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Capacity Purchase Agreement

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

by and between

Utah Associated Municipal Power Systems

and

Payson City, Utah

Dated as of \_\_\_\_\_\_ 1, 2024

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Capacity Purchase Agreement

This Capacity Purchase Agreement is made and entered into as of \_\_\_\_\_\_ 1, 2024 (this *“Agreement”*) by and between the Utah Associated Municipal Power Systems, an energy services interlocal entity and a political subdivision of the State of Utah (*“UAMPS”*), and Payson City, Utah, a municipal corporation and a political subdivision of the State (the *“City”*). UAMPS and the City are sometimes referred to individually herein as a *“party”* and collectively as the *“parties.”*

Recitals[[1]](#footnote-1)\*

Whereas, the City owns and operates the System, provides electric utility services to customers located within its established service area and is authorized pursuant to law to construct, operate and contract for the capacity and service of facilities that provide generation, transmission and related services; and

Whereas, the City requires additional generating capacity to enable it to continue to provide safe, reliable and economical electric services to the customers served by the System and has received a Proposal and Scope of Work from Wheeler Power Systems, an affiliate of Wheeler Machinery Co. (*“Wheeler”*), for the “Payson City Power Generation Facility New Plant/Existing Plant Retrofit” dated May 7, 2024 (the *“Proposal”*) for the improvement, retrofitting and equipping of the City’s existing electric generation facility, including the acquisition and installation of six Caterpillar G3520 Natural Gas generator sets (together with related improvements to be undertaken by the City as described herein, the *“Project”*); and

Whereas, the City is a member of UAMPS and has requested that UAMPS, through its Member Services Project, own, construct, acquire and finance the Cost of Construction of the Project and sell the capacity, output and services of the Project to the City pursuant to this Agreement; and

Whereas, in furtherance of the Project, UAMPS will (a) enter into the Procurement and Construction Agreement with Wheeler providing for the acquisition and construction of various components of the Project and (b) pursuant to this Agreement will contract with the City for the acquisition and construction of the remaining components necessary to complete the Project and for the operation and maintenance of the Project after its completion; and

Whereas, the City has found and determined that the Project will enhance, improve and extend that capability, reliability and services of the System for the use and benefit of customers located within its electric service area established by law, and the Capacity Payments and other amounts payable by the City under this Agreement are payable solely from the rates, charges or revenues derived from the System and are not secured by the full faith and credit or the taxing power of the City, the State or any political subdivision; and

Whereas, the execution, delivery and performance of this Agreement by UAMPS and the City has been duly authorized and approved by all necessary action of their respective governing bodies.

Now, Therefore, in consideration of the premises and the respective representations, covenants and agreements hereinafter contained, the parties hereto do mutually promise, covenant and agree as follows:

Article I  
  
Definitions and Representations

*Section 1.1. Definitions* . In addition to the terms defined in the preamble and recitals, the following terms shall have the following meanings in this Agreement:

*“Act”* means the Utah Interlocal Cooperation Act, Title 11, Chapter 13, Utah Code Annotated 1953, as amended.

*“Agreement”* means this Capacity Purchase Agreement dated, as of \_\_\_\_\_\_ 1, 2024, between UAMPS and the City, and shall include any and all amendments and supplements hereto hereafter made in conformity herewith and with the Bond Documents.

*“Authorized Representative”* means, (i) in the case of UAMPS, its Chief Executive Officer thereof, or any officers, employees, contractors or other agents of UAMPS authorized to perform specific acts or to discharge specific duties and (ii) in the case of the City, its Mayor and those officers or employees authorized to act pursuant to letters of authority issued from time to time by the Mayor and delivered to UAMPS.

*“Bond Counsel”* means Chapman and Cutler LLP or any other nationally recognized bond counsel selected by UAMPS and approved by UAMPS.

*“Bond Documents”* means (a) the resolution adopted by UAMPS on May 18, 2022, authorizing the execution of the Project Agreements and the issuance of the Bonds to finance the costs of the Project, (b) all resolutions supplemental to such resolution and a certificate of determination of the City under such resolution, (c) the Bonds, (d) any contract or agreement between UAMPS and the Lender and (e) the Tax Certificate.

*“Bond Fund”* means the Bond Fund established by the Bond Documents.

*“Bonds”* means the bonds, notes or other debt obligations issued or incurred by UAMPS pursuant to the Bond Documents to finance the costs of the Project.

*“Capacity Payment”* means the amounts payable by the City for the purchase of the Project Capacity pursuant to this Agreement as shall be set forth on Schedule I.

*“Code”* means the Internal Revenue Code of 1986, as amended, and the U.S. Treasury Regulations thereunder.

*“Cost of Construction”* means all costs of acquiring, installing and/or constructing the Project or any portion thereof to completion and operation, which costs shall include but shall not be limited to (i) all costs of environmental review, engineering and architectural services with respect to the Project or any portion thereof, including the cost of design, test borings, surveys, estimates, plans and specifications and for supervising construction, as well as for the performance of all other duties required by or consequent upon the proper installation and/or construction of, and the making of alterations, renovations, additions and improvements in connection with, the completion, operation and/or energization of the Project or any portion thereof; (ii) all costs paid or incurred for labor, materials, services, supplies, machinery, equipment and other expenses and to construction managers, contractors, suppliers, builders and materialmen in connection with the acquisition, installation and/or construction of the Project or any portion thereof; and (iii) all costs which are required to be paid, under the terms of any contract or contracts, for the acquisition or construction of the Project or any portion thereof, including under the Procurement and Construction Agreement.

*“Event of Default”* under the Bond Documents has the meaning specified in Section 5.1.

*“Impositions”* has the meaning assigned to such term in Section 3.5.

*“Legal Requirements”* has the meaning assigned to such term in Section 3.6.

*“Lender”* means the purchaser of the Bonds.

*“Lien”* has the meaning assigned to such term in Section 3.8.

*“Loss Event”* has the meaning assigned to such term in Section 3.7.

*“Operating Expenses”* means all actual operation and maintenance expenses costs of the System incurred by the City for maintaining and operating the System, calculated in accordance with generally accepted accounting principles used by the City consistently applied, including: (a) costs of purchased or generated power and energy; (b) costs of fuel, water, and other commodities; (c) costs of transmission and interconnection services, including the amounts payable by the City under this Agreement; (d) expenses of maintenance, repair, billing and collection, and other expenses incurred to maintain and preserve the System in good repair and working order; and (e) the administrative costs of the City relating to the System, including salaries and wages of employees, payments to employees retirement and benefit systems, overhead, taxes (if any), fees of auditors, accountants, attorneys, engineers, or other consultants, insurance premiums and all other reasonable and necessary costs of the City or charges required to be paid by it relating to the System; *provided that* Operating Expense do not include: (i) depreciation, replacement and obsolescence charges or reserves therefor, (ii) amortization of intangibles or other bookkeeping entries of a similar nature, (iii) costs of capital additions, replacements, betterments, extensions or improvements to the System that under generally accepted accounting principles are chargeable to a capital account or to a reserve for depreciation, (iv) payments in lieu of taxes and transfers to the general fund of the City, (v) charges for the payment of any bonds or other debt obligations payable from the Revenues of the System and (vi) the Capacity Payments payable by the City under this Agreement.

*“Permitted Encumbrances”* means, as of any particular time,

(a) this Agreement and the Bond Documents; and

(b) liens for real estate taxes, assessments, levies and other governmental charges, the payment of which is not in default; and

(c) utility, access and other easements and rights‑of‑way, restrictions and exceptions that an Authorized Representative of the City certifies to UAMPS will not interfere with or impair the City’s use of the Project as provided in this Agreement; and

(d) such minor defects, irregularities, encumbrances, easements, rights‑of‑way (including agreements with any railroad the purpose of which is to service a railroad siding) and clouds on title as normally exist with respect to property similar in character to the Project and as do not, either singly or in the aggregate, materially impair the value or use of the property affected thereby for the purpose for which it was acquired and held by UAMPS under this Agreement; and

(e) any mechanics’, workmen’s, repairmen’s, materialmen’s, contractors’, warehousemen’s, carriers’, suppliers’ or vendors’ lien or right in respect thereof if payment is not yet due and payable, all if and to the extent permitted by Section 3.8 of this Agreement.

*“Person”* means any individual, corporation, partnership, joint venture, association, joint stock company, trust, unincorporated organization or government, any agency or political subdivision thereof or any other entity.

