing the singular also include the plural and vice versa;

19.14.3 references to natural persons or parties include any Person having legal capacity;

19.14.4 references to a person include such person's successors and assigns; provided, however, that with respect to a Party and its rights and obligations under this Agreement, references to a Party shall only include such Party's successors and assigns if such successors and assigns are permitted by this Agreement;

19.14.5 words importing one gender include the other gender;

19.14.6 the words “include” and “including” mean “including, but not limited to” and corresponding grammatical variants;

19.14.7 except as otherwise expressly stated herein, all references in this Agreement to this Agreement or to contracts, agreements, or other documents shall be deemed to mean this Agreement and such contracts, agreements or other documents, as the same may be modified, supplemented, or amended from time-to-time;

19.14.8 except as otherwise expressly stated herein, all references to Preambles, Recitals, Sections, Articles and Exhibits in this Agreement are references to the Preamble, Recitals, Sections, Articles and Exhibits of this Agreement;

19.14.9 words and abbreviations not defined in this Agreement which have well-known technical or design, engineering, or construction industry meanings are used in this Agreement in accordance with such recognized meanings;

19.14.10 each reference to any applicable Law shall be construed as a reference to such applicable Law as it may have been, or may from time to time be, amended, replaced, extended or re-enacted and shall include any subordinate legislation, rule or regulation promulgated under any such applicable Law and all protocols, codes, proclamations and ordinances issued or otherwise applicable under any such Law;

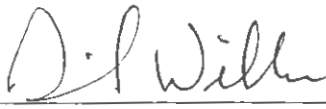
19.14.11 if any payment or obligation under this Agreement would, by the method for calculating time provided herein, become due on a day other than a Business Day, such payment or obligation will be deemed to be due on the next following Business Day; and

19.14.12 the terms “hereof”, “herein”, “hereto”, “hereunder” and words of similar or like import, refer to this entire Agreement, together with its Exhibits and Schedules, if any, and not any one particular Article, Section, Exhibit, Schedule, or other subdivision of this Agreement.




IN WITNESS WHEREOF, the undersigned have duly executed this Agreement as of the day and year first written above.

PUBLIC SERVICE COMPANY OF  
COLORADO


By:   
Name: David Wilks  
Title: Vice President

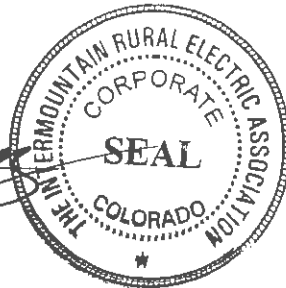


INTERMOUNTAIN RURAL  
ELECTRIC ASSOCIATION

By:   
Name: Timothy L. White  
Title: President


ATTEST:

By:   
Name: Eugene M. Sperry  
Title: Secretary-Treasurer

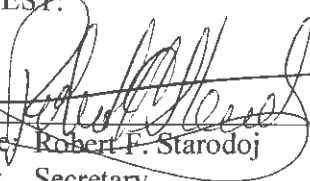
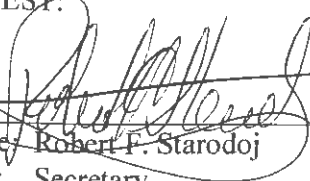




HOLY CROSS ELECTRIC  
ASSOCIATION, INC.

By:   
Name: Thomas R. Turnbull  
Title: President

ATTEST.

  
By:   
Name: Robert F. Starodoj  
Title: Secretary





Schedule 1 to  
Joint Ownership Agreement

Description of Facility Site

Lot 2, Comanche Subdivision, according to the plat recorded on December 21, 2005  
at Reception No. 1653781, County of Pueblo, State of Colorado

Description of the Facility

The Facility shall consist of the following:

(a) an approximately 750 MW (nominal) pulverized coal electric generating facility and related facilities (including all facilities, components, equipment and materials that make up the Facility), as further described in the Construction Agreements; and

(b) All capital expansions, modifications improvements, replacements, additions and renewals to the Facility that may be made from time to time pursuant to Article 9 of this Agreement or pursuant to the O&M Agreement, except for such capital expansions or modifications that, in accordance with Article 9, are undertaken, paid for and owned solely by PSCo.

The Facility shall not include the Existing Facility, the transmission facilities of PSCo, all real property rights to a fee or leasehold interest in the Property, the New Common Facilities, the Existing Common Facilities, and all other facilities, equipment, improvements and property owned by PSCo and located at the Property. Nothing in this Schedule 2 is intended, or shall be deemed, to diminish a Non-PSCo Party's Ownership Interests or Easements.

Description of Project Costs

“Project Costs” shall consist of Pre-Construction Costs, Construction Costs and Water Resource Costs.

Part A      Pre-Construction Costs

“Pre-Construction Costs” means (subject to the following sentence) internal and third party costs, fees and expenses incurred by or on behalf of PSCo or any of its Affiliates in connection with activities related to the Project prior to the issuance of the first limited notice to proceed under a Construction Agreement. Pre-Construction Costs shall not include any Construction Costs, Water Resource Costs or Internal Costs.

