**POWER GENERATION AND BALANCE OF PLANT AGREEMENT**

1. **Introduction.**

This Power Generation and Balance of Plant Agreement (“Agreement”) is entered into by and between Utah Associated Municipal Power Systems, a political subdivision of the State of Utah (“UAMPS” or “Client”) and Wheeler Machinery Co., a Utah corporation (“Wheeler”). This Agreement shall be binding and effective as of the date of signing, (the “Effective Date”).

1. **Recitals.**

Whereas, Payson City Power, Utah (“Payson”) has determined that the power needs of the customers served by its municipal electric utility system require the construction of the power generation plant described herein;

Whereas, Wheeler submitted a proposal for the “Payson City Power Facility” (the “Proposal”) to Payson for the construction and equipping of a power generation facility consisting \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (as more fully described in the Proposal, the “Project”);

Whereas, Payson is a member of UAMPS and has requested that UAMPS undertake, own and finance the Project on behalf of Payson and sell the capacity, output and services of the Project to Payson; and

Whereas, UAMPS will appoint Payson as its agent in connection with various matters relating to the Project and is willing to enter into this Agreement for the benefit of Payson.

Therefore, in consideration of the promises, covenants, and conditions set forth in this Agreement, and in further consideration of the execution of this Agreement and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Client and Wheeler agree as follows.

1. **Scope of Work.**

3.1 Wheeler shall provide all of the materials and equipment, including six (6) Caterpillar G3520H Natural Gas generator sets (“Generators”), and perform all of the work and services described in the Proposal in accordance with the specifications set forth in the Proposal (“Scope of Work”). The Proposal is attached hereto as Exhibit “A” and incorporated herein by this reference. The Scope of Work shall not include those items that are excluded under the “Clarifications and Assumptions” section of the Proposal, including water, sewer, substation improvements and site grading, and such excluded items shall be provided by Payson under its agreements with UAMPS.

3.2 The Scope of Work shall include Wheeler’s standard start-up, implementation and testing procedures for the Project (“Commissioning”). The testing procedures shall be sufficient to establish that the Generators are capable of performing in accordance with the technical specifications set forth in the Proposal as well as the requirements of the air quality permit for the Project. Wheeler shall permit UAMPS and Payson (or their consultants) to witness the performance testing and to review the results thereof.

3.3 The occurrence of the Effective Date of this Agreement shall constitute UAMPS’ notice to Wheeler to proceed with the Scope of Work.

3.4 Wheeler has previously provided the “Estimated Timeline Payson City Power,” setting forth its estimated timeline for the Scope of Work and the completion of the Project. Within seven business days of the Effective Date, Wheeler shall provide to UAMPS an update to such estimated timeline. UAMPS shall have seven business days after its receipt of the updated timeline to submit any questions or issues to Wheeler. The parties shall cooperate with one another in resolving any issues with respect to the timeline. Wheeler agrees to (a) perform the Scope of Work in accordance with the final timeline agreed to by the parties (the “Final Timeline”) and (b) give prompt written notice to UAMPS of any events or circumstances, including force majeure events, that it reasonably expects to delay the completion of the Project by thirty or more days.

3.5. The Final Timeline shall establish a date for the completion of Commissioning and the availability of the Project for commercial operation (the “Final Completion Date”). The target Final Completion Date is June 1, 2026. The parties acknowledge that the Covid-19 pandemic and recent supply chain issues have made it difficult to meet completion dates in the construction industry. Wheeler will use commercially reasonable efforts, in all circumstances, to complete Commissioning and to make the Project available for commercial operation by the Final Completion Date. Those efforts will include, among other things, reasonable expedited shipping fees, reallocation of human resources to expedite the Project, and longer procurement lead times.

3.6 Wheeler will be responsible for keeping the Project site in a safe and orderly condition and for cleaning up its work on the Project on a regular basis.

3.7 Upon discovery of any hazardous materials on the Project site, Wheeler shall cease work, notify Client and Payson immediately, and allow Client and Payson to contract with a properly licensed and a qualified hazardous material contractor to deal with such materials.