*“Procurement and Construction Agreement”* means the Power Generation and Balance of Plant Agreement dated as of \_\_\_\_\_\_\_\_\_\_, 2024 between UAMPS and Wheeler.

*“Project”* means the Project described in Exhibit A to this Agreement.

*“Project Agreements”* means this Agreement, the Procurement and Construction Agreement and any other contract or agreement entered into by UAMPS with respect to the acquisition, construction, operation and maintenance of the Project.

*“Project Capacity”* means all of the generating capacity, services and benefits of the Project.

*“Project Information”* has the meaning assigned to such term in Section 7.12.

*“Project Fund”* means the Project Fund established in the Bond Documents.

*“Redemption Price”* means, with respect to any Bond or a portion thereof, the principal amount thereof to be purchased, prepaid or redeemed in whole or in part, plus the applicable premium, if any, payable upon the purchase, prepayment or redemption thereof pursuant to such Bond or the Bond Documents.

*“Reserve Fund”* means any reserve fund established by the Bond Documents for payment of principal and interest on the Bonds or any other fees and expenses that are due and payable under the Bond Documents and any other costs related thereto.

*“Revenues”* means all income, revenues and moneys received, receivable or otherwise derived by the City from the ownership or operation of the System determined in accordance with generally accepted accounting principles consistently applied, including (a) all amounts received from the rates, fees and charges imposed for the capacity, energy and services provided by the System to retail consumers, and (b) all amounts received from the sale, remarketing or other disposition at wholesale of capacity, energy or other services; *provided that* the following items are not Revenues: (i) connection fees and other specific charges collected for the purpose of paying or reimbursing the cost of specific facilities; (ii) customers’ deposits or any other deposits subject to refund until such deposits have become the property of the City; (iii) grants which are restricted by the grantor for a specific purpose and are not available for general purposes of the System; and (iv) the net proceeds of eminent domain proceedings and casualty insurance maintained by the City with respect to the System to the extent such proceeds are not promptly applied to the repair or replacement of the System.

*“State”* means the State of Utah.

*“System”* means the complete municipal electric utility system of the City including, but not limited to, all facilities, works, properties and structures for the generation, transmission and distribution of electricity, including: (a) all contractual rights to electric capacity, energy and ancillary and related services; (b) transmission capacity and service; (c) all real property, including easements, rights-of-way necessary or convenient in connection with the System; (d) all licenses permits and approvals necessary for the operation of the System; and (e) all additions, betterments, extensions and improvements to the System hereafter acquired or constructed.

*“Tax Certificate”* means the Tax Exemption Certificate and Agreement of UAMPS with respect to the Bonds.

*“UAMPS Indemnified Parties”* means, collectively, UAMPS and its elected or appointed officials, employees, or agents.

*Section 1.2. Construction* *.* In this Agreement, unless the context otherwise requires:

(a) The terms “hereby”, “hereof”, “hereto”, “herein”, “hereunder” and any similar terms, as used in this Agreement, refer to this Agreement, and the term “hereafter” means after, and the term “heretofore” means before, the date of the execution and delivery of this Agreement.

(b) Words of the masculine gender mean and include correlative words of the feminine and neuter genders and words importing the singular number means and include the plural number and vice versa.

(c) Words importing persons include firms, associations, partnerships (including limited partnerships), trusts, corporations and other legal entities, including public bodies, as well as natural persons.

(d) Any headings preceding the texts of the several Articles and Sections of this Agreement, and any table of contents appended to copies hereof, shall be solely for convenience of reference and shall not constitute a part of this Agreement, nor shall they affect its meaning, construction or effect.

(e) All accounting terms not otherwise defined herein shall have the meanings in accordance with generally accepted accounting principles in the United States of America in effect from time to time as applicable to UAMPS and the City.

(f) References herein to Articles, Sections, Exhibits and Schedules refer to the Articles, Sections, Exhibits and Schedules of this Agreement unless the context clearly requires otherwise. References herein to an Article number (e.g., Article IV) or a Section number (*e.g.,* Section 6.2) shall be construed to be a reference to the designated Article number or Section number hereof unless the context or use clearly indicates another or different meaning or intent.

(g) The use herein of the word “include” or “including,” when following any general statement, term or matter, shall not be construed to limit such statement, term or matter to the specific items or matters set forth immediately following such word or to similar items or matters, whether or not non-limiting language (such as “without limitation” or “but not limited to” or words of similar import) is used with reference thereto, but rather shall be deemed to refer to all other items or matters that fall within the broadest scope of such general statement, term or matter.

*Section 1.3. Representations and Warranties by UAMPS* . UAMPS makes the following representations and warranties:

(a) UAMPS is duly organized and exists under the laws of the State, and it is authorized and empowered to enter into the transactions contemplated by this Agreement and to carry out its obligations hereunder.

(b) This Agreement constitutes the legal, valid and binding obligation of UAMPS enforceable against UAMPS in accordance with its terms, except to the extent that the enforceability of this agreement may be limited by bankruptcy, moratorium or insolvency or other laws affecting creditors’ rights generally and subject to general rules of equity (regardless of whether such enforceability is considered in an action at law or a proceeding in equity).

(c) There is no action, suit or proceeding before or pending or, to the best knowledge of UAMPS, threatened against UAMPS, by or before any court, public board, public body, administrative agency or arbitration board wherein an unfavorable decision, ruling or finding would adversely affect the transactions contemplated hereby or by the Project Agreements or the Bond Documents, or which, in any way, would adversely affect the validity of the Bonds, the Bond Documents, the Project Agreements or this Agreement.

(d) The execution, delivery and performance of this Agreement and the consummation of the transactions herein contemplated have been duly authorized by all requisite action on the part of UAMPS and will not violate or conflict with any provision of State law or any order of any court or agency of government or any agreement or other instrument to which UAMPS is a party or by which it or any of its property is subject or bound, or be in conflict with or result in a breach of or constitute (with due notice and/or lapse of time) a default under any agreement or other instrument or result in the imposition of any Lien, of any nature whatsoever other than Permitted Encumbrances.

(e) All consents, approvals or authorizations, if any, of any governmental authority required on the part of UAMPS in connection with the execution and delivery of this Agreement have been duly obtained.

(f) UAMPS is authorized and empowered by law to (i) acquire, construct, equip, install, energize and operate the Project, (ii) appoint the City as its agent in connection with the acquisition, construction, equipping, installation and operation of the Project, (iii) sell the Project Capacity to the City pursuant to this Agreement, (iv) finance the Project through the issuance of the Bonds pursuant to the Bond Documents, and (v) take all actions necessary or convenient in connection with the foregoing.

*Section 1.4. Representations and Warranties by the City* . The City makes the following representations and warranties:

(a) The City is duly organized and existing under the laws of the State, and it is authorized and empowered to enter into the transactions contemplated by this Agreement and to carry out its obligations hereunder.

(b) This Agreement constitutes the legal, valid and binding obligation of the City enforceable against the City in accordance with its terms, except to the extent that the enforceability of this Agreement is qualified by (i) limitations imposed by bankruptcy laws of the United States or insolvency, reorganization, arrangement, moratorium or other laws relating to or affecting the enforcement of creditors’ rights generally, (ii) general principles of equity, regardless of whether such enforceability is considered in a proceeding in equity or at law and (iii) the exercise of judicial discretion in appropriate cases.

(c) There is no action, suit or proceeding pending or to the knowledge of the City threatened against the City by or before any court, public board, public body, administrative agency or arbitration board that would materially adversely affect the ability of the City to perform its obligations under this Agreement and all authorizations, consents and approvals of governmental bodies or agencies required to be obtained by the City as of the date hereof in connection with the execution and delivery of this Agreement or in connection with the performance of the obligations of the City hereunder have been obtained.

(d) The execution, delivery and performance of this Agreement and the consummation of the transactions herein contemplated have been duly authorized by all requisite action on the part of the City and will not violate or conflict with any provision of law or any order of any court or agency of government or any agreement or other instrument to which the City is a party or by which it or any of its property is subject or bound, or be in conflict with or result in a breach of or constitute (with due notice and/or lapse of time) a default under any such agreement or other instrument or result in the imposition of any Lien of any nature whatsoever other than Permitted Encumbrances.

(e) All consents, approvals or authorizations, if any, of any governmental authority required on the part of the City in connection with the execution and delivery of this Agreement have been duly obtained.

