

SCHEDULING ESS OPERATING AGREEMENT

Oregon Form

Agreement Number: _____

This Scheduling Electricity Service Supplier Operating Agreement (this “Agreement”) is made and entered into as of this ____ day of _____, 20____, by and between the Electricity Service Supplier, or control area operator “_____” (the “Scheduling ESS”), a _____ organized and existing under the laws of the State of _____, and PacifiCorp (the “Utility”), a corporation organized and existing under the laws of the State of Oregon. Scheduling ESS and Utility are sometimes individually referred to in this Agreement as a “Party” and collectively as the “Parties.”

Section 1: General Definitions

Except as otherwise defined in this Agreement, the defined terms used in this Agreement (as indicated by initial capitalization) shall have the meanings given to those terms in PacifiCorp’s Oregon tariffs, the complete terms of which are incorporated by reference into this Agreement. In the absence of a definition in those tariffs, a defined term will have the meaning given to that term in PacifiCorp’s FERC Open Access Transmission Electric Tariff Original Volume No. 11, including its appendices and attachments, as it may be amended from time to time (the “OATT”).

- 1.1 “Affiliate” means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, “control” means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary power.
- 1.2 “Bankrupt” means with respect to any entity, such entity (i) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it, (ii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is generally unable to pay its debts as they fall due.
- 1.3 “Business Day” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday. A Business Day shall open at 8:00a.m. and close at 5:00p.m. local time for the relevant Party’s principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.
- 1.4 “Calendar Day” means any day, except where a Party’s obligation is due on a calendar day which is a Saturday, Sunday, or a Federal Reserve Bank holiday, the Party’s obligation shall not be due until the next calendar day which is not a Saturday, Sunday, or Federal Reserve Bank holiday.
- 1.5 “Charges and Costs” shall have the meaning set forth in Section 5.6.
- 1.6 “Claims” means all third party claim or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject matter of an indemnity, and the resulting losses, damages, expenses, attorneys’ fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.

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- 1.7 “Commission” means the Oregon Public Utility Commission or successor governmental agency.
- 1.8 “Commission Administrative Rules” means the administrative rules of the Oregon Public Utility Commission as they may be amended from time to time.
- 1.9 “Competitive Electricity Services” means Electricity Services that the Consumer may purchase from an Electricity Service Supplier according to the Commission’s rules. Electricity Services means electricity distribution, transmission, generation or generation-related services.
- 1.10 “Controlled Grid” means the system of transmission and distribution lines and associated facilities used to transmit and delivery Electricity to and within PacifiCorp’s Controlled Grid owned or operationally controlled by PacifiCorp.
- 1.11 “Cure Period” shall have the meaning set forth in Section 5.3.
- 1.12 “Defaulting Party” has the meaning set forth in Sections 5.1 and 5.2.
- 1.13 “Early Termination Date” has the meaning set forth in Section 5.3.
- 1.14 “Scheduling ESS” shall have the meaning set forth in the Commission’s Administrative Rules.
- 1.15 “Event of Default” has the meaning set forth in Section 5.2.
- 1.16 “FERC” means the Federal Energy Regulatory Commission or any successor government agency.
- 1.17 “Letter(s) of Credit” means one or more irrevocable, transferable standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank having a credit rating of A- from S&P or A3 from Moody’s, in a form acceptable to the Party in whose favor the letter of credit is issued. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.
- 1.18 “Moody’s” means Moody’s Investor Services, Inc. or its successor.
- 1.19 “NERC” means the North American Electric Reliability Council or its successor.
- 1.20 “Non-Defaulting Party” has the meaning set forth in Sections 5.2 and 5.3.
- 1.21 “Performance Assurance” means collateral in the form of either cash, Letter(s) of Credit, or other security reasonably acceptable to the Requesting Party.
- 1.22 “Potential Event of Default” means an event which, with notice or passage of time or both, would constitute an Event of Default.
- 1.23 “Regulated Charges” means charges for services subject to the jurisdiction of the Commission.
- 1.24 “S&P” means the Standard & Poor’s Rating Group (a division of McGraw-Hill, Inc.) or its successor.
- 1.25 “Suspension Date” shall have the meaning set forth in Section 5.3.

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- 1.26 “Tariff” means the Utility’s tariff approved by and on file with the Commission as it may be amended from time to time.
- 1.27 “Termination Payment” has the meaning set forth in Section 5.6.

Section 2: General Description of Agreement

- 2.1 The Parties are bound by the terms set forth in this Agreement and otherwise incorporated into it by reference. The terms of the Utility’s Oregon Tariffs, as amended from time to time, (the “Tariff”) are hereby incorporated in their entirety by reference into this Agreement. This Agreement, the Tariff, and all rules, regulations and lawful orders and directives of the Oregon Public Utility Commission (the “Commission”) shall govern Scheduling ESS’s provision of Competitive Electricity Services to Consumers within Utility’s service territory. All aspects of the scheduling of Electricity and Ancillary Services on the Utility’s Controlled Grid are controlled by the Utility’s Tariff, this Agreement, the OATT, and relevant Federal Energy Regulatory Commission (“FERC”) and Commission rules, regulations and lawful orders and directives. A scheduling ESS and control area operator performing the duties of a scheduling ESS are collectively referred to herein as “Scheduling ESS”.
- 2.2 The Parties acknowledge that the standard form of this Agreement has been developed as part of the Commission regulatory process. Utility shall file the final form of this Agreement with the Commission. The terms of this Agreement may not be waived, altered, amended or modified, except as expressly provided in this Agreement.
- 2.3 If a conflict exists or develops between the provisions of this Agreement and the Tariff or the OATT, the provisions of the Tariff shall prevail for Commission jurisdictional conflicts; and the provisions of the OATT shall prevail for FERC jurisdictional conflicts.