The Parties agree that Pre-Construction Costs shall include internal and third party costs, expenses and fees (including the costs, expenses and fees of attorneys, engineers, advisors, surveyors and other consultants) associated with:

- A. Initial Design – e.g., initial engineering/scope of work relating to the Project performed by PSCo or by the owner engineer retained by PSCo but not by a contractor under any Construction Agreement;
- B. Development – e.g., Project conceptualization; negotiations with owners of water resources used in connection with the Project; communications, negotiations and administrative or judicial proceedings with or involving interested parties, Governmental Authorities and other stakeholders (customer groups, environmental groups, industry groups, community and consumer groups, etc. but excluding any Non-PSCo Party); preparation of bid packages for the Construction Agreements and negotiations with contractors for such Construction Agreements; advertising, public messaging, public forums and promotion;
- C. Land Acquisition – e.g., negotiations with landowners of real property and real property rights to be acquired for the Project; the purchase price of such purchased real property and real property rights;
- D. Pre-Construction Project Administration - e.g., Project administration, overhead and supporting systems (e.g. accounting and financial reporting, invoicing, accounts payable, general ledger, payroll, claims and litigation);
- E. Tax Abatement Costs – e.g., payments in lieu of taxes paid by PSCo to any Governmental Authority with respect to the Project, to the extent the

benefits of such payments are allocable to each holder of Ownership Interests.

Part B      Construction Costs

“Construction Costs” means (subject to the following sentence) internal and third party costs, fees and expenses incurred by or on behalf of PSCo or any of its Affiliates in connection with the Project until the Commercial Operation Date, including all costs, fees and expenses described below. Construction Costs shall not include any Pre-Construction Costs, Water Resource Costs or Internal Costs.

The Parties agree that Construction Costs shall include internal and third party costs, expenses and fees (including the costs, expenses and fees of attorneys, engineers, advisors, surveyors and other consultants) associated with:

- A. Design – e.g., initial engineering/scope of work performed by any contractor under a Construction Agreement;
- B. Engineering – e.g., detail design, facility configuration and technical support for permitting, procurement and construction for the Project;
- C. Procurement – e.g., procurement associated with the acquisition, construction and/or installation of the Project;
- D. Construction – e.g., construction of the Project including the turbines, boilers, environmental control equipment, as well as excavation, utilities, testing and commissioning (costs or credits derived from testing and commissioning will be accounted for as Construction Costs), as well as those costs, expenses and fees associated with the Construction Agreements; and
- E. Pre-Commercial Operations Project Administration - e.g., Project administration, overhead and supporting systems (e.g. accounting and financial reporting, construction invoicing, accounts payable, general ledger, payroll, claims and litigation).

Part C      Water Resource Costs.

“Water Resource Costs” means (subject to the following sentence) costs payable by PSCo in connection with procuring necessary water resources for the Project, including but not limited to lump sum payments and costs to upgrade water delivery systems. Water Resource Costs shall not include any Pre-Construction Costs, Construction Costs or Internal Costs.

Government Approvals

Part A        PSCo

1.     Facility CPCN
2.     Air emissions permit for the Facility issued by the Colorado Department of Public Health and Environment
3.     acceptance for filing by the Federal Energy Regulatory Commission of the applicable Non-PSCo Party's power purchase agreement with PSCo, as amended, amended and restated, or otherwise modified in connection with the transactions contemplated by the Project Agreements

Part B        Non-PSCo Party

1.     Facility CPCN
2.     Air emissions permit for the Facility issued by the Colorado Department of Public Health and Environment
3.     acceptance for filing by the Federal Energy Regulatory Commission of the applicable Non-PSCo Party's power purchase agreement with PSCo, as amended, amended and restated, or otherwise modified in connection with the transactions contemplated by the Project Agreements

Description of New Common Facilities

**FUNCTIONAL GROUP I**  
**Lime Slurry Preparation System**

<b>Item</b>	<b>Description</b>
Lime Slurry Preparation System	The two, 100% capacity, lime storage and slurry preparation trains and all associated equipment required to meet the needs of the Facility and Existing Facility's air quality control systems
Lime Storage Silos	The two, 100% capacity, storage silos dedicated to holding lime product for the Lime Slurry Preparation System
Lime Unloading System	One rail unloading and elevator system to fill the Lime Silos
Lime Silo Rail Spur	The rail spur installed to allow rail supply and unloading for lime product for the Facility and the Existing Facility

**FUNCTIONAL GROUP II**  
**Raw Water Piping, Storage, & Treatment**

<b>Item</b>	<b>Description</b>
Raw Water Pumps	The additional raw water pumps and associated equipment to be used for Facility ash cooling water, mill rejects water, fire protection, plant wash down, and dust suppression
Raw Water Clarifiers	The two additional, 50% capacity, lime softener type Raw Water Clarifiers to be located between the

	Raw Water Reservoir and the Treated Water Pond including their pumps and associated equipment needed to treat the additional raw water requirements of the Facility
Demineralizer System	The additional demineralizer trains, including transfer pumps and associated equipment, needed to treat water for the Facility located between the treated water pond and the demineralized water storage tanks
Demineralized Water Storage	The new tank to store 250,000 gallons of demineralized water for the Facility, and to provide storage for the Existing Facility. Two (2) new demineralized water transfer pumps will transfer water from the demineralized water tank to the Facility condenser and cycle makeup, and for use in the Existing Facility condensate storage tanks.