(f) The City is authorized and empowered by law to (i) own and operate the System, (ii) acquire, construct, equip, install, energize and operate the Project as the agent of UAMPS, (iii) purchase the Project Capacity from UAMPS pursuant to this Agreement, (iv) pay the Capacity Payments and the other amounts payable by the City under this Agreement, provided that the Capacity Payments and such other amounts shall be payable solely from the Revenues of the System as provided herein, and (v) take all actions necessary or convenient in connection with the foregoing.

(g) No Event of Default, and no event that with the giving of notice or the passage of time, or both, would constitute an Event of Default, has occurred and is continuing.

Article II  
  
Purchase and Sale of Project Capacity; Financing of the Project

*Section 2.1. Purchase and Sale of Project Capacity* *.*

(a)  UAMPS has all legal rights of title and ownership of the “Procurement and Construction Components” of the Project identified on Exhibit A. UAMPS hereby sells to the City and the City hereby purchases from UAMPS, the Project Capacity, for and during the term herein provided and upon and subject to the terms and conditions herein set forth. UAMPS hereby delivers to the City and the City hereby accepts sole and exclusive possession of the Project.

(b) The City shall assure that, during the term of this Agreement, the rights to and interests in the land on which or above which the Project is located and the “Payson City Components” of the Project identified on Exhibit A shall be sufficient, as applicable, for the design, installation, construction, testing and energization of the Project and for the operation and continued allowed existence of the Project after construction.

(c) UAMPS covenants and agrees not to sell, convey, transfer, lease, mortgage or encumber the Project or any portion thereof except as specifically permitted under this Agreement.

*Section 2.2. Contract Term* *.* The term of this Agreement shall commence as of \_\_\_\_\_\_ 1, 2024 and shall, subject to Section 6.2, expire on the date on which the City has paid all of the Capacity Payments and the other amounts payable by the City hereunder.

*Section 2.3. Payment Provisions, Pledge of Capacity Payments* .

(a)  The City covenants to make Capacity Payments in the amounts and at the times as shall be set forth on Schedule I. UAMPS agrees that such Capacity Payments shall be deposited directly in the Bond Fund.

(b) The City shall pay, as additional amounts payable hereunder, all Impositions, as defined in and in accordance with the provisions of Section 3.5 hereof. If the City fails to pay any Imposition except as permitted by Section 3.5, UAMPS may make such payment and the City shall reimburse UAMPS therefor in accordance with Section 2.3(c).

(c) In the event the City should fail to make or cause to be made any of the payments required under the foregoing provisions of this Section, the amount not so paid shall continue as an obligation of the City until the amount not so paid shall have been fully paid with interest on such overdue amount until the date of payment at an interest rate per annum equal to the “WSJ Prime Rate” published in *The Wall Street Journal*.

(d) The City shall have the option to prepay its Capacity Payment obligations and to exercise its option to purchase the Project at the times and in the manner provided in Article VI hereof.

(e) Pursuant to the Bond Documents UAMPS will pledge and assign as security for the Bonds all of UAMPS’ right, title and interest in the Capacity Payments payable hereunder. The City hereby consents to the above‑described pledge, assignment and security interest.

(f) The parties agree that any amounts remaining in the Bond Fund upon expiration or earlier termination of the Contract Term after payment in full of the Bonds (or provision for payment thereof having been made in accordance with the provisions of the Bond Documents) and any expenses in accordance with the Bond Documents shall belong to and be paid to the City as overpayment of Capacity Payments.

*Section 2.4. Special and Limited Obligation of the City* *.*

(a) The obligation of the City to pay the Capacity Payments and all other payments provided for in this Agreement and to operate and maintain the Project in accordance with Article III shall in each case be (i) a special and limited obligation of the City, payable solely from the Revenues of the System, and (ii) subject to the preceding clause, absolute and unconditional, irrespective of any defense or any rights of set‑off, recoupment or counterclaim or deduction and without any rights of suspension, deferment, diminution or reduction it might otherwise have against UAMPS, and the obligation of the City shall arise and continue whether or not the Project is completed, operating or operable or its use is curtailed, suspended or terminated.

(b) The City agrees to make all payments required under this Agreement as an item of the Operating Expenses of the System; *provided that* in the event that the City issues bonds, notes or other debt obligations that are payable from and secured by a pledge of the Revenues of the System (*“Revenue Bonds”*), the City may provide in the resolution, ordinance, indenture or other instrument pursuant to which such Revenue Bonds are issued that the Capacity Payments payable hereunder shall be paid on a parity basis (*i.e.,* equally and ratably) with the debt service payments on such Revenue Bonds. The City agrees to provide to UAMPS a substantially final draft of the instrument pursuant to which such Revenue Bonds are to be issued for review and comment.

(c) The City’s obligations hereunder shall be payable solely from the Revenues of the System as a cost of electric generation capacity and service that is necessary and useful in the operation of the System. Such obligations are not, nor shall they be construed to be, general obligations of the City or the State or any political subdivision thereof, nor are such obligations intended to be, or are they secured by, the full faith and credit or the taxing power of the City or the State or any political subdivision thereof. This Agreement shall not constitute an indebtedness, general obligation or a charge against the general credit or taxing power of the City, the State or any political subdivision of the State within the meaning of any constitutional or statutory limitation. This Agreement is not and shall not be construed to be a lending or a donation of the credit of the City for any purpose whatsoever.

*Section 2.5. Financing of the Project* *.*

(a) UAMPS agrees to issue the Bonds pursuant to the Bond Documents to finance the Cost of the Construction of the Project. The parties acknowledge that the amounts payable to Wheeler under the Procurement and Construction Agreement are the largest component of the Cost of Construction, and that these amounts are payable upon the occurrence of certain milestones set forth in the Procurement and Construction Agreement. The parties agree to consult with one another and to solicit the advice of UAMPS’ municipal advisor with respect to the timing for the issuance of the Bonds.

(b) At the request of the City, UAMPS will include in the Cost of Construction to be financed with the Bonds such amounts as are necessary to pay or reimburse the City for the costs of the acquisition, construction and installation of those components of the Project that are within the City’s responsibility under Article III and identified as the “Payson City Components” on Exhibit A, as the same may be revised from time to time as provided herein. Prior to the issuance of the Bonds, the City shall provide to UAMPS such information as shall be necessary to complete and conform the description of the Payson City Components and the costs or estimated costs thereof, and UAMPS shall prepare and attach a completed Exhibit A to this Agreement and provide a copy of the same to the City.

(c) UAMPS anticipates that the Bonds will be sold in a direct purchase transaction with a Lender selected through a request for proposals process. UAMPS and its municipal advisor expect to solicit proposals to purchase the Bonds from at least three prospective Lenders. UAMPS agrees to review all such proposals with the City and to select a Lender that is mutually agreeable to UAMPS and the City. Upon the selection of the Lender and the determination of the debt service requirements of the Bonds, UAMPS shall prepare and submit a completed Schedule I to the City setting forth the Capacity Payments payable under this Agreement.

(d) The City agrees to cooperate with UAMPS in connection with the financing of the Project and to provide such information as may be necessary or desirable in connection with any request for proposals or as may be requested by a prospective Lender. The City further agrees to (i) execute and deliver a certificate of determination approving the final terms and provisions of the Bonds and Schedule I to this Agreement, (ii) provide such certificates and legal opinions as may be required in connection with the closing of the sale of the Bonds and (iii) provide such continuing information during the term of the Bonds, including budgets, financial statements and operating information with respect to the System, as may be required under the Bond Documents.

(e) The Bonds, together with the interest thereon, are special limited obligations of UAMPS payable solely from the Capacity Payments payable by the City under this Agreement. The obligation of UAMPS to pay the Bonds is a special and limited obligation payable solely from the Capacity Payments, and the Bonds shall not be payable from and shall have no claim on the revenues or assets of any other project of UAMPS. The Bonds shall not constitute a debt or pledge of the full faith and credit or taxing power of the State, the City or any political subdivision of the State or a loan of the credit of any of the foregoing within the meaning of any constitutional or statutory limitation and shall never constitute or give rise to a pecuniary liability of UAMPS, the State, the City or any political subdivision of the State. No owner of any Bonds shall have the right to compel any exercise of taxing power of the State, the City or any political subdivision of the State to pay the Bonds or the interest thereon. This Agreement is not and shall not be construed to be a lending or a donation of the credit of UAMPS for any purpose whatsoever.