3.8 No change orders or contract additions or subtractions will be made unless agreed to in writing by Payson City’s representative or UAMPS representative, and Wheeler’s representative. All change orders must be executed in writing before any agreement modifications are in place.

1. **Consideration.**

4.1 Client agrees to the following pricing model including fixed cost for Caterpillar & associated equipment and Cost plus model for all other related costs. The Caterpillar fixed cost will be $17,437,796.17, includes the following scope, not to adjust after the signing of this agreement:

4.1.1- Caterpillar G3520H Generator Sets, freight, installation, start-up/commissioning

4.1.2 – Caterpillar Paralleling Switchgear, freight, start-up/commissioning

4.1.3 – Safety Power Selective Reduction Catalysts, freight, start-up/commissioning

4.1.4 – Sutton Stromart radiators, freight, start-up/commissioning

4.1.5 – Balance of Plant MCCs and Distribution Panels, freight, start-up/commissioning

4.2 Payson agrees to pay Wheeler according to the following schedule. Price includes use taxes if applicable. Progress payments shall be calculated as percentages of the target project contract value (specified below in Section 4.4) and be due and payable according to the following milestones:

|  |  |
| --- | --- |
| 10% On Contract Signing (net 30 days) |  |
| 27.5% On 1st Genset Delivery to Site |  |
| 27.5% On Last Genset Delivery to Site |  |
| 15% Begin Commissioning |  |
| 20% On-Line/Retention/Reconciliation |  |
|  |  |

4.2All other related costs for the Project are equal to Wheeler’s cost, plus a margin of 10% of cost for allocated, direct expenses, plus margin of 7% of cost for Wheeler’s profit, and Caterpillar direct cost. Wheeler will provide Payson with visual inspection of original invoices for these costs.

4.3 All original invoices and disclosures provided will be under separate Non-Disclosure Agreement. No copies of original invoices will be afforded to UAMPS/Payson in any medium for Payson’s records. UAMPS/Payson is subject to the requirements of the Government Records Access and Management Act, Chapter 2, Title 63G, Utah Code Annotated or its successor (“GRAMA”). All materials submitted by Wheeler pursuant to this Agreement are subject to disclosure unless such materials are exempt from disclosure pursuant to GRAMA. The burden of claiming an exemption from disclosure shall rest solely with Wheeler. Any materials for which Wheeler claims a privilege from disclosure shall be submitted marked as “Business Confidential” and accompanied by a concise statement of reasons supporting Wheeler's claim of business confidentiality. UAMPS/Payson will make reasonable efforts to notify Wheeler of any requests made for disclosure of documents submitted under a claim of business confidentiality. Wheeler may, at Wheeler’s sole expense, take any appropriate actions to prevent disclosure of such material. Wheeler specifically waives any claims against Owner related to disclosure of any materials required by GRAMA.

4.4 Project will have a target project price of $12,299,197.70 for cost plus expenses and a total fixed cost for Caterpillar & associated equipment of $17,437,796.17 for a total target price of $29,736,993.87 for the original scope of work as defined in Exhibit A. Additional Change Orders under section 4 may cause the original cost to increase with both parties’ approval. Change Orders will be equal to Wheeler’s cost, plus 10% of cost for allocated, direct expenses, plus 7% of cost for Wheeler’s profit, and Caterpillar direct cost.

4.5 In the event the Client terminates, suspends, or abandons this Agreement without cause pursuant to Section 5.3, the Client shall pay Wheeler a proportionate amount of the Consideration Payment for any of the Scope of Work which was performed or provided prior to termination, suspension, or abandonment.

1. **Termination and Non-Appropriation.**

5.1 The Client may terminate this Agreement, for cause, if Wheeler materially fails to perform the terms of the Agreement. The following are examples of “cause” for termination:

5.1.1 Wheeler’s performance under this Agreement fails to meet industry standards.

5.1.2 Wheeler materially fails to perform its duties and obligations required by this Agreement with diligence or within the time specified herein.

5.1.3 Wheeler has otherwise materially breached this Agreement.

5.1.4 Wheeler files a voluntary bankruptcy petition or an involuntary bankruptcy petition is filed against Wheeler and such involuntary petition is not dismissed within thirty (30) days.