**FUNCTIONAL GROUP III**  
**Wastewater Treatment & Storage**

<b>Item</b>	<b>Description</b>
Spray Dry Absorber Water Tanks	The two new wastewater storage tanks that will be installed to allow re-use of the Facility and the Existing Facility wastewater streams including all pumps, valves, piping, and associated equipment
Ash Pond #4 Transfer Pumps	The new pumping system that will be installed to supply water to the Spray Dry Absorber Water Tanks from ash pond #4



**FUNCTIONAL GROUP IV**  
**Miscellaneous Equipment**

<b>Item</b>	<b>Description</b>
Auxiliary Steam Piping Addition	The saturated steam system line installed to tie the Existing Facility auxiliary steam connections to Facility auxiliary steam connections
Mobile Equipment	Additional equipment identified as new common
Other	Additional tools and work equipment identified as New Common Facilities

Scheduling Protocol

**ARTICLE I**  
**DEFINITIONS AND PURPOSE**

Section 1.1 Purpose. This Scheduling Protocol (this "Protocol") is intended to establish certain procedures, rights and obligations relating to the scheduling, dispatch and transmission of Energy associated with the Operating Capacity Entitlement of each Party pursuant to the Joint Ownership Agreement (the "Agreement") to which this Protocol is attached.

Section 1.2 Definitions.

(a) Capitalized terms not otherwise defined herein shall have the meanings given to such terms in the Agreement.

(b) Capitalized terms used herein shall have the meaning set forth below:

"AGC" means automatic generation control.

"Agreement" has the meaning set forth in Section 1.1.

"Ancillary Services" means such ancillary services as may be defined and required from time to time by the FERC or pursuant to an Applicable Protocol.

"Applicable Protocols" means the provisions, protocols, rules or other requirements of any tariff or equivalent document, reliability assurance agreement, operating agreement, transmission owner agreement or similar agreement, manuals or similar documents, and their respective successors, then in effect in and applicable to PSCo's control area or to PSCo as a load serving entity on behalf of its retail customers, including such protocols as may be required by a regional transmission organization, independent system operator, independent transmission provider, independent transmission company, regional reliability council, the Rocky Mountain Reliability Group or similar entity authorized by FERC to adopt such rules, and including such protocols as are currently in existence and those that are subsequently adopted and applied to PSCo's control area or PSCo during the term of this Agreement, including any grid management requirements.

"Available Net Generating Capability" means Net Generating Capability adjusted for capacity not available, or additional capacity available, for any reason,

including daily, monthly or seasonal rating changes, derates, Scheduled Maintenance, Unscheduled Maintenance, Operating Emergencies and Force Majeure.

“Commercial Operation Date” means the date the Facility produces commercial amounts of Energy and has passed all acceptance tests under the Construction Agreements, and care and custody of the Facility is accepted by the Operator.

“Delivery Point” means the point of interconnection between the Facility and the electrical transmission network of PSCo, located at the high side of the generator step-up transformer associated with the Facility.

“Energy” means the net measured amount of electric energy generated by the Facility and delivered to the Delivery Point for any period.

“FERC” means the Federal Energy Regulatory Commission or any successor agency thereto.

“Minimum Net Generation” means the lowest net electrical output at which the Facility can be reliably maintained in service on a continuous basis using coal as the only boiler fuel, measured at the Delivery Point.

“Net Generating Capability” means that amount of kilowatts or megawatts, less station use (including the Facility’s share of power usage by Common Facilities), that the Facility will supply at the Delivery Point, taking into account transformer losses between the Facility and the Delivery Point, consistent with Prudent Utility Practice, as determined on a quarterly basis for the prospective quarter in accordance with the testing standards applied by the Western Systems Coordinating Council or the Rocky Mountain Reserve Group, as applicable, or any successor or other entity that replaces the Western Systems Coordinating Council or the Rocky Mountain Reserve Group in providing such testing standards.

“Operating Capacity Entitlement” means the capacity entitlement and associated energy of each Party that at any time is determined by multiplying Available Net Generating Capability by such Party’s Facility Ownership Interest.

“Operating Emergency” means a sudden and unplanned event or circumstance that reduces or may reduce the availability of Capacity from, or generation of Energy by, the Facility.