Section 3: Representations and Covenants

- 3.1 Each Party represents and covenants that it is and shall remain in compliance with all applicable laws, regulations and tariffs, including without limitation Commission Administrative Rules, relevant Commission orders, the Tariff, the OATT, and FERC rules and orders.
- 3.2 Each Party represents that (a) it has the full power and authority to execute and deliver this Agreement and to perform its terms and conditions; and (b) the execution, delivery and performance of this Agreement have been duly authorized by all necessary corporate or other action by the Party.
- 3.3 Each Party shall (a) exercise all reasonable care, diligence and good faith in the performance of its duties under this Agreement; (b) carry out its duties in accordance with applicable recognized professional standards; and (c) comply with this Agreement, all Commission Administrative Rules, relevant Commission orders, the Tariff, the OATT, and FERC rules and orders.
- 3.4 Scheduling ESS represents that it meets (a) the criteria for and satisfies all conditions for Commission certification as an “Electricity Service Supplier” and that it is certified with the Commission as a “Scheduling ESS”; or the criteria for and satisfies all conditions for NERC certification as a control area operator and that it is certified with NERC as a control area operator and (b) all “Electricity Service Supplier” standards set forth in this Agreement. Upon request by Utility, Scheduling ESS shall provide evidence to Utility of its compliance with this Section 3.4.

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- 3.5 Each Party represents that it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which could result in it being or becoming Bankrupt;
- 3.6 Each Party represents that it has disclosed any legal proceedings, of which the Party has knowledge, pending or threatened against it or any of its affiliates that could materially adversely affect such Party's ability to perform its obligations under this Agreement;
- 3.7 Each Party represents that no Event of Default or Potential Event of Default with respect to it has occurred within the last five (5) years and that no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement.

Section 4: Term of Agreement

The term of this Agreement shall commence following (a) Commission certification of Scheduling ESS as a Scheduling "Electricity Service Supplier", or NERC certification of Scheduling ESS as a control area operator, as applicable, and (b) execution of this Agreement by both Parties. The term of this Agreement shall terminate on the earlier of (a) the date Scheduling ESS informs Utility that it is no longer operating as Scheduling ESS in Utility's service territory; (b) termination pursuant to Section 5 of this Agreement; (c) the effective date of decertification by the Commission or lapse of certification pursuant to the Commission Administrative Rules; or (d) the effective date of a new Scheduling ESS Operating Agreement between the Parties. The provisions of this Agreement shall terminate automatically upon notice by Utility that the functions of the Utility relevant to scheduling have been transferred to a Regional Transmission Organization. Scheduling ESS agrees to reexecute Utility's then current form of Scheduling ESS Operating Agreement by each anniversary of the commencement of this Agreement, and such agreement shall be effective for twelve calendar months. Scheduling ESS acknowledges that it may provide scheduling services to ESS's only after (a) October 1, 2001, or such other date as the Commission may direct, and (b) it has complied with all provisions of this Agreement and the Tariff. Notwithstanding anything to the contrary in this Agreement, a Party's obligation to pay money to the other Party under this Agreement shall survive any expiration or termination of this Agreement.

Section 5: Events of Default; Remedy for Default

- 5.1 Reliability and Safety Default: A reliability and safety default ("Reliability and Safety Default") by a Party (the "Defaulting Party") shall occur when Scheduling ESS takes any action or inaction that could, in the reasonable judgment of Utility, materially adversely affect safety or system reliability, including but not limited to, actions or inactions relating to scheduling and delivering electric energy and supply capacity to meet the needs of Consumers. Upon the occurrence of a Reliability and Safety Default under this Section 5.1, Utility may immediately take any action which, in the reasonable judgment of Utility, is required to restore safety and system reliability, including without limitation immediate termination of Scheduling ESS's rights under this Agreement. Utility shall notify Scheduling ESS, the Commission and the Scheduling ESS's as soon as practicable after taking any action pursuant to this Section 5.1.
- 5.2 Other Events of Default: An event of default ("Event of Default") by a Party ("Defaulting Party") shall occur when one or more of the following occurs:
- (a) the Defaulting Party fails to make any payment when due under this Agreement to the other party to this Agreement (the "Non-Defaulting Party"), which nonpayment continues for three (3) Business Days after written notice of such default is given by the Non-Defaulting Party;

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(b) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated;

(c) any material violation of a term, condition or obligation of this Agreement, the Tariff, the OATT or the Network Integration Transmission Service Agreement (“NITSA”);

(d) all of the following occur: (i) a Defaulting Party’s unexcused failure to observe or perform any material financial or credit covenant or obligation contained in any other Agreement with Non-Defaulting Party or any of Non-Defaulting Party’s affiliates; (ii) such failure continues for at least five (5) Business Days after notice of such failure is given to the Defaulting Party; and (iii) the Non-Defaulting Party’s claim with respect to the unexcused failure to observe or perform the covenant or obligation exceeds \$500,000 (a continuing failure shall be aggregated for this purpose);

(e) fails to provide Performance Assurance as described in Section 8.2;

(f) the Defaulting Party fails to increase a collateral deposit in compliance with and as defined in the Tariff within two (2) days of receiving notice from Utility that an increase is required according to the terms of the Tariff; or when all of the following occur: (i) the Defaulting Party’s unexcused failure to increase a collateral deposit in compliance with any other agreement with the Non-Defaulting Party or any of the Non-Defaulting Party’s affiliates when an increase is required pursuant to the other agreement with the Non-Defaulting Party or any of the Non-Defaulting Party’s affiliates; (ii) such failure continues for at least two (2) Business Days or for the amount of time provided for in the other agreement before there would be a default under the other agreement, whichever is longer; and (iii) the increase in collateral deposit in the other agreement is at least \$500,000;

(g) such party consolidates or amalgamates or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting surviving or transferee entity does not expressly assume all the obligations of such Party under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party;

(h) the Defaulting Party fails to establish, maintain or extend a collateral deposit within five (5) days of expiration of a collateral deposit in compliance with and as defined in the Tariff or any other Agreement with the Non-Defaulting Party or any of the Non-Defaulting Party’s affiliates when required pursuant to this Agreement, the Tariff or any other Agreement with the Non-Defaulting Party or any of the Non-Defaulting Party’s affiliates;

(i) the Defaulting Party:

(i) makes a general assignment or arrangement for the benefit of creditors;

(ii) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors, or has such petition filed or a proceeding commenced against it and, in the case of a petition filed or proceeding commenced against it, such petition or proceedings results in a judgment of insolvency or bankruptcy or the entry of any order for relief or the making of an order for the winding-up or liquidation of such entity, or is not dismissed, discharged, stayed or restrained within twenty (20) Business Days of the filing or commencement thereof;

(iii) otherwise becomes bankrupt or insolvent (however evidenced) as such terms are generally defined under federal or state insolvency law;

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(iv) fails or gives notice that it is generally unable to pay its debts as they become due;