5.2 Prior to terminating this Agreement as contemplated by Section 5.1, the Client must first provide written notice to Wheeler of the Client’s intention to terminate this Agreement. Said notice of termination must be provided by the Client to Wheeler at least thirty (30) calendar days prior to termination. After receiving such notice of termination from the Client, Wheeler shall have the next fifteen (15) calendar days in which to cure any deficiency noted by the Client.

5.3 Any Scope of Work which Wheeler has completed or performed prior to the date of any termination, suspension, or abandonment, shall be recorded, and tangible work documents shall be transferred to, and become the sole property of, the Client. Client will pay Wheeler for any and all performance completed on the Project.

1. **Taxes.**

6.1 All applicable taxes, assessed for the Project construction, will be the responsibility of Wheeler. All taxes, fees, and expenses imposed upon it for work, labor, material, and services required to fulfill this contract is responsibility of Wheeler. Client will be responsible for all applicable governmental permits.

1. **Indemnification and Insurance.**

7.1 Each party (the "Indemnifying Party") will indemnify, defend, and hold the other party, its officers, directors, employees, and/or shareholders, harmless from and against any and all damages (whether ordinary, direct, indirect, incidental, special, consequential, or exemplary), judgments, liabilities, fines, penalties, losses, claims, actions, demands, lawsuits, costs, and expenses including, without limitation, reasonable attorneys' fees, which arise out of or relate to any material breach of this Agreement or of the representations or warranties contained therein by the Indemnifying Party, or its employees or agents, (including, but not limited to, any breach by such Indemnifying Party of its confidentiality obligations hereunder) or acts or omissions of negligence, willful misconduct, or fraud of the Indemnifying Party or its employees or agents, including, but not limited to, third party claims and claims for property damage or personal injury to the Indemnifying Party's Personnel ("Personnel" defined as such Party's officers, directors, owners, employees, servants and agents, independent contractors and subcontractors); provided, however, that the foregoing does not in any manner relieve either Party or any third party of its obligations under statutory workers' compensation law and other laws regarding employer obligations as to such Party's own employees.

7.2 The Indemnifying Party's obligations under this Section will be subject to being provided by the other party with prompt written notice of the event giving rise to an indemnity obligation, providing reasonable cooperation and assistance in the defense or settlement of any claim (at the Indemnifying Party's sole cost and expense), and granting the Indemnifying Party control over the defense and settlement of the same. Providing the Indemnifying Party with notice of the event giving rise to an indemnity obligation is an express condition precedent to the duty to provide a defense and indemnity. Notice must be made in strict accordance with the provisions of this Agreement, and time is of the essence. With respect to this Section, in the event the Indemnifying Party fails to provide a reasonably sufficient defense of an indemnified claim, the other party may, after written notice to the Indemnifying Party, retain its own legal counsel and provide its own defense with respect to the indemnified claim, and the Indemnifying Party will reimburse all reasonable attorneys' fees and expenses for such defense. The Indemnifying Party will have the right to consent to any settlement or judgment that is binding upon the Indemnifying Party.

7.3 Wheeler shall provide for the payment of worker’s compensation benefits to its employees employed on or in connection with the performance of this Agreement, and in accordance with applicable State and Federal laws.

7.4 Wheeler shall maintain commercial general liability insurance, with a limit of liability not less than $1,000,000 per occurrence and $2,000,000 aggregate limit of liability.

7.5 Wheeler, at its own expense, shall maintain automobile public liability insurance with bodily injury and death limits of at least $2,000,000 combined single limit of liability. Such benefits insurance and coverage shall not be deemed to limit Wheeler’s liability under this Agreement. It is intended by this Section that the requirements set forth herein will satisfy applicable minimum requirements under Utah law. However, in the event that the foregoing requirements do not satisfy applicable Utah law, Wheeler must maintain automobile public liability insurance in amounts satisfying applicable Utah law.