“PPA” means, with respect to each Non-PSCo Party, its power purchase agreement or power supply agreement, as applicable, with PSCo and in effect as of the date of the Agreement, as such agreement may from time to time thereafter be amended, supplemented or modified in accordance with the terms thereof.

“Protocol” has the meaning set forth in Section 1.1.

“Scheduled Maintenance” means routine corrective maintenance, preventive maintenance and equipment overhauls which have been identified and scheduled by PSCo, as Operator.

“Unscheduled Maintenance” means maintenance or repairs not scheduled by PSCo, as Operator, but required for the proper operation and maintenance of the Project.

“WECC” means the Western Electric Coordinating Council or any successor entity.

(c) References to Sections and Articles are, unless otherwise noted herein, references to Sections and Articles of this Protocol.

(d) Except as provided in Section 1.2(c), the rules of construction in Section 19.14 of the Agreement shall apply to this Protocol.

## **ARTICLE II FACILITY AVAILABILITY**

Section 2.1 Availability. PSCo shall operate the Facility and make available to each Party its Operating Capacity Entitlement at all times except and to the extent the Facility is not operating due to Scheduled Maintenance, Unscheduled Maintenance, Operating Emergencies and Force Majeure. Each Party's Operating Capacity Entitlement shall further be subject at all times to any changes in the Available Net Generating Capability occurring as the result of Scheduled Maintenance, Unscheduled Maintenance, Operating Emergencies, Force Majeure, derates and the ramping capability of the Facility.

Section 2.2 Notice of Available Net Generating Capability Forecasts. At or prior to 5:00 P.M. Mountain Time each day, PSCo, as Operator, shall notify each Owner of the anticipated hourly Available Net Generating Capability for the next day (the "Availability Forecast"). Operator shall be entitled to submit a standing Availability Forecast that shall be effective until it issues an updated Availability Forecast pursuant to this Section 2.2.

## **ARTICLE III SCHEDULING AND DISPATCH OF ENERGY**

Section 3.1 Scheduling and Dispatch Rights. From and after the Commercial Operation Date and until the termination of the Agreement, the Parties agree to schedule or, upon conversion to AGC in accordance with Section 3.3, dispatch Energy associated with their respective Operating Capacity Entitlements in accordance with the following procedures:

(a) Right to Schedule and Dispatch. Subject at all times to the availability of the Facility as described in Section 3.1 above, each Non-PSCo Party shall be entitled to

schedule or, upon conversion to AGC in accordance with Section 3.3, dispatch generation of Energy from the Facility for its account in accordance with Section 3.2, up to its Operating Capacity Entitlement. Subject to Section 3.6 below, each Non-PSCo Party and shall receive all scheduled Energy associated with its Operating Capacity Entitlement at the Delivery Point.

(b) Minimum and Maximum Scheduling Obligations. Unless otherwise agreed to in writing by each Party, when a Non-PSCo Party schedules Energy from the Facility it shall schedule an amount equal to or greater than the product of its Facility Ownership Interest and the Minimum Net Generation; provided, a Non-PSCo Party may schedule Energy in excess of its Operating Capacity Entitlement only to the extent provided in Section 2.4 of the O&M Agreement and not during an Operating Emergency.

### Section 3.2 Scheduling Procedures.

(a) Annual Estimates. By no later than two hundred and ten (210) days prior to the Scheduled Commercial Operation Date and by May 1 of each full year of commercial operations thereafter, each Party shall prepare and submit to PSCo, as Operator, a forecast of such Party's estimate of the Energy it expects to schedule from the Facility for (i) each month of the following year starting initially on the Scheduled Commercial Operation Date and thereafter on January 1 of the following calendar year and (ii) for each summer and winter season for the following four years.

(b) Day-Ahead Schedules. Starting with the day preceding the Commercial Operation Date, each Non-PSCo Party shall prepare and submit to PSCo, as Operator, by no later than 9:00 A.M. Mountain Time, a day-ahead schedule of the Energy it wishes to receive at the Delivery Point during each hour of the following day. Each Non-PSCo Party shall be entitled to submit a standing request for its full Operating Capacity Entitlement until it chooses to schedule a lesser amount, in which event such Non-PSCo Party shall submit such new schedule in with the terms of this Section 3.2(b). A Party's failure to submit a day-ahead schedule pursuant to this Section 3.2(b) shall be deemed to be a submission of such Party's most recent day-ahead schedule, as updated pursuant to Section 3.2(c) below.

(c) Final Hour-Ahead Schedules. Subject to Section 3.2(e), by no later than twenty (20) minutes prior to each hour, each Party shall provide to PSCo, as Operator, its final binding schedule for Energy for the next successive hour of Facility operations. Each Non-PSCo Party shall be entitled to submit a standing request for its full Operating Capacity Entitlement until it chooses to schedule a lesser amount in accordance with the terms of Section 3.2(b). A Party's failure to submit a final hour-ahead schedule pursuant to this Section 3.2(c) shall be deemed to be a submission of such Party's most recent hour-ahead schedule pursuant to this Section 3.2(c).