(v) is dissolved (other than pursuant to a consolidation, acquisition, amalgamation or merger by Utility and subject to Section 11);

(vi) has a resolution passed for its winding up, dissolution or liquidation (other than pursuant to a consolidation, acquisition, amalgamation or merger);

(vii) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for all or substantially all of its assets;

(viii) has a secured party take possession of all or substantially all of its assets, or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all of its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within twenty (20) days thereafter;

(ix) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in any of the foregoing clauses; or

(x) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts;

(j) the occurrence of a Material Adverse Change, as defined in the Tariff, with respect to the Defaulting Party or the Defaulting Party's guarantor. A Material Adverse Change shall not constitute an Event of Default if the Defaulting Party establishes and maintains, for so long as the Material Adverse Change is continuing, a collateral deposit in compliance with and as defined by the Tariff in an amount at least equal to the Utility's exposure as defined in the Tariff. The Event of Default will be deemed to continue however, if the Defaulting Party does not meet the minimum credit requirements as defined by the Tariff.

(k) a Scheduling ESS is decertified or not recertified by the Commission; or a control area operator performing the duties of a scheduling ESS is decertified by NERC;

(l) a Scheduling ESS submits a schedule it knows or should have known is materially misleading, false or fraudulent.

5.3 Remedies for an Event of Default under Sections 5.2(a)-(f):

(a) Suspension Date: Upon the occurrence of an Event of Default under Sections 5.2 (a)-(f), the other party, (the "Non-Defaulting Party"), shall have the right, but not the obligation, within thirty (30) days, to designate by facsimile or other reasonable means any of the subsequent ten (10) Business Days as a suspension date (the "Suspension Date"). Upon the occurrence of an Event of Default under Sections 5.2(a)-(f), the Non-Defaulting Party shall have the right to draw on any outstanding collateral deposits in whole or in part, liquidate any Performance Assurance then held by or for the benefit of the Secured Party free from any claim or right of any nature whatsoever of the Defaulting Party, including any equity or right of purchase or redemption by the Defaulting Party, and/or exercise any of the rights and remedies of a Secured Party with respect to all Performance Assurance, including such rights and remedies under law then in effect.

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- (b) Cure Period: The Defaulting Party shall have ten (10) Business Days from the Suspension Date to cure the Event of Default such that there is no longer an Event of Default (the "Cure Period").
- (c) Early Termination Date: If the Defaulting Party does not or is unable to remedy the Event of Default such that there is no longer an Event of Default during the Cure Period, the Non-Defaulting Party may designate any of the subsequent ten (10) Business Days after the last day of the Cure Period as an early termination date (the "Early Termination Date") of the Agreement which is the subject of the default and all other Agreements with the Non-Defaulting Party and any of its affiliates.

5.4 Remedies for an Event of Default under Sections 5.2(g)-(l). Upon the occurrence of any Event of Default described in any of Sections 5.2(g)-(l), the Non-Defaulting Party may unconditionally and immediately declare an Early Termination Date.

5.5 Notice and Result of Declaration of an Early Termination Date: Declaration of an Early Termination Date accelerates all amounts owing between the Parties and liquidates and terminates this Agreement, any other terminated agreement between the Defaulting Party and the Non-Defaulting Party and any of its affiliates (collectively, the "Terminated Agreements") and individually the "Terminated Agreement") and all transactions between the parties. Upon termination:

- (a) the Non-Defaulting Party shall notify in writing (by facsimile or other reasonable means) the Defaulting Party of the Agreements which are terminated;

- (b) the Parties shall be liable for the obligations contained in Section 5.6;

- (c) the Non-Defaulting Party may withhold any payments due and suspend all performance to the Defaulting Party due under any of the Terminated Agreements or under the Tariff; and

- (d) the Non-Defaulting Party may do any one or more of the following: (i) exercise any of the rights and remedies of a Secured Party with respect to all Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of setoff against any and all property of the Defaulting Party in possession of the Non-Defaulting party or its agent; (iii) draw on any outstanding Letter of Credit issued for its benefit or any other collateral deposit as defined in the Tariff; and (iv) liquidate all Performance Assurance then held by or for the benefit of the Security Party free from any claim or right of any nature whatsoever of the Defaulting Party, including any equity or right of purchase or redemption by the Defaulting Party. The Secured Party shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce the Pledgor's obligations under the Agreement (the Pledgor remaining liable for any amounts owing to the Secured Party after such application), subject to the Secured Party's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

5.6 (a) Charges and Costs: On the Early Termination Date, the Non-Defaulting Party shall have the right to liquidate any and all Terminated Agreements and terminated transactions with the Defaulting Party then outstanding and determine the charges and costs (the "Charges and Costs") for each such Terminated Agreement and terminated transaction by:

- (i) Closing out the Terminated Agreement[s] and terminated transaction[s] so that each such Terminated Agreement and terminated transaction is canceled, and calculating in good faith the Non-Defaulting Party's Charges and Costs.

- (a) Utility charges to be included in the calculation of the Charges and Costs include all of the of the following:

- (1) all billed or unbilled Tariff service charges and OATT

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charges.

(2) all other miscellaneous charges for products or services provided by Utility and incurred by Scheduling ESS, and

(3) any applicable late payment charges as allowed by law, rule or tariff.

(b) Scheduling ESS charges to be included in the calculation of the Charges and Costs include all of the following:

(1) all miscellaneous charges owed by Utility,

(2) all billed and unbilled energy imbalance payments as calculated in Utility's FERC OATT, and

(3) any applicable late payment charges.

(ii) Setting off or aggregating, as appropriate, the Charges and Costs as calculated in Section 5.6(a)(i) (the "Termination Payment") and notifying the Defaulting Party. The Non-Defaulting Party shall aggregate all Charges and Costs into a single amount by: netting out (a) all Charges and Costs that are due to the Defaulting Party, plus, at the option of the Non-Defaulting Party, any collateral deposit then available to the Non-Defaulting Party pursuant to this Agreement or the Tariff, plus any or all other amounts due to the Defaulting Party under this Agreement against (b) all Charges and Costs due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the "Termination Payment") payable by one party to the other. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate.

(iii) Notifying the Defaulting Party of Payment of the Termination Payment. As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within two (2) Business Days after such notice is effective; provided, however, that if the Non-Defaulting Party owes the Termination Payment, the notice provided herein shall not be effective until after the collateral deposit becomes immediately available funds.