7.6 Wheeler, at its own expense, shall maintain professional liability/errors and omissions insurance appropriate to Wheeler’s profession, with a minimum coverage of $2,000,000 per occurrence. The professional liability/errors and omissions insurance required by this Section must be project specific with at least a one-year extended reporting period (or longer upon request by the Client). Wheeler shall, likewise, require its subcontractors, if any, to provide for such benefits insurance and to maintain such insurance at no expense to the Client.

7.7 Before commencing the Scope of Work, and at any time thereafter upon written request by the Client, Wheeler shall furnish the Client with a copy of certificates of insurance as evidence that policies providing the coverage required by this Agreement are in effect.

7.8 The Commercial General Liability and Automobile Liability policies required by this Agreement, shall include the Client, its directors, officers, agents, and employees as additional insured persons with respect to the activities of Wheeler in the performance of this Agreement, or that of its employees, agents, subcontractors, independent contractors, and the like. Any certificate or certificates presented as evidence of insurance shall specify the date when such benefits and insurance expire. Unless a different length of time is expressly set forth in this Agreement, Wheeler shall maintain any insurance required by this Agreement until after the Scope of Work has been fully performed by Wheeler, and subsequently approved and accepted by the Client. Wheeler shall provide the Client with written notice at least sixty (60) days in advance of any cancellation, termination, or material alteration of said policies of insurance.

1. **Representations and Warranties.** Each party represents that:

8.1 Its signatory has the authority to execute this Agreement.

8.2 It has not sold, assigned, or otherwise transferred any interest in the claims or subject matter contemplated by this Agreement.

8.3 Wheeler represents and warrants that:

8.3.1 Wheeler has sufficiently and reasonably researched the requirements of this Agreement, understands the same, and is able to competently perform each of its duties and obligations required hereunder.

8.3.2 Wheeler warrants the workmanship, materials, proper functioning, and manner of the Scope of Work contemplated by this Agreement for one year from the date of Commissioning (“Warranty Period”). In the event that any portion of the Scope of Work does not remain in good and operating condition (in the reasonable judgment of the Client and the Developer) during the Warranty Period (ordinary wear and tear excepted), Wheeler, at its own expense, shall immediately perform all necessary repairs and replacements to maintain such inadequate Scope of Work in good and operating condition (to the Client’s reasonable satisfaction). Should any portion of the Scope of Work imminently jeopardize the health and safety of the Client, or any other individual, the Client may perform any necessary repairs and replacements (or arrange for a third party to perform such services) at Wheeler’s expense – to be paid by Wheeler within thirty (30) days of receiving a notice of indebtedness from the Client.

8.3.3 As to the equipment, the manufacturer’s standard 12-month warranty shall prevail. Wheeler reserves the right to give notice as to when the manufacturer’s warranty period begins to run, Wheeler shall notify manufacturers as of the date of Commissioning.

8.3.4 Wheeler shall perform its obligations required by this Agreement in a manner consistent with applicable professional and technical standards for Scope of Work of a similar and comparable nature, and shall ensure that the implementation thereof is also performed in an applicable professional, technical, and workmanlike manner. Wheeler shall correct any defect in its performance at no additional cost to the Client. Upon request by the Client, Wheeler must be able to summarize and concisely report pertinent information associated with this Agreement and the performance thereof to the Client in a timely manner. Wheeler shall not make any alterations or variations in or additions to, or omissions from, its duties and obligations contemplated by this Agreement, without the prior written consent of the Client

8.3.5 Wheeler’s licensure or authority to transact business issued by the Utah Division of Corporations and Commercial Code and the Utah Division of Occupational and Professional Licensing, as well as any other required licensure, is currently active, and shall remain active throughout the performance of this Agreement.

1. **Confidentiality.**

9.1 The parties acknowledge that this Agreement may be subject to public disclosure pursuant to the Government Records Access and Management Act, Utah Code Ann. § 63G-2-101, *et seq*., as the same may be amended from time to time.

9.2 Notwithstanding Section 9.1., Wheeler agrees that, except as directed by the Client, Wheeler shall not at any time during or after the term of this Agreement disclose to any person or entity any information or document provided by the Client which the Client has designated as “confidential” or “private.” Upon the conclusion or termination of this Agreement, Wheeler shall turn over to the Client all documents, papers, and other matter, including copies thereof, which are in Wheeler’s possession or control, and which are designated “confidential” or “private.” Wheeler further agrees to bind its employees and any sub-contractors to the terms and conditions of this Section 10.2.