(d) Other Estimates. Each Non-PSCo Party shall from time to time prepare and deliver (i) such other schedules and forecasts as PSCo may request and (ii) such

other schedules and forecasts as the Rocky Mountain Reliability Group may require or as may be required under any other Applicable Protocols.

(e) Emergencies. Notwithstanding Section 3.2(c) above, each Non-PSCo Party shall notify PSCo as soon as possible following any emergency or any unexpected occurrence that at any time causes a reduction in such Non-PSCo Party's ability to take its Facility Percentage Share of Available Net Generating Capability and shall provide PSCo with its best estimate of the impact and anticipated duration of such occurrence. The affected Non-PSCo Party shall promptly provide updates to PSCo regarding the foregoing as new information becomes available to such Non-PSCo Party.

(f) Calculation of Actual Energy and Station Load. The E&O Committee shall develop procedures to calculate the actual amount of Energy produced by the Facility and the actual amount of station load.

Section 3.3 Rights to AGC. PSCo shall have the sole right to dispatch using AGC unless and until a Non-PSCo Party converts to AGC in accordance with this Section 3.3. A Non-PSCo Party may request PSCo to convert such Non-PSCo Party to AGC, subject to the following terms and conditions.

(a) Notice. The Non-PSCo Party requesting conversion to AGC (the "Requesting Party") shall provide not less than one (1) year's prior written notice of the date on which it requests to begin dispatching its Operating Capacity Entitlement by means of AGC.

(b) Technological Possibility. The E&O Committee shall use commercially reasonable efforts to implement a request from a Requesting Party to utilize AGC. In the event that joint AGC is not reasonably practicable for reasons including, but not limited to, the introduction of any Applicable Protocols, PSCo shall not be required to provide any Requesting Party the right to convert to AGC.

(c) Costs. The Requesting Party shall be responsible for all of its internal costs and for all costs and expenses incurred by PSCo or the Facility in connection with providing AGC service to such Requesting Party.

(d) Procedures. Prior to conversion to AGC, the E&O Committee shall have issued procedures in accordance with Prudent Utility Practice governing the Requesting Party's conversion to AGC. These procedures shall include a requirement that any Requesting Party back down on its schedule to such a level as to allow the Facility to regulate, if the Facility is not currently regulating.

Section 3.4 Scheduling and Dispatch Agent. Each Party shall at all times be responsible for obtaining any "tags" or other applicable power flow tracking mechanisms for all of such Party's scheduling and dispatch transactions related to the Facility and shall appoint a scheduling and dispatch agent to obtain such tags or power flow tracking mechanisms.

Section 3.5 Transmission. Each Party shall be solely responsible for arranging transmission service for all of the Energy it schedules from the Facility.

Section 3.6 Maintenance; Deration; Start up and Shut down.

(a) Notice. In the event of any deration or outage (partial or total) or any start up or shut down, including in connection with any Operating Emergency, at the Facility, PSCo, as Operator, shall notify each Non-PSCo Party telephonically as soon as is reasonably practicable, and such notice shall include a description of, an estimate of the extent of, and an estimate of the duration of, such deration or outage.

(b) Adjustment to Available Net Generating Capability. If, because of Scheduled Maintenance, Unscheduled Maintenance, an Operating Emergency, Force Majeure, deration, ramping capability, start up or shut down, the Available Net Generating Capability is less than the Available Net Generating Capability assumed in the schedules of any Party, each Party shall bear any such alteration in the Available Net Generating Capability immediately in proportion to its respective scheduled Energy for any applicable hour regardless of whether such Party has received notice of such alteration or the cause for such alteration prior to its occurrence. If such reduction in Net Generating Capability continues after the initial scheduling hour, the Available Net Generating Capability shall be allocated to each Party in proportion to its respective Facility Ownership Interest. Each Non-PSCo Party shall, if necessary, revise their schedules to reflect the actual Energy available from the Facility during the period of any reduction in Net Generating Capability.

#### **ARTICLE IV**

#### **UN-SCHEDULED ENERGY; MARKET SALES**

Section 4.1 Unscheduled Energy. If a Non-PSCo Party schedules less than the full amount of Energy to which it is entitled PSCo shall for the applicable time period back down the Facility by the amount of such unscheduled Energy unless PSCo purchases such unscheduled Energy pursuant to such Non-PSCo Party's PPA.

Section 4.2 Market Sales. Subject at all times to any requirements contained in its PPA, a Non-PSCo Party may utilize its Operating Capacity Entitlement and the associated Energy for wholesale sales to third parties in lieu of serving its load with such Energy.

#### **ARTICLE V**

#### **ANCILLARY SERVICES**

Each Party shall have the right to schedule, in accordance with this Protocol, its Facility Ownership Share of the Ancillary Services (other than AGC and voltage support), available from the Facility, and to have Operator provide the associated Energy.