(b) After calculation of a Termination Payment, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party or any of its affiliates under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party or any of its affiliates. The remedy provided for in this Section shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

(c) Nothing in this Section 5.6 shall be construed to relieve the Non-Defaulting Party of its obligation to give any prior notice of default required under this Agreement or the Tariff.

5.7 Notwithstanding the provisions of this Section, the Non-Defaulting Party's right to draw on a collateral deposit of the Defaulting Party does not remedy or cure the Event of Default or

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preclude the Non-Defaulting Party from declaring a Suspension Date pursuant to Section 5.3(a) and/or an Early Termination Date pursuant to Sections 5.3(c) and 5.4.

Section 6: Billing and Payment

The Utility will bill Scheduling ESS, and Scheduling ESS agrees to pay the Utility for all services and products provided by the Utility in accordance with the terms and conditions set forth in the Utility's Tariff and OATT. Any services provided by Scheduling ESS to Utility shall be by separate agreement between the Parties and are not a subject of this Agreement.

Section 7: Party Obligations

- 7.1 Scheduling ESS represents that it is certified as a Scheduling ESS, or is certified as a control area operator by NERC and is representing a non-scheduling ESS, and has a valid NITSA with Utility as applicable.
- 7.2 Scheduling ESS acknowledges an ESS may not receive Scheduling Services from Scheduling ESS until it has certified to Utility the commencement of all transmission services related to the service request.
- 7.3 Scheduling ESS agrees to satisfy Utility's creditworthiness requirements as set forth in the Tariff, OATT and under this Agreement.
- 7.4 Unless otherwise agreed by the Consumer, Scheduling ESS agrees to maintain the confidentiality of all Proprietary Consumer Information (as such term is defined in OAR 860-038-005) that Utility or ESS provides to Scheduling ESS.
- 7.5 Scheduling ESS agrees to pay the fees stated in Utility's Tariff, or other applicable Utility tariffs, including fees for processing this Agreement.
- 7.6 Scheduling ESS agrees not to engage in the unauthorized use of Electricity and agrees to notify Utility immediately of any suspected unauthorized Electricity use. Scheduling ESS shall preserve any evidence of unauthorized energy use.
- 7.7 Scheduling ESS agrees to provide Utility ten (10) Business Days notice prior to discontinuance of service to an ESS, or if the ESS has waived this period, Scheduling ESS agrees to notify Utility on the same date it notifies the ESS.
- 7.8 Scheduling ESS agrees to adjust, increase, maintain, or extend collateral deposit according to the terms of Utility's OATT and Tariff as required.
- 7.9 When Scheduling ESS knows or has reason to know that an Event of Default or Potential Event of Default is certain to happen, is occurring or has already occurred, Scheduling ESS agrees to give notice to Utility as soon as practicable after learning of the Event of Default or Potential Event of Default, but in no event later than 24 hours after learning that the Event of Default or Potential Event of Default is certain to occur or is likely to occur. Scheduling ESS agrees to give notice of an Event of Default under Section 5.1 to Utility immediately after Scheduling ESS knows such an Event of Default has happened, is occurring or is likely to occur.
- 7.10 Scheduling ESS shall comply with all data and information exchange requirements and procedures, as are prescribed in Utility's OATT and Tariff.

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- 7.11 Utility will provide notice to Scheduling ESS of amendments to the Tariff or OATT initiated by the Utility relevant to Scheduling ESS.
- 7.12 If a Party has reasonable grounds to believe that the other Party's creditworthiness or performance under this Agreement has become unsatisfactory, the insecure Party will provide the other Party with written notice requesting Performance Assurance in an amount determined by the insecure Party in a commercially reasonable manner. Upon receipt of such notice, the other Party shall have three (3) Business Days to remedy the situation by providing such Performance Assurance to the insecure Party. To secure its obligation under this Agreement and to the extent either or both Parties deliver Performance Assurance under this Section, each Party (a "Pledgor") hereby grants to the other Party (the "Secured Party") a present and continuing security interest in, and lien on (and right of setoff against), and assignment of, all cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, such Secured Party, and each Party agrees to take such action as the other Party reasonably requires in order to perfect the Secured Party's first-priority security interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from liquidation thereof. In the event that the other Party fails to provide Performance Assurance, or a guaranty or other credit assurance acceptable to the insecure Party within three (3) Business Days of receipt of notice, then an Event of Default under Section 5 will be deemed to have occurred and the insecure Party will be entitled to the remedies set forth in Section 5 of this Agreement.
- 7.13 Scheduling ESS is responsible for forecasting hourly loads, taking into account weather forecasts, scheduled outages and any other factors that may affect the actual hour-by-hour load.
- 7.14 Scheduling ESS is responsible for any electrical losses experienced by Utility's system in serving ESS's Consumer's loads. Electricity delivered to Utility's Controlled Grid must be sufficient to serve both the load and the electrical losses associated with delivery of the Electricity to the load. Scheduling ESS is responsible for obtaining the loss percentage factors from Utility and for applying these factors when forecasting the load requirements. Utility shall have the right to seek changes to the loss percentage factors in its tariffs from time to time.
- 7.15 Scheduling ESS is responsible for arranging Network Transmission Service across Utility's transmission facilities.
- 7.16 Scheduling ESS is responsible for arranging all necessary Point-to-Point transmission services on third-party transmission systems.
- 7.17 Scheduling ESS is responsible for arranging appropriate Ancillary Services in accordance with the Tariff and the OATT. Scheduling ESS shall be responsible for ensuring that any self-provided Ancillary Services meet the requirements of Utility's Tariff and the OATT, as well as all generally accepted regional reliability criteria.
- 7.18 Scheduling ESS shall be primarily responsible for energy imbalance settlements with Utility under the Energy Imbalance Service schedule of the OATT. Scheduling ESS agrees to pay Utility for all charges incurred for settlement under the OATT. For these purposes, the Energy Imbalance shall be calculated for the aggregate of ESS's loads and resources under the care of Scheduling ESS, treating that aggregate of the Scheduling ESS's direct access loads and losses as a single load obligation and all the resources as a single resource.
- 7.19 Scheduling ESS shall communicate load forecasts and the pre-schedule of transfers under Network Transmission Service to serve Direct Access Service loads to Utility's Transmission Schedulers by 10:00 am of the day before the day of Electricity flow in accordance with the OATT. Scheduling ESS shall be required to submit a schedule for each hour of each day, including a requirement to submit a zero schedule whenever appropriate. Telephone contact with

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verification by fax will be the accepted means of pre-schedule submission until electronic scheduling becomes available on the OASIS or via other regionally accepted means. Utility reserves the right to require Scheduling ESS to use electronic scheduling. Once Scheduling ESS has timely submitted the pre-schedules and Utility has accepted and verified them, Scheduling ESS may make changes in the pre-schedules during the day concurrent with delivery at any time up to thirty minutes before the start of the relevant clock hour. Under contingency situations, Scheduling ESS may request changes within the schedule hour, and Utility's dispatchers will accept such requests, subject to system capability and generally accepted regional scheduling practices.