1. **Equal Opportunity.** Neither Wheeler, nor any subcontractor of Wheeler, shall discriminate against any employee, applicant for employment, or recipient of services on the basis of race, religion, color, sex, age, disability, or national origin.
2. **Record Keeping and Audits.** Parties shall maintain accurate accounting records for all goods and services provided in the performance of this Agreement, and shall retain all such records for a period of at least three (3) years following the termination or completion of this Agreement. Upon forty-eight (48) hours written notice and during normal business hours, the Client shall have access to and the right to audit any records or other documents pertaining to this Agreement. Wheeler shall furnish copies of any records requested by the Client at Wheeler’s expense.
3. **Relationship of the Parties and Immunity.**

12.1 The relationship between the Parties shall be that of independent contracting parties. Each party shall be responsible for the manner of its own performance of this Agreement. Nothing herein shall be construed to create an employer-employee, principal-agent, or other similar relationship. Neither party is authorized to, nor shall either party, enter into any contract or commitment on behalf of the other party. Neither party shall be considered an affiliate or subsidiary of the other party. It is expressly understood that this Agreement, including the performance thereof, is not a joint venture, partnership, or any other relationship other than that of independent contracting parties.

12.2 Nothing in this Agreement, nor the performance hereof, shall adversely affect any immunity from suit, or any right, privilege, claim or defense, which the Client or its employees, officers, and directors may assert under State of Federal law, including (but not limited to) The Governmental Immunity Act of Utah, Utah Code Ann. § 63G-7-101, *et seq*. All claims against the Client or its employees, officers, and directors are subject to the provisions of the aforementioned act, which controls all procedures and limitations in connection with any claim of liability.

1. **Notices.**

13.1 If any notice is required to be provided pursuant to the terms and conditions of this Agreement, said notice must be provided by certified mail as follows:

To the Client: To Wheeler:

UAMPS

Attn:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

155 N 400 W. Salt Lake City, UT 84103 Wheeler Machinery Co. Attn: Shane Minor 4901 West 2100 South, Salt Lake Client, Utah 84120

13.2 The designation of any address or individual contemplated by this Section 13 may be changed by notice given in the same manner as provided in this Section 13. and shall not be subject to the restrictions contemplated by Section 20.

1. **Attorneys’ Fees and Costs.** Each party shall bear its own attorneys’ fees and costs incurred in connection with the drafting, execution, and performance of this Agreement. However, if any action at law or in equity is necessary to enforce or interpret the terms of this Agreement, the prevailing party in such action shall be entitled to recover reasonable attorneys’ fees, legal costs, and other collection fees and costs incurred by said prevailing party in connection with the suit, both before and after judgment, in addition to any other relief to which such party may be entitled.

14.1 The parties agree that time is of the essence to complete the project by the COD. Deadlines must be met to avoid market exposure during the summer of 2026. The costs of such a market pricing cannot be calculated. Therefore Exhibit “B” specifies a project schedule with anticipated turnover, star-online date or commercial operational date (COD) of June 1, 2026.

14.2 If commercial operation is not achieved on or before June 1, 2026, delay damages shall accrue and become payable to the Owner within five days after the end of each calendar month. The delay damages shall be an amount equal to $333.00 per day, per unit not commercially operable.

1. **Non-Waiver.** No failure to exercise and no delay in exercising any right, remedy, or power under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, remedy, or power under this Agreement preclude any other or further exercise thereof, or the exercise of any other right, remedy or power provided herein or by law or in equity.
2. **Binding Effect.** This Agreement is binding upon the parties and their proper and allowable heirs, legatees, representatives, successors, transferees, and assignees.

