

*Each Solar PV project is unique. This document is intended to be a **model only**. The requirements should be modified as appropriate to fit the specific project. Agency or municipal counsel must be consulted when developing a PGA for a Solar PV project.*

## **Appendix E: Model Performance Guarantee Agreement (PGA)**

### Performance Guarantee Agreement (PGA)

This Performance Guarantee Agreement (this “**Performance Warranty**”) is entered into by the parties listed below (each a “**Party**” and collectively the “**Parties**”) as of the date signed by Seller below (the “**Effective Date**”).

<b>Purchaser:</b>		<b>Seller:</b>	
Name and Address		Name and Address	
Phone		Phone	
Fax		Fax	
E-mail		E-mail	

This Performance Warranty sets forth the terms and conditions of a performance guarantee provided by Seller in conjunction with that certain Solar Power Purchase Agreement by and between Seller and Purchaser dated of even date herewith (the “**PPA**”). All capitalized terms used hereunder shall have the meanings given such terms in the PPA. The term of this Performance Warranty shall be concurrent with the term of the PPA.

1. **Warranty.** Seller guarantees that during the term of the PPA the System will generate the guaranteed kilowatt-hours (kWh) (“**Guaranteed kWh**”) of energy under usual weather conditions set forth as follows:

A. Commencing on the fifth anniversary of the Commercial Operation Date, if at the end of each successive sixty (60) month anniversary thereof, the cumulative Actual kWh (defined below) generated by the System is *less* than the Guaranteed kWh, then Seller will send Purchaser a refund check equal to the difference between the Guaranteed kWh and the cumulative Actual kWh multiplied by the Guaranteed Energy Price per kWh (defined below). Seller will make that payment within thirty (30) days after the end of the relevant calendar year.

B. Commencing on the fifth anniversary of the Commercial Operation Date, if at the end of each successive sixty (60) month anniversary thereof the Actual kWh is *greater* than the Guaranteed kWh during any sixty (60) month period, this surplus will be carried over and will be used to offset any deficits that may occur in the next true up period.

C. “**Guaranteed kWh**”

True Up Term Years	Guaranteed kWh
Years 1-5	
Years 6-10	
Years 11-15	
Years 16 -20	

D. “**Actual kWh**” means the AC electricity produced by the System in kilowatt-hours measured and recorded by Seller during each successive sixty (60) month anniversary of the Commercial Operation Date and divided by the “**Insolation Adjustment Factor.**” The Insolation Factor shall be calculated as follows:

Insolation Adjustment Factor = X/Y, with

X = Estimated insolation for the applicable measuring period calculated as the sum of estimated monthly insolation levels in the global horizontal plane for the System in units of kWh/m<sup>2</sup> for the System configuration based on historical

data; and

Y = Actual insolation for the applicable measuring period calculated as the sum of actual monthly insolation levels measured in the global horizontal plane in units of kWh/m<sup>2</sup> for the System configuration.

For purposes of measuring the Actual kWh and determining the Insolation Adjustment Factor, Seller shall use an industry-standard monitoring service, data acquisition system and/or modelling tool, or, to the extent such services, systems and/or tools are not available, Seller shall make estimates by reasonable means.

E. “**Guaranteed Energy Price per kWh**” means the dollar value per kWh as calculated in the table below:

True Up Term	Utility/ kWh (X)	Solar/kWh (Y)	<b>Guaranteed Energy Price per kWh (X - Y)</b>
Years 1-5	\$		\$
Years 6-10	\$		\$
Years 11-15	\$		\$
Years 16 - 20	\$		\$

2. **Exclusions.** The Warranty does not apply to any repair, replacement or correction required due to the following:

A. someone other than Seller or its approved service providers installed, removed, re-installed or repaired the System;

B. Destruction or damage to the System or its ability to safely produce energy not caused by Seller or its approved service providers while servicing the System (e.g., a tree falls on the System);

C. Purchaser’s failure to perform, or breach of, Purchaser’s obligations under the PPA (such as if Purchaser modifies or alters the System);

D. Purchaser’s breach of this Performance Warranty including being unavailable to provide access or assistance to Seller in diagnosing or repairing a problem or failing to maintain the System as stated in the Solar Operation and Maintenance Guide;

E. any Force Majeure Event (as defined below);

F. a power or voltage surge caused by someone other than Seller including a grid supply voltage outside of the standard range specified by the Utility;

G. Any System failure not caused by a System defect (e.g., such as making roof repairs); or

H. Theft of the System.

Seller hereby disclaims, and any beneficiary of this Performance Warranty hereby waives any warranty with respect to any cost savings from using the System.

3. **Force Majeure.** If Seller is unable to perform all or some of its obligations under this Performance Warranty because of a Force Majeure Event, Seller will be excused from whatever performance is affected by the Force Majeure Event, provided that:

- A. Seller, as soon as is reasonably practical, gives Purchaser notice describing the Force Majeure Event;
- B. Seller's suspension of its obligations is of no greater scope and of no longer duration than is required by the Force Majeure Event; and
- C. No Seller obligation that arose before the Force Majeure Event that could and should have been fully performed before such Force Majeure Event is excused as a result of such Force Majeure Event.