Article III  
  
Construction, Operation and Maintenance of the Project; Impositions and Legal Requirements

*Section 3.1. Construction of the Project* .

(a) The City hereby approves the terms and provisions of the Procurement and Construction Agreement and authorizes UAMPS to execute and deliver the Procurement and Construction Agreement on its behalf. UAMPS hereby appoints the City as its agent in connection with the acquisition and construction of the Project and, so long as no Event of Default has occurred hereunder, agrees to consult with the City with respect to all actions, decisions, directions and matters arising under the Procurement and Construction Agreement.

(b) The City, as the agent of UAMPS, agrees to cause the acquisition, construction and installation of those components of the Project for which it is responsible (identified as the “Payson City Components” on Exhibit A) to be completed as soon as is reasonably practicable and in accordance with the terms of the Procurement and Construction Agreement, this Agreement and all applicable requirements of governmental authorities and law.

(c) The City and UAMPS may agree to change the description and specifications of the Project, and may add facilities, equipment and other capital items to the description of the Project, so long as such change or addition is mutually agreed to by the parties and does not substantially alter the nature of the Project; *provided that* (i) prior to making any such change or addition, UAMPS shall consult with Bond Counsel to ensure that such change or addition will not adversely affect the continued exemption from federal income taxation of interest on the Bonds, and (ii) any amendment of the description and specifications of the Project shall not entitle the City to any abatement or reduction in the Capacity Payments and other amounts payable by the City under this Agreement.

*Section 3.2. Operation of the Project* .

(a) UAMPS hereby appoints the City as its agent in connection with the operation, maintenance, repair and replacement of the Project and, so long as no Event of Default has occurred hereunder, authorizes the City to take all actions, make all decisions, give all directions and control all matters with respect to the operation, maintenance, repair and replacement of the Project. UAMPS shall have no control over, and no obligation with respect to, the Project, including the operation, maintenance, repair, replacement or use of the Project. The City shall be solely responsible for the procurement of fuel and other consumables necessary for the operation of the Project.

(b) The City will pay all costs of operating, maintaining, repairing and replacing the Project and will make all decisions regarding the operation or use of the Project.

(c) The City will hold, in its own name, all real property, easements, rights of way, and any other interests in land under the Project and UAMPS shall have no rights therein; *provided that* the City hereby grants an easement and license to UAMPS for the purpose of (i) inspecting the Project and monitoring the compliance by the City with its obligations under this Agreement and (ii) upon the occurrence and continuation of an Event of Default, taking the actions provided for in Section 5.2.

*Section 3.3. Maintenance, Insurance, Alterations and Improvement* .

(a) During the term of this Agreement, the City will maintain the Project in the same manner in which the City maintains similar facilities that it owns and in accordance with accepted utility practice. The City may install any replacements or perform renewals and repairs to the Project that it deems necessary or desirable (whether ordinary or extraordinary, structural or nonstructural, foreseen or unforeseen). UAMPS shall be under no obligation to replace, service, test, adjust, erect, maintain or effect replacements or perform renewals or repairs of the Project, to effect the replacement of any inadequate, obsolete, worn‑out or unsuitable parts of the Project, or to furnish any services for the Project, and the City hereby agrees to assume full responsibility therefor.

(b) The City will procure and maintain insurance on the Project consistent with the insurance it maintains on and with respect to the System pursuant to Section 4.6.

(c) The City may make such alterations of or additions to the Project or any portion thereof from time to time as it in its discretion may determine to be desirable for its uses and purposes, and such alterations or additions shall constitute a part of the Project. The City may install or permit to be installed, machinery, equipment and other personal property and fixtures on the Project and may replace Project components with other property.

(d) Except as otherwise provided in Section 3.8, unless UAMPS shall consent thereto in writing, the City shall not create, permit or suffer to exist any Lien against the Project or any portion thereof, or the interest of the City in the Project or this Agreement except for Permitted Encumbrances.

*Section 3.4. Removal of Obsolete Portions of the Project; Sale of Portions of a Project* .

(a) The City may remove from the Project and sell, assign or otherwise dispose of any portion of the Project, which is obsolete, worn‑out or no longer usable for the purpose for which such portion had originally been acquired (including from a Loss Event), *provided* that this Agreement shall remain valid, binding and enforceable following such removal. The City shall be required to deposit in the Bond Fund or otherwise pay to UAMPS any amounts received by the City from such sale, assignment or disposition, which amounts will be credited against the Capacity Payments next payable by the City. Upon removal by the City of a portion of the Project, which is obsolete, worn‑out or no longer usable for the purpose for which such portion had originally been acquired, the City may notify UAMPS that such property no longer constitutes part of the Project and effective upon such notice the definition of the Project will be deemed to be so amended.

(b) The City may remove from the Project and sell, assign or otherwise dispose of any portion of the Project which is not obsolete, worn‑out or no longer usable for the purpose for which such portion had originally been acquired (including from a Loss Event), *provided* *that* (i) this Agreement shall remain valid, binding and enforceable following such removal and (ii) the City shall deposit in the Bond Fund any funds received by it from the sale or other disposition of such removed property for use first as prepayment of Capacity Payments thereafter coming due and second, if no such Capacity Payments are to come due, as directed in the Bond Documents.

(c) The removal from the Project of any property under this Section shall not entitle the City to any abatement or reduction in the Capacity Payments and other amounts payable by the City under this Agreement. The rights provided to the City under this Section are in addition to the option of the City to purchase the Project or portions thereof under Section 6.1.

*Section 3.5. Taxes, Assessments and Governmental Charges* . The City shall pay when the same shall become due all taxes and assessments, general and specific, if any, levied and assessed upon or against the Project, this Agreement, any estate or interest of UAMPS or the City in the Project or transfer of such estate or interest, or the Capacity Payments hereunder during the term of this Agreement, and all assessments and other governmental charges and impositions whatsoever, foreseen or unforeseen, ordinary or extraordinary, under any present or future law, and charges for public or private utilities or other charges incurred in the occupancy, use, operation, maintenance or upkeep of the Project, all of which are herein called *“Impositions.”* The Capacity Payments set forth on Schedule I do not include an element intended to cover the cost of Impositions that may be levied and assessed upon or against the Project. Any such Impositions shall be the City’s obligation and paid as additional amounts payable in accordance with Section 2.3(b). UAMPS shall promptly forward to the City any notice, bill or other statement received by UAMPS concerning any Imposition. The City may pay any Imposition in installments if so payable by law, whether or not interest accrues on the unpaid balance. The City may contest in good faith the validity, existence or applicability of any Imposition. Notwithstanding anything herein to the contrary, the City may withhold payment of such Imposition during such contest so long as the failure to pay such Imposition does not adversely affect the validity and enforceability of this Agreement or the other obligations of the City hereunder. At the request of the City, UAMPS shall pay an Imposition, but only to the extent that the City provides funds to UAMPS to make such payment. Any refund of an Imposition shall belong to the City and UAMPS shall promptly pay over any refund of an Imposition received by it to the City.

*Section 3.6. Compliance with Law* *.* The City agrees that it will, throughout the term of this Agreement and at its sole cost and expense, operate and maintain the Project in compliance, in all material respects, with all federal, state and local statutes, codes, laws, acts, ordinances, orders, judgments, decrees, rules, regulations and authorizations, whether foreseen or unforeseen, ordinary or extraordinary, which shall now or at any time hereafter be binding upon or applicable to the Project or the City’s operation and maintenance of the Project or any portion thereof (including without limitation those relating to zoning, land use, environmental protection, air, water and land pollution, toxic wastes, hazardous wastes, solid wastes, wetlands, health, safety, equal opportunity, minimum wages, and employment practices) (the *“Legal Requirements”*), and will observe and comply with all conditions, requirements, and schedules necessary to preserve and extend all rights, licenses, permits (including, without limitation, zoning variances, special exception and non‑conforming uses), privileges, franchises and concessions in connection with the operation and maintenance of the Project or any portion thereof. The City may in good faith contest the validity or applicability of any Legal Requirement. Notwithstanding anything herein to the contrary, the City may withhold compliance with such Legal Requirement during such contest so long as such noncompliance does not adversely affect the validity and enforceability of this Agreement or the other obligations of the City hereunder.

*Section 3.7. Damage, Destruction and Condemnation* .