1. **Assignment.** Neither party hereto may assign this Agreement, nor delegate any responsibilities under this Agreement. Any purported assignment or delegation in violation of this Section 18, without prior written consent from the non-assigning party, shall be void, and will be considered a material breach of this Agreement.
2. **Time.** Time is of the essence with this Agreement, as well as every term, covenant, and condition contained herein.
3. **Force Majeure.** Neither party will be liable for any failure or delay in performing an obligation under this Agreement that is due to causes beyond its reasonable control, such as natural catastrophes, pandemics, factory delays, supply chain limitations, governmental acts or omissions, laws or regulations, labor strikes or difficulties, transportation stoppages or slowdowns, or the inability to procure parts or materials. This provision shall not apply to a party’s obligation to make payment when due under the terms of this Agreement.
4. **Amendments.** This Agreement may not be modified, amended, or terminated, except by an instrument in writing, signed by each party hereto.
5. **Further Assurances.** The Client and Wheeler mutually agree to execute such other documents and to take such other action as may be reasonably necessary to further the purposes of this Agreement.
6. **Incorporation of Miscellaneous Material.** Each section of this Agreement shall be considered a part hereof, including (but not limited to) Sections 1. and 2., respectively. Likewise, any exhibit referenced in this Agreement is made a part hereof.
7. **Drafting and Voluntary Execution.**

23.1 The negotiation and drafting of this Agreement have been accomplished collectively by each party hereto, and for all purposes this Agreement shall be deemed to have been drafted jointly by each such party. The parties acknowledge that they have been represented by counsel of their choice in all matters connected with the negotiation and preparation of this Agreement, or that they have had the opportunity to be represented by counsel, and that they have reviewed this Agreement with their counsel, or that they have had the opportunity to review this Agreement with their counsel, and that they fully understand the terms of this Agreement and the consequences thereof. Furthermore, the parties hereto have been afforded the opportunity to negotiate as to any and all terms of this Agreement, and each party is executing this Agreement voluntarily and free of any undue influence, duress, or coercion. The parties further acknowledge that they have relied on their own judgment, belief, knowledge, and advice from their own representatives, consultants, affiliates, and agents, as to the extent and effect of the terms and conditions contained herein. The parties are not relying upon any statement or representation made by any other party or any officer, director, employee, agent, servant, adjustor, or attorney acting on behalf of another party, unless such a statement or representation is expressly set forth in this Agreement.

23.2 The headings in this Agreement are for convenience only and shall not be interpreted to limit the meaning of the language contained herein in any way.

1. **Severability.** If any provision of this Agreement is determined to be invalid or unenforceable, the remaining provisions of this Agreement shall, nevertheless, be construed, performed, and enforced as if the invalidated or unenforceable provision had not been included in the text of the Agreement.
2. **Governing Law.**

25.1 This Agreement shall be construed in accordance with the laws of the State of Utah, regardless of any choice or conflict of law rules.

25.2 Each party agrees that any legal action or proceeding with respect to this Agreement may only be brought in the state or federal courts of Salt Lake County, in the State of Utah. Consequently, each party hereby submits itself unconditionally to the jurisdiction and venue of the aforementioned courts.

1. **Third-Party Beneficiaries.** This Agreement is not meant to create any rights or benefits (whether intended or incidental) for any third party. Only the named parties to this Agreement may enforce the terms and conditions hereof.
2. **Entire Agreement.** All agreements, covenants, representations and warranties – express or implied, oral or written – of the parties concerning the subject matter hereof are contained solely in this Agreement, subject to any implied warranties and conditions imposed upon the parties by Utah law. No other agreements, covenants, representations, or warranties – express or implied, oral or written – have been made by any party to any other party concerning the subject matter hereof. All prior and contemporaneous conversations, negotiations, possible and alleged agreements, representations, covenants, and warranties concerning the subject matter hereof are merged herein. This is an integrated agreement
3. **Duplicate Originals.** This Agreement may be executed in identical duplicate originals, each of which shall be deemed to be an original, and all of which shall be deemed to constitute one and the same instrument.
4. **Signatures.** The Client and Wheeler voluntarily enter into this Agreement, as evidenced by affixing their respective signatures, below.

**Client Corporation: Wheeler Machinery Co.:**

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

By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By: Stephen Green

Its: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Its: VP – Sales & Rental

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_