## ARTICLE VI REQUIRED CHANGES

Section 6.1 New Generation. The Parties acknowledge and agree that if any Non-PSCo Party acquires new rights to generation other than the Facility following the date of the Agreement, the procedures and provisions contained in this Protocol may no longer reflect appropriate arrangements for scheduling Energy and other products produced by the Facility. The Non-PSCo Parties agree that at any such time, upon written notice from PSCo, they shall in good faith negotiate and without delay negotiate an amendment to this Protocol with PSCo as may be necessary or appropriate.

Section 6.2 Changes in Transmission System Requirements and Standards. The Parties acknowledge and agree that if PSCo, as owner and operator of its transmission facilities, WECC or another entity whose regulations or guidelines are customarily followed by utilities in the same region of the United States as PSCo adopts rules, requirements and/or guidelines that are inconsistent with the provisions of this Protocol or that affect any Party's scheduling of Energy, the Parties shall in good faith and without delay negotiate an amendment to this Protocol as may be necessary or appropriate to take into account the new rules or requirements.



Schedule 7 to  
Joint Ownership Agreement

Air Permit Costs

Party	Aggregate Amount	Monthly Payment
IREA	\$24,500,000	\$1,020,833.33
Holy Cross	\$7,736,842	\$322,368.41

Project Cost Estimates

Item	Total
Steam Turbine Generation Area	\$70,800,000
Boiler Island Area	\$325,200,000
Unit 3 AQCS Area	\$92,300,000
Fuel and Ash Area	\$33,600,000
Site Development and Utilities Area	\$6,600,000
Water and Wastewater Treatment Area	\$15,500,000
Electrical and I&C Area	\$63,700,000
Yard Area	\$117,600,000
Direct Costs	\$725,300,000
Direct Cost Adjustments and Indirect Costs	\$361,100,000
TOTAL	\$1,086,400,000

## EXHIBIT A

### Form of Bill of Sale

THIS BILL OF SALE (this "Bill of Sale") is made as of the [ ] day of [ ], 20[ ] by [ ], a [ ] ("Seller"), for the benefit of [ ], a [ ] ("Buyer").

### WITNESSETH:

WHEREAS, pursuant to that certain [Joint Ownership Agreement], dated as of [ ], 200[ ] (as amended, supplemented or otherwise modified from time to time, the "Joint Ownership Agreement"), by and among Seller, Buyer and [Insert Name(s) of other Non-PSCo Party(ies)], Seller has agreed to sell, assign, convey, transfer and deliver to Buyer, and Buyer has agreed to purchase, assume and acquire from Seller, a portion of Seller's ownership interests in the Facility Assets; and

WHEREAS, pursuant to the Joint Ownership Agreement, Seller has entered into this Bill of Sale to evidence such conveyance to Buyer.

NOW, THEREFORE, in consideration of the foregoing premises and for other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, Seller hereby agrees as follows:

1. Defined Terms. Capitalized terms which are used but not defined in this Bill of Sale shall have the meaning ascribed to such terms in the Joint Ownership Agreement.

2. Assignment. Seller does hereby sell, assign, convey, transfer and deliver to Buyer, and Buyer does hereby purchase and assume from Seller:

(a) [ ]% of Seller's right, title and interest in and to the Facility Assets other than the New Common Facilities, which is equal to a [ ]% undivided ownership interest therein; and

(b) [ ]% of Seller's right, title and interest in and to the New Common Facilities; provided, however, that upon the fifteenth (15<sup>th</sup>) anniversary of the Commercial Operation Date, automatically and without any further consideration by Seller to Buyer, Buyer's right, title and interest in and to the New Common Facilities shall be adjusted to a percentage interest that is equal to Buyer's Total Facility Percentage Share and Seller's right, title and interest in and to the New Common Facilities will be adjusted by the amount of such adjustment;

(collectively, the "Transferred Facility Assets Ownership Interest").

3. No Liens. Seller represents and warrants to Buyer that (a) it is duly authorized to execute and deliver this Bill of Sale and (b) it has good and marketable title to the Transferred Facility Assets Ownership Interest, free and clear of all Liens other than Permitted Encumbrances.