(a) In the event that at any time during the term of this Agreement the whole or portion of the Project shall be damaged or destroyed, or taken or condemned by a competent authority for any public use or purpose, or by agreement between UAMPS and those authorized to exercise such right, or if the temporary use of the Project or any portion thereof shall be so taken by condemnation or agreement (a *“Loss* *Event”*):

(i) UAMPS shall have no obligation to rebuild, replace, repair or restore the Project,

(ii) there shall be no abatement, postponement or reduction in the Capacity Payments or other amounts payable by the City under this Agreement, and

(iii) the City will promptly give written notice to UAMPS of any Loss Event of greater than $500,000 or any Loss Event that will permanently result in a loss of use of the Project, which notice shall generally describe the nature and extent of such Loss Event.

(b) The City shall not be obligated to rebuild, replace, repair or restore the Project or any portion thereof or purchase the Project or any portion thereof following a Loss Event so long as this Agreement shall remain valid, binding and enforceable on the City following such Loss Event. If the City elects to rebuild, replace, repair or restore the Project or any portion thereof following a Loss Event, it shall do so with funds other than funds provided or otherwise derived under this Agreement.

(c) Any proceeds of insurance or condemnation awards or recoveries of claims against contractors (or an amount equal to such proceeds, awards or recoveries) received by UAMPS or the City shall be, as directed by the City, deposited into the Project Fund or the Bond Fund for use to pay or reimburse the costs of rebuilding, replacing, repairing or restoring the related portions of the Project, for the prepayment of Capacity Payments thereafter coming due, or as may otherwise be permitted in the Bond Documents; provided, however, that, if the foregoing proceeds (or amounts equal thereto) are received by the City in respect of facilities that were a part of the Project when the damage or the basis for the claim originally arose but which facilities were subsequently removed from the definition of the Project, any proceeds (or amounts equal to such proceeds) received by the City shall be retained by the City as its own funds.

*Section 3.8. Discharge of Liens* *.*

(a) Except as permitted by Section 7.3, the City shall not sell, assign, encumber (other than Permitted Encumbrances), convey or otherwise dispose of its interest in the Project or any portion thereof during the term of this Agreement, without the prior written consent of UAMPS, and any purported disposition without such consent shall be void; if any lien, encumbrance or charge is filed or asserted, or any judgment, decree, order, levy or process of any court or governmental body is entered, made or issued or any claim (such liens, encumbrances, charges, judgments, decrees, orders, levies, processes and claims being herein collectively called *“Liens”*), whether or not valid, is made against the Project or any portion thereof or the interest therein of UAMPS or the City or against any of the Capacity Payments or other amounts payable under this Agreement or the interest of the City under this Agreement other than Liens for Impositions not yet payable, or payable without the addition of any fine, penalty, interest or cost for non‑payment, Permitted Encumbrances, or Liens being contested as permitted by Section 3.8(b), the City forthwith upon receipt of notice of the filing, assertion, entry or issuance of such Lien (regardless of the source of such notice) shall give written notice thereof to UAMPS and take all action (including the payment of money and/or the securing of a bond) at its own cost and expense as may be necessary or appropriate to obtain the discharge in full thereof and to remove or nullify the basis therefor. Nothing contained in this Agreement shall be construed as constituting the express or implied consent to or permission of UAMPS for the performance of any labor or services or the furnishing of any materials that would give rise to any Lien against UAMPS’ interest in the Project.

(b) So long as no Event of Default has occurred and is continuing hereunder, the City may at its sole expense contest by appropriate action conducted in good faith and with due diligence, the amount or validity or application, in whole or in part, of any Lien.

(c) Notwithstanding the preceding paragraphs, the City shall not be required to discharge Liens against the interest of the City in the Project as long as this Agreement will remain valid, binding and enforceable. Nothing herein shall be construed as limiting the right of the City to use the generating capacity, output and services provided by the Project in connection with the operations of the System or to sell the capacity and output of the Project to third parties to the extent permitted by the Tax Certificate.

*Section 3.9. Covenant of Quiet Enjoyment* *.* So long as the City shall pay the Capacity Payments and all other sums payable by it under this Agreement and shall duly observe all the covenants, stipulations and agreements herein contained obligatory upon it and no Event of Default hereunder shall have occurred and be continuing, the City shall have, hold and enjoy, during the term hereof, peaceful, quiet and undisputed possession of the Project, and UAMPS (at the sole cost and expense of the City) shall from time to time take all necessary action to that end, subject to Permitted Encumbrances.

*Section 3.10. No Warranty of Condition or Suitability* *.* UAMPS has not and does not make any representation or warranty whatsoever, either express or implied, with respect to the merchantability, condition, fitness, design, operation or workmanship of the Project or any portion thereof, the fitness of the Project for any particular purpose, the quality or capacity of the materials in the Project, or the suitability of the Project for the purposes or needs of the City or the extent to which proceeds derived from the sale of the Bonds will be sufficient to pay the cost of the Project. The City is satisfied that the Project is suitable and fit for its purposes. UAMPS shall not be liable in any manner whatsoever to the City or any other person for any loss, damage or expense of any kind or nature caused, directly or indirectly, by the property of the Project or the use or maintenance thereof or the failure of operation thereof, or the repair, service or adjustment thereof, or by any delay or failure to provide any such maintenance, repairs, service or adjustment, or by any interruption of service or loss of use thereof or for any loss of business howsoever caused.

Article IV  
  
Covenants and Agreements of the City

*Section 4.1. Compliance with Agreement* *.* The City will punctually pay the Capacity Payments and the other amounts payable hereunder in strict conformity with the terms of this Agreement. The City will faithfully observe and perform all the agreements, conditions, covenants and terms contained herein required to be observed and performed by it, and will not terminate this Agreement for any cause whatsoever, including, without limiting the generality of the foregoing, any acts or circumstances that may constitute failure of consideration, destruction of or damage to the Project, condemnation of the Project by any governmental entity, commercial frustration of purpose, any change in the tax or other laws of the United States of America or of the State or any political subdivision of either or any failure of UAMPS to observe or perform any agreement, condition, covenant or term required to be observed and performed by it contained herein, whether express or implied, or any duty, liability or obligation arising out of or connected with this Agreement.

*Section 4.2. No Prior Liens on Revenues* *.* The City covenants and agrees that it will not enter into any agreement, make any pledge, grant any lien or otherwise take any action with the effect that (i) except as permitted in Section 2.4(b), the Capacity Payments do not constitute items of Operating Expenses, (ii) the other amounts payable by the City hereunder do not constitute items of Operating Expenses or (iii) the Operating Expenses are not payable as a first charge on the Revenues.

*Section 4.3. Against Sale or Other Disposition of Property* *.* The City will not sell, lease, encumber or otherwise dispose of any System properties in any manner that would materially adversely affect the efficient and proper operation of the System or the Revenues to be produced by the operation of the System; *provided that* any real or personal property which has become nonoperative, obsolete or worn out or which is not needed for the efficient and proper operation of the System may be sold, exchanged or disposed of by the City.

*Section 4.4. Maintenance and Operation of the System* *.*

(a) The City will maintain and preserve the System in good repair and working order at all times and will operate the System in an efficient and economical manner and will pay all Operating Expenses of the System as they become due and payable.

(b)The City will pay and discharge any and all lawful claims for labor, materials or supplies which, if unpaid, might become a lien on the Revenues, the System or any part thereof.

(c) The City will comply with, keep, observe and perform all agreements, conditions, covenants and terms, expressed or implied, required to be performed by it contained in all contracts for the use of the System and all other contracts affecting or involving the System to the extent that the City is a party thereto.

*Section 4.5. Rates and Charges* *.*

(a) The City shall establish, fix, prescribe and collect rates and charges for the sale or use of the electric power and energy and related services provided by the System which, together with other available income, are reasonably expected to produce Revenues at least sufficient to pay in each fiscal year of the City all Operating Expenses of the System, the Capacity Payments and all other amounts payable by the City under this Agreement, and all other amounts payable out of the Revenues, including debt service on any Revenue Bonds issued by the City. The City will review such rates and charges from time to time, and upon any material change to the operations of circumstances of the System and shall promptly revise such rates and charges as necessary to comply with the foregoing requirement.

(b) Except in connection with the receipt of federal or State funding, or as required by law or as a condition to the acquisition or operation of the Project or System, the City will not permit any part of the System, or any facility thereof, to be used, or taken advantage of, free of charge by any person, firm or corporation, or by any public agency (including the United States of America, the State of Utah and any public corporation, political subdivision, city, county, district or agency of any thereof).