- 7.20 At any time, Utility dispatching personnel may request, or direct, changes in Scheduling ESS's transfers to its loads, as the dispatcher deems necessary to prevent, or to minimize, disturbances on the grid. Requests for changes initiated by the Pacific Northwest Scheduling Coordinator ("PNSC") will be passed along to Scheduling ESS by the Utility dispatcher. Directives for action initiated by the PNSC, including the possible action of dropping load, will be complied with as directed.
- 7.21 Scheduling ESS shall become a member of and adhere to all applicable reliability and scheduling standards of the Northwest Power Pool ("NWPP") and the Western Systems Coordinating Council ("WSCC"). Scheduling ESS shall maintain a center staffed with knowledgeable personnel 24 hours a day and equipped with appropriate communications facilities to reasonably ensure necessary coordination with Utility's operating personnel at any time. Utility has the right to visit the center from time to time to verify the capabilities of Scheduling ESS, its facilities and its personnel. Failure of Scheduling ESS to maintain adequate scheduling capability is an Event of Default under this Agreement.

Section 8: Mutual Netting/Settlement Agreement

- 8.1 The Parties hereby agree that they may discharge on the same date mutual debts and payment obligations due and owing to each other pursuant to all agreements and transactions through netting, in which case all amounts owed by each Party to the other Party during the billing period under this Agreement, including late payment charges, and payments and credits shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.
- 8.2 If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the billing period, including but not limited to, late payment charges, and payments or credits, that Party shall pay such sum in full when due.
- 8.3 Unless the Party benefiting from a collateral deposit as defined in the Tariff notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Section 5, all amounts netted pursuant to this Section shall not take into account or include any collateral deposit which may be in effect to secure a Party's performance under this Agreement or the Tariff.

Section 9: Limitation of Liability

- 9.1 NEITHER PARTY SHALL BE LIABLE FOR ANY DAMAGES, LOSS, COST, CLAIM, INJURY, EXPENSE (INCLUDING REASONABLE ATTORNEY FEES), OR LIABILITY OF ANY KIND ARISING OUT OF OR RELATED TO THE OTHER PARTY'S FAILURE TO ADHERE TO THE REQUIREMENTS, PRACTICES AND PROCEDURES SET FORTH IN THIS AGREEMENT, THE COMMISSION'S ADMINISTRATIVE RULES OR THE TARIFF. IN ADDITION, UTILITY SHALL NOT BE LIABLE FOR MISTAKES THAT ARE ATTRIBUTABLE TO CONSUMERS, ESSS OR SCHEDULING ESSS. UTILITY IS NEITHER BOUND BY, NOR WILL IT ENFORCE,

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CONTRACTS BETWEEN SCHEDULING ESSS AND THEIR CONSUMERS OR BETWEEN SCHEDULING ESSS AND ESSS. UTILITY SHALL NOT MEDIATE OR OTHERWISE RESOLVE DISPUTES BETWEEN SCHEDULING ESSS AND THEIR CONSUMERS OR BETWEEN SCHEDULING ESSS AND ESSS.

9.2 THE UTILITY'S LIABILITY FOR INTERRUPTION, SUSPENSION, CURTAILMENT, OR FLUCTUATION OF ELECTRICITY SERVICE IS LIMITED PURSUANT TO THE APPLICABLE PROVISIONS OF THE TARIFF.

9.3 TO ELIMINATE TO THE EXTENT POSSIBLE THE POTENTIAL FOR FUTURE DISAGREEMENTS WITH RESPECT TO MATTERS ARISING FROM THIS AGREEMENT, UTILITY AND SCHEDULING ESS RECOGNIZING THE POTENTIAL MAGNITUDE OF THE POTENTIAL CONSEQUENTIAL, INCIDENTAL OR PUNITIVE DAMAGES THAT MIGHT ARISE FROM THIS AGREEMENT, AND TO ELIMINATE THE RISKS EACH MIGHT FACE WERE SUCH CATEGORIES OF DAMAGES NOT EXCLUDED, UTILITY AND SCHEDULING ESS AGREE THAT THE REMEDIES AVAILABLE TO THEM SHALL BE LIMITED AS PROVIDED BELOW. NOTHING IN THIS SECTION IS INTENDED TO AFFECT LIQUIDATED DAMAGES PROVISIONS IN OTHER AGREEMENTS BETWEEN THE PARTIES OR THEIR AFFILIATES.

SCHEDULING ESS AND UTILITY AGREE THAT FOR ANY CLAIM ARISING FROM ANY THEORY OF RECOVERY OR LIABILITY WHETHER BASED IN CONTRACT, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY AND WHETHER OR NOT ARISING FROM THE SOLE, JOINT OR CURRENT NEGLIGENCE, GROSS NEGLIGENCE OR RECKLESS CONDUCT OF SCHEDULING ESS OR UTILITY), UNDER WARRANTY, INDEMNITY OR OTHERWISE, IN NO EVENT SHALL EITHER SCHEDULING ESS OR UTILITY BE LIABLE TO THE OTHER OR ANY THIRD PARTY HEREUNDER FOR ANY LOST OR PROSPECTIVE PROFITS OR ANY OTHER SPECIAL, PUNITIVE, EXEMPLARY, CONSEQUENTIAL (*INCLUDING, BUT NOT LIMITED TO, REPLACEMENT POWER COSTS OR OTHER BUSINESS INTERRUPTION DAMAGES*), INCIDENTAL OR INDIRECT LOSSES OR DAMAGES OF ANY KIND WHATSOEVER UNDER OR IN RESPECT OF THIS AGREEMENT OR FOR ANY BREACH OR FAILURE OF PERFORMANCE RELATED HERETO HOWSOEVER CAUSED, WHETHER OR NOT ARISING FROM THE SOLE, JOINT OR CURRENT NEGLIGENCE, GROSS NEGLIGENCE OR RECKLESS CONDUCT OF SCHEDULING ESS OR UTILITY.