4. Disclaimers. EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES IN SECTION 3 OF THIS BILL OF SALE AND THOSE SET FORTH IN THE JOINT OWNERSHIP AGREEMENT OR IN CERTIFICATES DELIVERED BY SELLER PURSUANT THERETO, THE TRANSFERRED FACILITY ASSETS OWNERSHIP INTEREST IS BEING SOLD AND TRANSFERRED "AS IS, WHERE IS", AND SELLER MAKES NO REPRESENTATION OR WARRANTY, WRITTEN OR ORAL, STATUTORY, EXPRESS OR IMPLIED, AT LAW OR IN EQUITY OR OTHERWISE, WITH RESPECT TO THE FACILITY ASSETS OR THE TRANSFERRED FACILITY ASSETS OWNERSHIP INTEREST (OR ANY FACILITY OWNERSHIP INTEREST OR NEW COMMON FACILITIES OWNERSHIP INTEREST) OR THE PROJECT, INCLUDING WITH RESPECT TO (A) THE MERCHANTABILITY, USAGE, SUITABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF THE FACILITY ASSETS OR THE TRANSFERRED FACILITY ASSETS OWNERSHIP INTEREST (OR ANY FACILITY OWNERSHIP INTEREST OR NEW COMMON FACILITIES OWNERSHIP INTEREST) OR THE WORKMANSHIP THEREOF OR THE ABSENCE OF DEFECTS THEREIN, WHETHER LATENT OR PATENT, (B) THE BUSINESS, FINANCIAL CONDITION, PROSPECTS (FINANCIAL OR OTHERWISE), LIABILITIES OR RISKS OF THE FACILITY ASSETS OR THE TRANSFERRED FACILITY ASSETS OWNERSHIP INTEREST (OR ANY FACILITY OWNERSHIP INTEREST OR NEW COMMON FACILITIES OWNERSHIP INTEREST) OR THE PROJECT, OR (C) THE PHYSICAL CONDITION, QUALITY OR VALUE OF THE FACILITY ASSETS OR THE TRANSFERRED FACILITY ASSETS OWNERSHIP INTEREST (OR ANY FACILITY OWNERSHIP INTEREST OR NEW COMMON FACILITIES OWNERSHIP INTEREST) OR THE PROJECT, AND ANY SUCH OTHER REPRESENTATION OR WARRANTY IS HEREBY EXPRESSLY DISCLAIMED.

5. Binding Effect; Assignment. This Bill of Sale and all of the provisions hereof shall be binding upon Seller and its successors and permitted assigns and shall inure to the benefit of Buyer and its successors and permitted assigns.

6. No Third Party Beneficiary. Nothing in this Bill of Sale is intended to confer upon any other person except Buyer and Seller any rights or remedies hereunder or shall create any third party beneficiary rights in any person.

7. Governing Law. This Bill of Sale shall be governed by, and construed and interpreted in accordance with, the laws of the State of Colorado.

8. Construction. This Bill of Sale is delivered pursuant to Section 4.4.2(a) of the Joint Ownership Agreement and is subject to the terms of the Joint Ownership Agreement, including Article 12 thereof. In the event of any conflict or

ambiguity between the terms of the Joint Ownership Agreement and the terms of this Bill of Sale, the terms of the Joint Ownership Agreement shall control.

9. Counterparts. This Bill of Sale may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Bill of Sale has been duly executed and delivered by Seller as of the date first above written.

SELLER

[\_\_\_\_\_]

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

Name:

Title:

ACCEPTED AND AGREED TO  
THIS [\_\_\_\_\_] DAY OF [\_\_\_\_], 20[\_\_\_\_]:

BUYER

[\_\_\_\_\_]

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

Name:

Title:

EXHIBIT B

Form of Bargain and Sale Deed

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, with an address of 550 15th Street, Suite 1000, Denver, CO 80202 ("PSCo"), for the consideration of ten dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, hereby sells and conveys to [\_\_\_\_], [\_\_\_\_], with an address of [\_\_\_\_] ("Grantee"), the property in Pueblo County, Colorado described on Exhibit 1, attached hereto and incorporated by this reference, (the "Property"), but reserving unto PSCo, the easements, rights and interests in the Property described on Exhibit 2, attached hereto and incorporated by this reference.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2006

PUBLIC SERVICE COMPANY OF  
COLORADO,  
a Colorado corporation

By: \_\_\_\_\_  
Its: \_\_\_\_\_

STATE OF COLORADO                    )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2006, by \_\_\_\_\_ as \_\_\_\_\_ of Public Service Company of Colorado, a Colorado corporation.

Witness my hand and official seal.

My commission expires:

\_\_\_\_\_  
Notary Public

**EXHIBIT 1**  
**THE PROPERTY**

AN UNDIVIDED [ ]% INTEREST IN THE FOLLOWING REAL PROPERTY:

LOT 2, COMANCHE SUBDIVISION, ACCORDING TO THE PLAT RECORDED ON  
DECEMBER 21, 2005 AT RECEPTION NO. 1653781, COUNTY OF PUEBLO,  
STATE OF COLORADO

## EXHIBIT 2 RESERVED EASEMENT AND INTERESTS

A perpetual non-exclusive easement on, over, under, and across the portion of the Property described on Exhibit 2-A, attached hereto and incorporated by this reference (the "Easement Premises") for the transmission and distribution of electricity and communication signals, and for the installation and maintenance of utility facilities, and other equipment, facilities and fixtures which are used or useful in connection with facilities and operations related to the generation of electricity and other accessory uses now or hereafter located on property owned by PSCo and described on Exhibit 2-B, attached hereto and incorporated by this reference (the "PSCo Property"), which may be underground, aboveground or overhead, and which may include, without limitation: towers, poles, and other supports of whatever materials; together with braces, guys, anchors, cross-arms, cables, conduits, wires, conductors, manholes, transformers, pipes, railroad tracks and other fixtures, devices, and appurtenances used or useful in connection with any of the foregoing (collectively the "PSCo Facilities").