(c) The City shall have in effect at all times rules and regulations (i) requiring all users of the electricity and other services provided by the System to pay the rates, fees and charges imposed by the City and (ii) providing for the billing and payment thereof.

*Section 4.6. Insurance* *.*

(a) Subject to the condition that insurance is obtainable at reasonable prices and upon reasonable terms and conditions, the City will procure and maintain insurance on the System and the Project and public liability insurance in such amounts and against such risks as are usually insurable in connection with similar enterprises and are normally carries by municipalities and other public power systems in the operation of similar properties, *provided that* the City may in its discretion be a self-insurer of any risk. [To be discussed: All policies of insurance on the Project shall name UAMPS as an additional insured.]

(b) The City will secure and maintain adequate fidelity insurance or bonds on all officers and employees handling or responsible for the funds of the System.

*Section 4.7. Books and Accounts* *.*

(a) The City will keep proper books of record and accounts of the System in accordance with generally applicable account principles as applied to the City in which complete and correct entries shall be made of all transactions relating to the System and the Revenues. Such books of record and accounts shall at all times during normal business hours be subject to inspection by UAMPS or its representatives authorized in writing.

(b) UAMPS shall not be required to review or inspect, and shall not be deemed to have notice of, the contents of the books and records of the City.

*Section 4.8. Protection of Security and Rights of UAMPS* *.* The City will preserve and protect the security and the rights of UAMPS to the Capacity Payments hereunder and will warrant and defend such rights against all claims and demands of all persons.

*Section 4.9. Payment of Taxes; Compliance with Governmental Regulations* *.* The City will pay and discharge all taxes, assessments and other governmental charges, if any, which may hereafter be lawfully imposed upon the System or any part thereof or upon the Revenues when the same shall become due. The City will duly observe and conform with all valid regulations and requirements of any governmental authority relative to the operation of the System or any part thereof, but the City shall not be required to comply with any regulations or requirements so long as the validity or application thereof shall be contested in good faith.

*Section 4.10. Expenses; Indemnity* *.*

(a) The City shall pay all reasonable costs and expenses of UAMPS incurred in connection with this Agreement.

(b) To the extent permitted by law, the City shall at all times protect, indemnify and hold the UAMPS Indemnified Parties harmless of, from and against

(i) all costs and expenses arising from or relating to compliance with environmental laws and regulations and orders of governmental agencies applicable to the Project or arising from or relating to mitigation, remediation, or abatement of environmental impacts,

(ii) any and all claims (whether in tort, contract or otherwise), demands, expenses (including reasonable attorney’s fees) and liabilities for any loss, damage, injury and liability of every kind and nature and however caused, including any liability arising from failure to comply with applicable environmental laws, regulations or orders applicable to the Project, and

(iii) taxes of any kind and by whomsoever imposed on UAMPS in respect of the Project or the Bonds,

in each case arising from or relating to the Project or resulting from, arising out of, or in any way connected with the financing of the costs of the Project; *provided, however,* that the City shall have no indemnification obligation under this Section for any such costs, expenses, claims, demands, taxes or liabilities arising from the intentional misrepresentation or willful misconduct of UAMPS or the UAMPS Indemnified Parties. The indemnification set forth in this Section shall be binding upon the City for any and all claims, demands, expenses, liabilities and taxes set forth herein and shall survive the expiration or termination of this Agreement.

*Section 4.11. Tax Covenants* .

(a) The City shall not take any action or permit to be taken any action within its control which would cause or which, with the passage of time if not cured would cause, the interest on the Bonds to become includable in gross income for federal income tax purposes. To that end, the City hereby covenants that it will not take or fail to take any action that would cause the Bonds to be (a) “arbitrage bonds” within the meaning of Section 148 of the Code, (b) “private activity bonds” within the meaning of Section 141 of the Code, or (c) “federally guaranteed” within the meaning of Section 149(b) of the Code.

(b) Without limiting the generality of the foregoing paragraph, the City further covenants and agrees that:

(i) it will at all times comply with the provisions of the Tax Certificate and the rebate requirements contained in Section 148(f) of the Code;

(ii) no use will be made of the proceeds of the Bonds, or any funds or accounts of the City which may be deemed to be proceeds of the Bonds, pursuant to Section 148 of the Code and applicable regulations (proposed or promulgated) under which, if such use had been reasonably expected on the date of issuance of the Bonds, would have caused the Bonds to be classified as “arbitrage bonds” within the meaning of Section 148 of the Code;

(iii) it will not sell or dispose of the capacity and output of the System, including the Project, in such manner that such sale, disposition or use would cause the Bonds to be “private activity bonds” described in Section 141 of the Code or“arbitrage bonds” described in Section 148 of the Code; and

(iv) it will not take any action that will adversely affect the exemption from federal income taxation of interest on the Bonds, nor will it omit to take any action necessary to preserve the exclusion from federal gross income of interest on the Bonds.

Pursuant to these covenants, the City obligates itself to comply throughout the term of the Bonds with the requirements of Section 103 of the Code and the regulations proposed or promulgated thereunder.

(c) The City and UAMPS recognize that UAMPS is issuing the Bonds and has certain responsibilities related to the maintenance of the exemption from federal income taxation of interest on the Bonds. The City agrees that it will cooperate with and assist UAMPS (at the City’s expense) in taking actions related to the Bonds.

(d) UAMPS will promptly notify the City if the Internal Revenue Service (the *“IRS”*) contacts UAMPS concerning the Bonds and will forward any written communications from the Internal Revenue Service concerning the Bonds to the City. In the case of any inquiries or requests from the Internal Revenue Service for information concerning the Bonds, the City will cooperate with UAMPS and take all reasonable actions requested by UAMPS (at the expense of the City) to respond to such inquiries in a timely fashion.

(e) UAMPS and the City recognize that the IRS or another regulatory entity may undertake an examination of the Bonds. In the event that UAMPS is notified of such an examination, UAMPS shall notify the City. UAMPS will (at the expense of the City) coordinate the defense of such examination and will determine if counsel should be hired and, if so, which counsel. Except to the extent that UAMPS determines that another party should undertake a response, UAMPS will be responsible for compiling answers to any information or document request that might be presented to it or the City in the course of any such examination. If an examination cannot be closed without a closing agreement, UAMPS will use reasonable efforts to reach an acceptable closing agreement with such regulatory agency and to obtain all required City and UAMPS approvals of such closing agreement.

(f) The IRS and other regulatory agencies may conduct compliance checks from time to time. As part of such compliance check, the IRS or another regulatory agency may send questionnaires to UAMPS or to the City. UAMPS will promptly advise the City concerning any such compliance check. UAMPS (at the expense of the City) will compile a response to any compliance check and may hire counsel to assist in the response to a compliance check. The City will advise UAMPS of any such compliance check promptly after receiving notice thereof.

(g) The City and UAMPS recognize that if there is a violation of the covenants of the City related to the maintenance of the tax exmption of interest on the Bonds or a violation of the covenants of the City related to the maintenance of the tax-exempt status of the Bonds, then UAMPS may be able to enter into a voluntary closing agreement with the IRS to preserve the favorable tax status of the Bonds. UAMPS will consult with the City with respect to whether a voluntary closing agreement is desirable and possible. UAMPS will be responsible for the negotiation of any voluntary closing agreement and may retain or consult with counsel in connection with any such negotiation. The City shall pay or reimburse UAMPS for any settlement amount and the costs and fees, including fees of counsel, incurred in obtaining such settlement.

*Section 4.12. Further Assurances* *.* The City will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered such further acts, instruments, conveyances, transfers and assurances, including Uniform Commercial Code financing statements, if any, at the sole cost and expense of the City, as UAMPS deems reasonably necessary or advisable for the implementation, effectuation, correction, confirmation or perfection of this Agreement.

Article V  
  
Events of Default; Remedies

*Section 5.1. Events of Default* *.* Any one or more of the following events shall constitute an “Event of Default” hereunder:

(a) Failure of the City to pay any Capacity Payment that has become due and payable by the terms of Section 2.3(a); and

(b) Failure of the City to pay any amount due hereunder (other than under Section 2.3(a)) and continuance of such failure for thirty days after notice of such failure is given to the City by UAMPS; and

(c) bankruptcy, reorganization, arrangement, insolvency or liquidation proceedings, including proceedings under Title 11, Chapter 9, United States Code or other proceedings for relief under any federal or state bankruptcy law or similar law for the relief of debtors, are instituted by or against the City and, if instituted against the City, said proceedings are consented to or are not dismissed within thirty days after such institution.