Section 10: Indemnification

10.1 Notwithstanding Section 9, Scheduling ESS shall indemnify and hold harmless Utility and its current and future direct and indirect parent companies and affiliates and their shareholders, officers, directors, employees, agents, servants and assigns from any and all claims and liabilities for losses, expenses (including reasonable attorneys' fees on trial or appeal), damage to property, or injury to or death of any person that is caused wholly or in part by a negligent, grossly negligent or willful act or omission by Scheduling ESS, its officers, directors, employees, or agents or that arises (i) as a direct or indirect result of any performance or nonperformance by Scheduling ESS to Scheduling ESS's agreements with Consumers or ESSs; (ii) as a direct or indirect result of any performance or nonperformance by any party to Scheduling ESS's agreements with other third parties; (iii) from any breach of this Agreement or the Tariff; (iv) from the services provided or the equipment used by Scheduling ESS; or (v) from Scheduling ESS's relationship with a Consumer or ESS; except to the extent caused wholly or in part by a negligent, grossly negligent or willful act or omission of Utility. At Utility's option, Scheduling ESS shall defend Utility (by counsel reasonably satisfactory to Utility and at Scheduling ESS's expense) against any such claim or liability covered by this Section 10.1.

In addition, Utility is a participant in the WSCC Reliability Management System ("RMS"). Under the system, Utility is subject to sanctions, including financial penalties, if certain reliability criteria are exceeded. Utility must have timely and accurate load forecasts and resource schedules from Scheduling ESS to operate the Utility Controlled Grid in a reliable

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manner. Scheduling ESS agrees that to the extent its actions or omissions cause Utility to incur an RMS sanction, Scheduling ESS shall indemnify and hold Utility harmless for the sanction.

- 10.2 Notwithstanding Section 9, Utility shall indemnify and hold harmless Scheduling ESS and its current and future direct and indirect parent companies and affiliates and their shareholders, officers, directors, employees, agents, servants and assigns from any and all claims and liabilities for losses, expenses (including reasonable attorneys' fees on trial or appeal), damage to property, or injury to or death of any person that is caused wholly or in part by a negligent, grossly negligent or willful act or omission by Utility, its officers, directors, employees, or agents, or that arises (i) as a direct or indirect result of any performance or nonperformance by Utility to the Utility's agreements with Consumers and ESSs; (ii) as a direct or indirect result of any performance or nonperformance by any party to the Utility's agreements with other third parties; (iii) from any breach of this Agreement or the Tariff; (iv) from the services provided or the equipment used by Utility; or (v) from Utility's relationship with a Consumer or ESS; except to the extent caused wholly or in part by a negligent, grossly negligent or willful act or omission of Scheduling ESS. Subject to Section 9 of this Agreement, Utility shall also indemnify and hold these parties harmless against claims or liabilities that arise from the services rendered by Utility under this Agreement. At Scheduling ESS's option, Utility shall defend Scheduling ESS (by counsel reasonably satisfactory to Scheduling ESS and at Utility's expense) against any claim or liability covered by this Section 10.2.
- 10.3 An indemnifying Party's duty to indemnify under this Section 10 shall survive termination of this Agreement. In addition, the Party's duty to indemnify shall not be limited by the amount or type of damages, compensation or benefits payable by or for the indemnifying Party under any statutory scheme, including, without limitation, under any Worker's Compensation Acts, Disability Benefit Acts or other Employee Benefit Acts.
- 10.4 Utility or Scheduling ESS or its respective officers, directors, employees or agents seeking indemnification under this Section (the "Indemnified Party") shall notify the other Party (the "Indemnifying Party") in writing of any matter that may result in an indemnity payment under this Section promptly upon the discovery of such matter. In such circumstances, the Indemnified Party shall provide the Indemnifying Party with such information and assistance, as the Indemnifying Party shall reasonably request. The Indemnifying Party assuming the defense of the relevant claim or action shall not be liable for any settlement thereof, which is made without its consent.

Section 11: Assignment and Delegation

Scheduling ESS may not assign or delegate its rights or obligations under this Agreement. Any assignment in violation of this Section 11 shall be void and without effect. Notwithstanding the provisions of this Section 11, Utility may, subject to any approval required by the Commission, assign this Agreement to any successor in interest through purchase, merger or corporate restructuring.

Section 12: Independent Contractors

Each Party shall perform its obligations under this Agreement as an independent contractor.

Section 13: Entire Agreement

This Agreement, all attachments to this Agreement and the Tariff (as it may be amended from time to time) comprise the entire agreement between the Parties with respect to the subject

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matter hereof. This Agreement supersedes all other agreements, statements or understandings, written or oral, between the Parties related to the subject matter hereof. The Parties may amend this Agreement pursuant to the terms of Section 22 only.

Section 14: Nondisclosure

14.1 Neither Party may disclose any Confidential Information obtained pursuant to this Agreement to any third party, including affiliates of the receiving Party, without the express prior written consent of the other Party. "Confidential Information" shall include information supplied by Scheduling ESS to Utility in the application process marked proprietary or confidential subject to the limitations herein described, all "Proprietary Consumer Information" as defined in OAR 860-038-0005, and any other information designated as confidential by both parties in writing. Confidential Information shall not include information known to either Party before obtaining the same from the other Party, information in the public domain, or information obtained by a Party from a third party who did not, directly or indirectly, receive the same from the other Party to this Agreement or from a party who was under an obligation of confidentiality to the other Party to this Agreement or information developed by either Party independent of any Confidential Information. The receiving Party shall use the higher of the standard of care that the receiving Party uses to preserve its own confidential information or a reasonable standard of care to prevent unauthorized use or disclosure of such Confidential Information. Confidential Information shall remain confidential for a period of three (3) years, or on an earlier date if it becomes information in the public domain pursuant to some legitimate process outside the scope of this Agreement or the conduct of the Parties to this Agreement; provided, however, that each party's own Confidential Information shall be subject to disclosure by that party at any time prior to the end of the three (3) year period. Each receiving Party shall, upon termination of this Agreement and at the request of the disclosing Party, promptly return or destroy all Confidential Information of the disclosing Party then in its possession.