"Force Majeure Event" means any event, condition or circumstance beyond the control of and not caused by Seller's fault or negligence. It shall include, without limitation, failure or interruption of the production, delivery or acceptance of electricity due to: an act of god; war (declared or undeclared); sabotage; riot; insurrection; civil unrest or disturbance; military or guerilla action; terrorism; economic sanction or embargo; civil strike, work stoppage, slow-down, or lock-out; explosion; fire; earthquake; abnormal weather condition or actions of the elements; hurricane; flood; lightning; wind; drought; the binding order of any governmental authority (provided that such order has been resisted in good faith by all reasonable legal means) the failure to act on the part of any governmental authority (provided that such action has been timely requested and diligently pursued); unavailability of electricity from the utility grid, equipment, supplies or products; and failure of equipment not used by Seller or under its control.

4. **Notices.** All notices under this Performance Warranty shall be in writing and shall be by personal delivery, facsimile transmission, electronic mail, overnight courier, or regular, certified, or registered mail, return receipt requested, and shall be deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the party identified in this Performance Warranty at the address set forth above or such other address as either party may specify in writing. Each party shall deem a document faxed or sent by electronic mail to it as an original document.

5. **Applicable Law.** This Performance Warranty and the respective rights and obligations of the Parties hereto shall be governed by and construed in accordance with the laws of the State of New York, except where the federal supremacy clause requires otherwise. Venue for any actions or disputes arising out of this Performance Warranty shall be proper in a court of competent jurisdiction within the State of New York.

6. **Assignment and Transfer of this Performance Warranty.**

A. Assignment by Seller. Pursuant to section 138 of the New York State Finance Law, the Seller shall not sell, transfer or assign (collectively, an "Assignment") the Performance Warranty or any interest therein, without the prior written consent of Purchaser, which shall not be unreasonably withheld, conditioned or delayed; provided, however, that, without the prior consent of Purchaser, Seller may (i) assign this Agreement to an Affiliate of Seller; (ii) assign, mortgage, pledge or otherwise collaterally assign this Performance Warranty in connection with any financing of the Solar PV System (including pursuant to a sale-leaseback transaction), (iii) assign this Performance Warranty to any entity through which Seller is obtaining financing or capital for the Solar PV System, and (iv) assign this Performance Warranty to any person succeeding to all or substantially all of the assets of Seller (provided that Seller shall be released from liability hereunder as a result of any of the foregoing permitted assignments only upon assumption of Seller's obligations hereunder by the assignee); provided, however, that in each case, any assignee shall agree in writing to be bound by the terms and conditions of this Performance Warranty and so long as the Seller, or the successor by way of merger of Seller, delivers such tax and enforceability assurance as Purchaser may reasonably request. In the event that Seller identifies such secured Financing Party in Schedule 5 of the PPA, or in a subsequent notice to Purchaser, then Purchaser shall comply with the provisions set forth in Exhibit B of the PPA. Any Financing Party shall be an intended third

party beneficiary of this Section 6.A. Any assignment by Seller without any required prior written consent of Purchaser shall not release Seller of its obligations hereunder.

B. Acknowledgment of Collateral Assignment. In the event that Seller identifies a secured Financing Party in Schedule 5 of the PPA, or in a subsequent notice to Purchaser, then Purchaser hereby: (a) acknowledges the collateral assignment by Seller to the Financing Party, of Seller’s right, title and interest in, to and under the Performance Warranty, as consented to under Section 6.A of the Performance Warranty; (b) acknowledges that the Financing Party as such collateral assignee shall be entitled to exercise any and all rights of lenders generally with respect to the Seller’s interests in this Performance Warranty within the timeframes specified herein with respect to Seller; (c) acknowledges that it has been advised that Seller has granted a first priority perfected security interest in the Solar PV System to the Financing Party and that the Financing Party has relied upon the characterization of the Solar PV System as personal property, as agreed in this Performance Warranty in accepting such security interest as collateral for its financing of the Solar PV System. Any Financing Party shall be an intended third party beneficiary of this Section 6.B.

C. Assignment by Purchaser. Purchaser may assign or transfer this Performance Warranty to any other New York State agency, authority, or public benefit corporation that is the successor in interest of the Purchaser and that is backed by the full faith and credit of the State of New York without the Seller’s prior consent, provided that (a) Purchaser shall promptly notify Seller of any such assignment in writing, (b) such assignee shall assume all of Purchaser’s obligations under the Performance Warranty in writing; and (c) such assignment shall in no event compromise the tax treatment of this Performance Warranty or the Seller. Any assignment that does not comply with the forgoing shall be invalid. Purchaser shall not sell, transfer or assign the Performance Warranty or any interest therein to any entity other than a New York State agency, authority, or public benefit corporation, as set forth in this section, without the prior written consent of Seller, which shall not be unreasonably withheld, conditioned or delayed.

7. **Entire Agreement, Changes.** This Performance Warranty contains the parties’ entire agreement regarding the matters set forth herein. Seller’s obligations under this Performance Warranty are separate and distinct from the obligations of the Seller or its assigns under the PPA. No breach of this Performance Warranty shall affect Purchaser’s obligations under the PPA. The PPA may be assigned to a third party without assignment of Seller’s obligations under this Performance Warranty. Any change to this Performance Warranty must be in writing and signed by both Parties. If any portion of this Performance Warranty is determined to be unenforceable, the remaining provisions shall be enforced in accordance with their terms or shall be interpreted or re-written so as to make them enforceable. Provisions that should reasonably be considered to survive termination of this Performance Warranty shall survive.

**[Purchaser]**

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

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

**[Seller]**

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

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_