*Section 5.2. Remedies on Default* . Whenever any Event of Default referred to in Section 5.1 hereof shall have occurred and be continuing, UAMPS, subject to the second succeeding paragraph of this Section, may take whatever action at law or in equity permitted by law to be taken against the City as may appear necessary or desirable to collect the amounts then due and thereafter to become due under this Agreement.

UAMPS, as owner of the Project, shall have the right to re‑enter and take possession of the Project, to sell or lease the Project, to terminate this Agreement and to exclude the City from possession of the Project upon the occurrence of an Event of Default under this Agreement. No action taken pursuant to this Section shall, except as expressly provided herein, relieve the City from the City’s obligations hereunder, all of which shall survive any such action.

Any amounts collected pursuant to action taken under this Section shall be deposited in the Bond Fund and applied in accordance with the provisions of the Bond Documents.

*Section 5.3. Remedies Cumulative* . The rights and remedies of UAMPS under this Agreement shall be cumulative and shall not exclude any other rights and remedies of UAMPS allowed by law or in equity with respect to any default under this Agreement. Failure by UAMPS to insist upon the strict performance of any of the covenants and agreements herein set forth or to exercise any rights or remedies upon default by the City hereunder shall not be considered or taken as a waiver or relinquishment for the future of the right to insist upon and, to the extent permitted by law, to enforce by mandatory injunction, specific performance or other appropriate legal remedy strict compliance by the City with all of the covenants and conditions hereof, or of the rights to exercise any such rights or remedies, if such default by the City be continued or repeated.

*Section 5.4. No Additional Waiver Implied by One Waiver* *.* In the event any covenant or agreement contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder. No waiver shall be binding unless it is in writing and signed by the party making such waiver. No course of dealing between UAMPS and the City or any delay or omission on the part of UAMPS in exercising any rights hereunder shall operate as a waiver.

*Section 5.5. Agreement to Pay Attorneys’ Fees and Expenses* *.* In the event the City should default under any of the provisions of this Agreement, and UAMPS should employ attorneys and/or incur other expenses for the collection of Capacity Payments or other amounts payable hereunder or the enforcement of performance or observance of any obligation or agreement on the part of the City herein contained, the City agrees that it will on demand therefor pay to UAMPS the reasonable fees and disbursements of such attorneys, and such other expenses so incurred, including fees and expenses on appeal.

Article VI  
  
Options

*Section 6.1. Options* *.*

(a) The City has the option, at any time and from time to time, to make advance Capacity Payments which, at the direction of the City, shall be deposited into the Bond Fund and held to make the next maturing scheduled payments of principal and interest on the Bonds or applied to redeem all or a portion of the Bonds, all in accordance with the terms of the Bond Documents. The City has the option, at any time and from time to time, to purchase all or any portion of the Project by making a purchase option payment equal to the amount necessary to purchase, redeem or prepay all or the applicable portion of the Bonds on the next purchase, redemption or prepayment date provided for in the Bond Documents. The City shall exercise its option to make such advance Capacity Payments or such purchase option by delivering a written notice of an Authorized Representative of the City to UAMPS setting forth (i) the amount of the advance Capacity Payment or purchase option payment, (ii) the principal amount of Bonds outstanding, if any, requested to be redeemed with such advance Capacity Payment or purchase option payment (which principal amount shall be in such minimum amount or integral multiple of such amount as shall be permitted in the Bond Documents), and (iii) the date on which such principal amount of Bonds are to be purchased, redeemed or prepaid as provided in the Bond Documents. Such advance Capacity Payment to be applied to redeem Bonds or to make any such purchase or prepayment option payment shall be paid in legal tender on or before the redemption, purchase or prepayment date and shall be an amount which, when added to the amount on deposit in the Bond Fund and available therefor, will be sufficient to pay the Redemption Price of the Bonds to be redeemed, together with interest to accrue on the Bonds to be redeemed to the date fixed for redemption, purchase or prepayment and all expenses of UAMPS (including reasonable fees and expenses of counsel to UAMPS) in connection with such redemption, purchase or prepayment. UAMPS agrees to take all actions required to be taken by it to effect such redemption, purchase or prepayment as and to the extent provided in the Bond Documents. After any purchase of a portion of the Project, the Capacity Payments payable pursuant to Section 2.3(a) may be reduced by the percentage equal to the percentage that the portion of the Project purchased is to the entire Project or by such other amount as may be agreed to by UAMPS and the City; *provided,* that the remaining amount of Capacity Payments payable may not be less than an amount sufficient to pay debt service on the Bonds when due.

(b) Nothing in this Section shall be deemed to require that the City exercise an option to purchase the Project or prepay the Capacity Payments, or any portion thereof, or in any way to limit the City’s right to effect a change in the definition of the Project or the right of the parties hereto to agree to effect an amendment to the definition of the Project, as provided in Section 3.1(c).

*Section 6.2. Termination of Agreement* . After full payment of the Bonds or provision for the payment in full thereof having been made in accordance with the Bond Documents, the City may terminate this Agreement by paying all amounts due and payable under this Agreement and by giving UAMPS notice in writing of such termination and thereupon such termination shall forthwith become effective, subject, however, to the survival of the obligations of the City under Section 4.10.

*Section 6.3. Conveyance of Title* . At the closing of any purchase of the Project or any portion thereof pursuant to Article VI hereof, UAMPS will upon receipt of the purchase price deliver to the City good title to the property being purchased evidenced in writing by a bill of sale or other instrument of conveyance, as such property then exists, subject to the following: (i) those license and encumbrances (if any) to which said property was subject when conveyed to UAMPS; (ii) those Liens resulting from the failure of the City to perform or observe any of the agreements on its part contained in this Agreement; and (iii) Permitted Encumbrances other than this Agreement and the Bond Documents.

Article VII  
  
Miscellaneous

*Section 7.1. Bond Documents; Amendment* *.* UAMPS shall have and may exercise all the rights, powers and authority granted to it in the Bond Documents, and may from time to time modify, amend or supplement the Bond Documents in accordance with the provisions thereof, *provided that* no change to the Bond Documents may increase the Capacity Payments payable by the City without its consent.

*Section 7.2. Force Majeure* . In case by reason of force majeure either party hereto shall be rendered unable wholly or in part to carry out its obligations under this Agreement, then except as otherwise expressly provided in this Agreement, if such party shall give notice and full particulars of such force majeure in writing to the other party within a reasonable time after occurrence of the event or cause relied on, the obligations of the party giving such notice (other than the obligations of the City to make payments required to be made hereunder), so far as they are affected by such force majeure, shall be suspended during the continuance of the inability then claimed which shall include a reasonable time for the removal of the effect thereof, but for no longer period, and such party shall endeavor to remove or overcome such inability with all reasonable dispatch. The term “force majeure,” as employed herein, shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, orders of any kind of the Government of the United States or of the State or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, washouts, droughts, arrest, restraining of government and people, civil disturbances, explosions, partial or entire failure of utilities, shortages of labor, material, supplies or transportation, or any other similar or different cause not reasonably within the control of the party claiming such inability. It is understood and agreed that the settlement of existing or impending strikes, lockouts or other industrial disturbances shall be entirely within the discretion of the party having the difficulty and that the above requirements that any force majeure shall be reasonably beyond the control of the party and shall be remedied with all reasonable dispatch shall be deemed to be fulfilled even though such existing or impending strikes, lockouts and other industrial disturbances may not be settled but could have been settled by acceding to the demands of the opposing person or persons.

*Section 7.3. Assignment or Sublease* *.* The City may not assign, partially assign or transfer this Agreement or sublet the whole or any part of the Project without the written consent of UAMPS, which consent may require that the City shall remain liable to UAMPS for the payment of all Capacity Payments and other payments hereunder and for the full performance of all of the terms, covenants and conditions of this Agreement. The City shall furnish or cause to be furnished to UAMPS a copy of any such assignment, transfer or sublease in substantially final form not later than thirty days prior to the date of execution thereof, together with its request that UAMPS consent thereto. In connection with any such consent, UAMPS may require that any funds received by or on account of the City in connection with a sublease, assignment, partial assignment, or transfer in accordance with this Section be deposited into the Bond Fund and applied to the payment of the prepayment of the Capacity Payments.