14.2 Notwithstanding Section 14.1, Confidential Information may be disclosed to any governmental, judicial or regulatory authority requiring such Confidential Information pursuant to any applicable law, regulation, ruling, or order; provided, however, that: (a) such Confidential Information is submitted under any applicable provision, if any, for confidential treatment by such governmental, judicial or regulatory authority, and (b) prior to such disclosure, the other Party is given prompt notice of the disclosure requirement so that it may take whatever action it deems appropriate, including intervening in any proceeding and seeking an injunction to prohibit such disclosure.

Section 15: Enforceability

If any provision of this Agreement or the application of such a provision is to any extent held invalid or unenforceable, the remainder of this Agreement and its application, other than those provisions that have been held invalid or unenforceable, shall not be affected and shall continue in full force and effect and shall be enforceable to the fullest extent permitted by law or in equity.

Section 16: Notices

16.1 Except as otherwise provided in this Agreement, all notices under this Agreement shall be in writing and shall be deemed given and effective (a) upon delivery if delivered by hand; (b) upon receipt if service is by certified mail (return receipt requested) to the latest known address and (c) upon confirmation of receipt to the Parties, if service is by facsimile. Notice shall be given to the Parties as follows:

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If to Scheduling ESS:

Contact Name: _____

Business Address: _____

Facsimile: _____

If to Utility:

Contact Name: _____

Business Address: _____

Facsimile: _____

- 16.2 Each Party shall be entitled to specify as its notice address any other address in the United States upon written notice to the other Party.
- 16.3 Each Party shall designate on Attachment A, the person(s) to be contacted with respect to specific operational matters under this Agreement. Each Party shall be entitled to specify any change to such person(s) upon written notice to the other Party.

Section 17: Time of Essence

The Parties expressly agree that time is of the essence for all portions of this Agreement.

Section 18: Dispute Resolution

- 18.1 **Informal Resolution of Disputes.** Except as provided below, any dispute arising between the Parties relating to interpretation of the Agreement or to the performance of the Parties' obligations hereunder, shall be reduced to writing and referred to the Parties' representatives as identified on Attachment A for resolution. Utility and Scheduling ESS shall meet and confer in an effort to resolve their dispute and will use good faith and commercially reasonable efforts to informally resolve all disputes so referred. Scheduling ESSs point of contact for all information, operations, questions, and problems regarding the Tariff and this Agreement shall be the Company's Scheduling ESS Office. Pending resolution, the Parties shall proceed diligently with the performance of their respective obligations under this Agreement, except if this Agreement has been terminated under Section 5.
- 18.2 **Unauthorized Electrical Use.** Notwithstanding Sections 18.3, 18.4 and 18.5, once unauthorized energy use is suspected, Utility, in its sole discretion, may take any or all of the actions permitted under the Tariff or this Agreement or otherwise available to Utility by law or in equity to document and make safe and reliable the installation or otherwise.
- 18.3 Notwithstanding Sections 18.2, 18.4 and 18.5, all disputes related to FERC-jurisdictional services as defined by the Federal Power Act, and all relevant FERC orders, rules, directives and decisions, shall be resolved pursuant to the dispute resolution procedures of the applicable OATT.

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18.4 If the Parties fail to resolve a dispute over which the Commission has primary jurisdiction and in which a party is not seeking monetary damages, except for disputes under Sections 18.2 and 18.3, within thirty (30) Calendar Days (or such other period as the parties may agree upon) after written notice of the dispute is referred to the Parties' representatives, the matter shall, upon demand of either Party, be submitted to resolution before the Commission, in accordance with applicable Oregon statutes, the Utility Tariff and the Commission's applicable rules, regulations and procedures for resolving complaints. The Parties agree to be bound by the final resolution of the dispute by the Commission. Except as provided in Section 18.5, each Party expressly waives any right to file an action in any court relating to any dispute subject to the provisions of this Section 18.4.

18.5 If the parties fail to resolve a dispute in which a party is seeking monetary damages, including but not limited to billing disputes, within thirty (30) Calendar Days (or such other period as the parties may agree upon) after written notice of the dispute is referred to the Parties' representatives, or in the event the Commission declines to assert or accept jurisdiction over any dispute submitted to it pursuant to Sections 18.4 or 18.6, or for all other disputes not subject to Sections 18.2, 18.3, or 18.4, the dispute shall be submitted to binding arbitration in the City of Portland, Oregon under the Commercial Arbitration Rules of the American Arbitration Association.

(a) If the amount in dispute is \$500,000 or less, the arbitration initiated under this Agreement shall be conducted before a single neutral arbitrator appointed by the parties. If the parties fail to agree upon a single arbitrator within twenty (20) calendar days of the referral of the dispute to arbitration the parties shall request the American Arbitration Association to appoint a single neutral arbitrator. If the amount in dispute exceeds \$500,000, each party shall choose one neutral arbitrator who shall sit on a three-member arbitration panel. The two arbitrators so chosen shall within twenty (20) calendar days of their selection, select a third arbitrator to chair the arbitration panel. The arbitration shall be before three (3) arbitrators. If the two neutral arbitrators selected by the Parties are unable to select and agree upon a third neutral arbitrator, either Party may apply to any federal or state court of competent jurisdiction for appointment of a third neutral arbitrator. In any case, the arbitrators chosen shall be knowledgeable in electric utility matters, including electric transmission and bulk power issues, and shall not have any current or past substantial business or financial relationships with any party to the arbitration (except prior arbitration). The arbitrator(s) shall provide each of the parties an opportunity to be heard and, except as otherwise provided herein, shall generally conduct the arbitration in accordance with the then current Commercial Arbitration Rules of the American Arbitration Association.

(b) Any arbitration award shall be in writing and shall contain the findings of fact and conclusions of law upon which the arbitrators relied in making the decision. The prevailing party in such arbitration shall be awarded its attorney fees and costs, including its share of the costs of arbitration. The results of the arbitration shall be final and binding upon the Parties and judgment on the award may be entered in any court having jurisdiction. In rendering the decision and award the arbitrators shall determine the rights and obligations of the Parties according to the substantive and procedural laws of the State of Oregon. The arbitrator(s) shall be authorized only to interpret and apply the provisions of the Tariff and this Agreement and shall have no power to modify or change any provisions in any manner. The arbitrators shall have no authority to award indirect, special, punitive, incidental, or consequential damages or any other damages not measured by the prevailing Party's actual damages and may not, in any event, make any rule, finding, or award that does not conform to the terms and conditions of this Agreement. The final decision of the arbitrator shall also be filed with FERC and the Commission, if it affects their respective jurisdictional rates, terms and conditions of service or facilities.