Together with the right and authority in PSCo, its successors, licensees, lessees, contractors, or assigns, and its and their agents and employees to (1) enter at all times upon said Easement Premises to survey, mark and sign the Easement Premises or the PSCo Facilities thereon, construct, install, operate, repair, remove, replace, reconstruct, alter, relocate, patrol, inspect, improve, enlarge, remove, and maintain the PSCo Facilities; (2) cut, remove, trim, or otherwise control (including without limitation by applying herbicides in accordance with applicable laws, rules and regulations) all trees, brush, and other growth which might interfere with or endanger the PSCo Facilities; (3) permit the joint use by others of, rights of way and conduit for similar purposes and for such other uses as may be required by law; and (4) have reasonable access to, and ingress and egress for personnel, equipment and vehicles over and across said Easement Premises.

No buildings, structures, signs, wells or other objects shall be erected, placed, or permitted to remain on, under, or over the Easement Premises by Grantee, including trees, shrubs and fences, which will or may be an interference with the PSCo Facilities now or hereafter constructed on the Easement Premises or an interference with the exercise of any of the rights herein granted. Grantee agrees it shall not cause or allow the grade of the surface of the Easement Premises to be materially altered without the prior written consent of PSCo, nor will Grantee perform any act on or adjacent to the Easement Premises which will interfere with or endanger the PSCo Facilities. Non-use or a limited use of this easement shall not prevent PSCo from thereafter making use of this easement to the full extent herein authorized.

PSCo's exercise of its reserved rights in the Easement Premises shall be conducted in a manner which does not materially interfere with the construction, operation, repair, maintenance, or use of the Easement Premises for a road and related uses (such as the installation of utilities) in connection with the construction and operation of the Facility (as referenced below). Any permitted improvements to the



Easement Premises, such as paving and utility installations, damaged or removed as a result of PSCo's exercise of the rights herein reserved shall be restored or replaced by PSCo, in substantially the same or better condition as existed prior to the damage or removal.

PSCo also reserves all right, title and interest to the PSCo Facilities which may be located on the Easement Premises, except for Grantee's right, title and interest in the New Common Facilities and the Facility, if any, located on the Easement Premises. For the purpose of this Deed, the terms New Common Facilities and the Facility shall have the meanings given such terms in that certain Second Amended and Restated Property Rights Agreement entered into between PSCo and Grantee, dated as of May 31, 2006, and recorded contemporaneously herewith.

The provisions of the foregoing reservations, interests, rights and easements shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, personal representatives, successors, and assigns of PSCo and Grantee, shall constitute covenants running with the land and shall inure to the benefit of and be binding upon future owners or holders of any right, title or interest in the Property and the PSCo Property.

**EXHIBIT 2-A**  
**EASEMENT PREMISES**

A portion of Section 20, Township 21 South, Range 64 West of the 6<sup>th</sup> Principal Meridian, City of Pueblo, County of Pueblo, State of Colorado, being more particularly described as follows:

Basis of Bearings:                      The easterly line of Section 20, Township 21 South, Range 64 West of the 6<sup>th</sup> Principal Meridian, being monumented at the northeast corner of said Section 20 by a 3 1/4" aluminum cap and being monumented at the southeast corner of said Section 20 by a 1 1/4" brass cap in range box, and assumed to bear S00°37'36"E a distance of 5287.76 feet.

Commencing at said northeast corner of Section 20, thence N89°23'07"W a distance of 149.74 feet to the Point of Beginning;

Thence S05°29'27"E a distance of 50.29 feet; thence N89°23'07"W a distance of 2348.52 feet to a point curve; thence on the arc of a curve to the left, having a delta of 90°36'53", a radius of 50.00 feet, a distance of 79.08 feet to a point of tangent; thence S00°00'00"E a distance of 649.81 feet; thence N90°00'00"W a distance of 50.00 feet; thence N00°00'00"E a distance of 649.81 feet to a point of curve; thence on the arc of a curve to the right, having a delta of 90°36'53", a radius of 100.00 feet, a distance of 158.15 feet to a point of tangent, said point being on the northerly line of the northeast quarter of said Section 20; thence on said northerly line S89°23'07"E a distance of 2343.17 feet to the point of beginning;

Containing a calculated area of 155,719 square feet, of 3.575 acres, more or less.

**EXHIBIT 2-B**  
**PSCO PROPERTY**

LOT 1, COMANCHE SUBDIVISION, ACCORDING TO THE PLAT RECORDED ON  
DECEMBER 21, 2005 AT RECEPTION NO. 1653781, COUNTY OF PUEBLO,  
STATE OF COLORADO