*Section 7.4. Amendments* *.* This Agreement may be amended only by a written amendment signed by the parties.

*Section 7.5. Notices* . All notices, certificates or other communications hereunder shall be deemed sufficiently given if (a) mailed by United States certified mail, return receipt requested, postage prepaid, or (b) if sent by a nationally recognized overnight courier, or (c) delivered personally, addressed as follows:

|  |  |
| --- | --- |
| (a) To UAMPS: | Utah Associated Municipal Power Systems 155 North 400 West, Suite 480 Salt Lake City, Utah 84103 Attention: Director of Corporate and Member Relations |

|  |  |
| --- | --- |
| (b) To the City: | Payson City Attention: David C. Tuckett, City Manager 439 West Utah Avenue Payson, Utah 84651 |

UAMPS and the City may, by notice given hereunder to each of the others, designate any further or different addresses to which subsequent notices, certificates or other communications to them shall be sent.

Any notice, certificate or other communication hereunder shall, except as may expressly be provided herein, be deemed to have been given or served two days after the date the same shall be deposited in the United States mail, postage prepaid, in the manner aforesaid or one day after the date that the same shall be deposited with a nationally recognized overnight courier or on the date of delivery or refusal thereof, if delivered personally.

*Section 7.6. Severability* . If any clause, provision or Section of this Agreement be ruled invalid by any court of competent jurisdiction, the invalidity of such clause, provision or Section shall not affect any of the remaining provisions hereof.

*Section 7.7. Inspection of Project* *.*

(a) Upon reasonable notice and with monitoring by the City, the City shall permit UAMPS and its agents or representatives to inspect the Project at all reasonable times during business days and business hours for the purpose of determining whether or not the City is in compliance with its obligations hereunder. UAMPS shall not have any duty to inspect the Project.

(b) Nothing in this Section or elsewhere in this Agreement shall imply any duty on the part of UAMPS to do any work, and performance thereof by UAMPS shall not constitute a waiver of the City’s default in failing to perform the same.

*Section 7.8. Effective Date; Counterparts* *.* This Agreement shall become effective upon its execution and delivery. It may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

*Section 7.9. Binding Effect* *.* This Agreement shall inure to the benefit of, and shall be binding upon, UAMPS and the City and their respective successors and assigns. The Lender is hereby made an express third-party beneficiary of this Agreement.

*Section 7.10. Law Governing* *.* This Agreement shall be governed by and construed in accordance with the laws of the State, without reference to any choice of law doctrine that would result in the application of the laws of another state.

*Section 7.11. Limited Recourse* *.*

(a) No recourse under any obligation, covenant or agreement of UAMPS contained in this Agreement shall be had against any appointed officials, employees, attorneys, contractors, and other agents of UAMPS, or any officer, official, agent or employee of the State or any department, board or agency of the foregoing, by the enforcement of any assessment or by any legal or equitable proceeding, by virtue of any statute or otherwise; it being expressly agreed and understood that this Agreement is solely a limited obligation of UAMPS, payable solely from the Capacity Payments and receipts derived from payments made by the City pursuant to this Agreement, which revenues and receipts will be pledged and assigned under the Bond Documents for the payment of the Bonds. No personal liability whatever shall attach to or be incurred by the appointed officials, employees, attorneys, contractors, and other agents of UAMPS, or any officer, official, agent or employee of the State or any department, board or agency of the foregoing, or any of them under or by reason of any of the obligations, covenants or agreements of UAMPS contained in this Agreement, or implied therefrom, and that any and all personal liability for breaches by UAMPS of any of such obligations, covenants or agreements either at common law or at equity, or by statute or constitution, of every such officer, director or employee, or any officer, official, agent or employee of the State or any department, board or agency of the foregoing, is hereby expressly waived as a condition of and in consideration for the execution of this Agreement; provided, however, that nothing in this Section shall relieve any of the foregoing persons or entities from any liability arising from his, her or its willful misconduct or intentional misrepresentation.

(b) Anything contained in this Agreement to the contrary notwithstanding, any obligation UAMPS may incur in connection with the undertaking of the Project for the payment of money shall not be deemed to constitute a debt or general obligation of UAMPS, the State or any political subdivision thereof, but shall be payable solely from the Capacity Payments and the other amounts payable by the City under this Agreement. No provision in this Agreement or any obligation herein imposed upon UAMPS, or the breach thereof, shall constitute or give rise to or impose upon UAMPS, the State or any political subdivision thereof a pecuniary liability or a charge upon its full faith and credit or taxing powers or any revenues of UAMPS other than the Capacity Payments and other amounts payable by the City under this Agreement.

*Section 7.12. Information Security* *.*

(a) It is possible that information that is provided to UAMPS by the City or that comes into the possession of UAMPS as a result of its ownership of the Project during the performance of this Agreement, may contain critical and sensitive information about the Project. *“Project Information”* means information about the Project that is so designated at any time by the City in writing to UAMPS.

(b) The City hereby designates the following information as Project Information:

(i) Information describing the precise location (survey coordinates) of the Project; and

(ii) Information relating to the design, operation, maintenance or construction of the Project; and

(iii) Information describing schedules for the design, operation, maintenance or construction of the Project, and

(iv) Information describing engineering or security vulnerabilities.

Project Information excludes any of the foregoing information if it has otherwise been made available to the public by the City or with the City’s consent.

(c) UAMPS may disseminate Project Information among officials, employees, attorneys, contractors, and other agents only as may be necessary in the performance of this Agreement. UAMPS shall, to the extent permitted by applicable law, including the Utah Government Records Access and Management Act, ensure that Project Information is not distributed, shared, or otherwise made accessible to others not involved in the performance of this Agreement other than with the prior consent of the City or pursuant to a valid final order or direction by a judicial, regulatory, administrative or other governmental body having jurisdiction thereof. If UAMPS is requested to disclose any Project Information pursuant to a judicial, regulatory, administrative or other governmental process, UAMPS shall immediately notify the City. The City may thereupon defend against disclosure at the City’s expense.

*Section 7.13. No Broker* . Each of the parties represents to the other that it has not dealt with any broker in connection with this transaction. If any claim is made by any broker who shall claim to have acted or dealt with the City or UAMPS in connection with this transaction, the City or UAMPS, as the case may be, will be responsible for payment of the brokerage commission, fee or other compensation to which such broker is entitled.

*Section 7.14. Entire Agreement* . This Agreement contains all the promises, agreements, conditions, inducements and understandings between UAMPS and the City relating to the Project and there are no promises, agreements, conditions, understandings, inducements, warranties or representations, oral or written, expressed or implied, between them other than as herein set forth.

*Section 7.15. Date of Agreement for Reference Purposes Only* . The date of this Agreement shall be for reference purposes only and shall not be construed to imply that this Agreement was executed on the date first above written.

In Witness Whereof, each party hereto has caused this Agreement to be executed in its name and on its behalf by its duly authorized officer as of the date first written above.

Utah Associated Municipal Power Systems

By:

Name: Les Williams

Title: Chairman

[Seal]

Attest:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: Jackie Coombs

Title: Assistant Secretary

Payson City, Utah

By:

Name: William R. Wright

Title: Mayor

[Seal]

Attest:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name: Kim E. Holindrake

Title: City Recorder

Exhibit A

Description of the Project\*

The following table shows the principal components of the Project and their costs:

|  |  |
| --- | --- |
| Project Component | Cost |
| *Procurement and Construction Components* |  |
| *Wheeler* | $29,736,993.87\* |
| *Power Engineers (Substation)* | 2,580,000.00 |
|  |  |
| *Payson City Components\*\** |  |
| Gas interconnection, gas line + gas train |  |
| Electric interconnection + transformers |  |
| Site grading and preparation |  |
| Utility interconnections (water + sewer) |  |
| Other  [NTD: Update list of City Components] |  |
| Total Cost: |  |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | |
| \* Payable on milestone dates per Section 4.2 of the Procurement and Constriction Agreement. | |
| \*\* Estimated. | |

Schedule I[[2]](#footnote-2)\*

Capacity Payment Schedule

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1. \* Capitalized terms used but not defined in the Recitals have the meanings assigned such terms in Section 1.1. [↑](#footnote-ref-1)
2. \* To be completed as provided in Section 2.5. [↑](#footnote-ref-2)