(c) Each Party understands that it will not, except as set forth below, be able to bring a court action concerning any dispute that is covered by this Section 18. Instead, each Party agrees to submit disputes to arbitration as provided in this Section. A Party shall have the right to bring a court action

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only in connection with enforcement of the provisions of this Section 18 or enforcement of the terms of any award of the arbitrators contemplated by this Section 18.5, or as provided in Section 18.2.

18.6 If, during a Cure Period, Scheduling ESS believes that special circumstances exist that would require more expeditious resolution of a dispute involving wrongful termination than might be expected under the process described in this Section, except Sections 18.2 and 18.3, it may submit its dispute directly to the Commission, with a copy provided to the other party(ies) involved in the dispute. The Commission should respond to such a filing by:

- (a) expeditiously resolving the dispute;
- (b) providing an interim resolution (subject to refund, etc.) and initiating the standard resolution process to provide a final solution; or
- (c) advising the Parties that the standard dispute resolution process described above be followed without extending the Cure Period.

Section 19: Applicable Law

This Agreement shall be interpreted, governed by and construed in accordance with the laws of the State of Oregon, and shall exclude any choice of law rules that direct the application of the laws or principles of another jurisdiction, irrespective of the place of execution or of the order in which the signatures of the parties are affixed or of the place or places of performance.

Section 20: Force Majeure

Neither Party shall be liable for any delay or failure in the performance of any part of this Agreement (other than obligations to pay money or to post security due to any event of force majeure or other cause beyond its reasonable control, including but not limited to flood, fire, lightning, epidemic, quarantine restriction, war, sabotage, act of a public enemy, earthquake, insurrection, riot, civil disturbance, strike, work stoppage caused by jurisdictional and similar disputes, restraint by court order or public authority, or action or non-action by or inability to obtain authorization or approval from any governmental authority, or any combination of these causes, which by the exercise of due diligence and foresight such Party could not reasonably have been expected to avoid and which by the exercise of due diligence is unable to overcome/ Notwithstanding the provisions of this section, the Utility's obligation to provide or continue to provide Electricity Services is subject to the applicable provisions of the Tariff. It is agreed that upon the Party so affected giving written notice and reasonably full particulars of such force majeure to the other Party within a reasonable time after the cause relied on, then the obligations of the Party, so far as they are affected by the event of force majeure, shall be suspended during the continuation of such inability and circumstance and shall, so far as possible, be remedied with all reasonable dispatch. Any disagreement over whether a particular event or series of events constitutes a force majeure shall be resolved pursuant to provisions of Section 18. If a force majeure event occurs, both Parties shall take all reasonable steps to comply with this Agreement and the Tariff despite the occurrence of the force majeure event

Section 21: Not a Joint Venture

Unless expressly provided in this Agreement, the duties, obligations, and liabilities of the Parties are intended to be several and not joint or collective. Nothing contained in this Agreement shall be construed to create an association, trust, partnership or joint venture or to impose a trust or partnership duty, obligation, or liability on or with regard to either Party. Each Party shall be liable individually and severally for its own obligations under this Agreement.

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Section 22: Amendments or Modifications

- 22.1 No amendment or modification shall be made to this Agreement, in whole or in part, except by an instrument in writing executed by authorized representatives of the Parties, and no amendment or modification shall be made by course of performance, course of dealing or usage of trade. Any amendments or modifications made to the Tariff are hereby incorporated by reference into the Agreement on an ongoing basis during the term of the Agreement.
- 22.2 This Agreement may be subject to such changes or modifications as the Commission may from time to time direct or necessitate in the exercise of its jurisdiction, and the Parties may amend the Agreement to conform to changes directed or necessitated by the Commission. If the Parties are unable to agree on the required changes or modifications to this Agreement, (a) their dispute shall be resolved in accordance with the provisions of Section 18, or (b) a Party may terminate this Agreement upon written notice to the other Party, which shall be effective upon receipt. Utility retains the right to unilaterally file with the Commission, pursuant to the Commission's rules and regulations, an application for a change in Utility's rates, charges, classification, service or rules, or any related agreement.

Section 23: Miscellaneous

- 23.1 Unless otherwise stated in this Agreement: (a) any reference in this Agreement to a section, subsection, attachment or similar term refers to the provisions of this Agreement; (b) a reference to a section includes that section and all its subsections; (c) the words "include," "includes," and "including" when used in this Agreement shall be deemed in each case to be followed by the words "without limitation;" and (d) the singular shall include the plural and the plural shall include the singular. The Parties agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement
- 23.2 The provisions of this Agreement are for the benefit of the Parties and not for any other person or third party beneficiary. The provisions of this Agreement shall not impart rights enforceable by any person, firm or organization other than a Party or a successor or assignee of a Party to this Agreement.
- 23.3 The descriptive headings of the various sections of this Agreement have been inserted for convenience of reference only and shall in no way define, modify or restrict any of the terms and provisions thereof.
- 23.4 Any waiver at any time by either Party of its rights with respect to a default under this Agreement, or with respect to any other matter arising in connection with this Agreement, shall not be deemed a waiver with respect to any other or subsequent default or matter and no waiver shall be considered effective unless in writing.
- 23.5 Each Party shall be responsible for paying its own attorney fees and other costs associated with this Agreement, except as provided in Sections 9 and 10. If a dispute exists under this Agreement, the prevailing Party, as determined by the dispute resolution procedure contained in Section 18, if used, or by a court of law, shall be entitled to reasonable attorney fees and costs.
- 23.6 Except as otherwise provided in this Agreement, all rights of termination, cancellation or other remedies in this Agreement are cumulative. Use of any remedy shall not preclude any other remedy in this Agreement.

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The Parties have executed this Agreement on the dates indicated below, to be effective upon the later date.

On Behalf of Scheduling ESS

On Behalf of Utility

Name:

Name:

Title:

Title:

Date:

Date:

ATTACHMENT A

A. Contact Persons (Section 16.3)

Utility

Contact/Telephone: _____

Scheduling ESS

Contact/Telephone: _____

B. Parties' Representatives (Section 18.1):

Utility Representative: _____

Scheduling ESS Representative: _____