

# **COOPERATIVE ENDEAVOR AGREEMENT**

**BY AND BETWEEN**

**STATE OF LOUISIANA**

**AND**

**LA ENERGY PARTNERS, LLC**

**[•], 2019**

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## COOPERATIVE ENDEAVOR AGREEMENT

This Cooperative Endeavor Agreement (“**Agreement**”), effective upon the date executed by both Parties (“**Effective Date**”), is made between:

**THE STATE OF LOUISIANA** (the “**State**”), appearing herein through Jay Dardenne, the Commissioner of Administration, Division of Administration, duly authorized and empowered by the State; and

**LA ENERGY PARTNERS, LLC** (“**LEP**”), a Delaware limited liability company, appearing herein through Michael T. Durham, its duly authorized agent;

(the State and LEP are collectively referred to as the “**Parties**” and singularly referred to as a “**Party**”).

### RECITALS:

#### I. General

WHEREAS, the Louisiana Constitution of 1974, as amended, in Article VII, Section 14(C), provides that for a public purpose the State and its political subdivisions may engage in cooperative endeavors with each other and with any public or private association, corporation or individual;

WHEREAS, the Louisiana Constitution of 1974, as amended, in Article IX, Section 1 provides that the natural resources of the State, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people;

WHEREAS, the operating costs and deferred maintenance and replacement of assets at State-owned and -operated facilities places a substantial financial burden on the State and exposes the State and those facilities to risks that materially and adversely impact the State’s ability to conduct its business and satisfy its commitments and obligations;

WHEREAS, to lessen the impact of lack of adequate funding, the State continuously seeks to mitigate these risks, eliminate unnecessary expenditures and increase efficiencies that derive savings;

WHEREAS, in furtherance of these efforts, the State, through the Office of State Buildings (“**OSB**”), issued a Solicitation for Offers for a Cooperative Endeavor Agreement Number 300000812, for a public-private partnership regarding statewide chiller facilities and building energy conservation measures (the “**SFO**”);

WHEREAS, Bernhard, LLC (doing business as Bernhard Energy Solutions) and Johnson Controls, Inc. collaborated to submit a proposal in response to the Solicitation for Offers pursuant to which they would form LEP to enter into this Agreement with the State in order to establish a framework pursuant to which the Parties will enter into arrangements to, among other things, convey exclusive leasehold or concession rights to LEP over certain State-owned or -controlled utility plants and engage LEP to undertake Improvements to State-owned or -controlled buildings in order to mitigate the State’s risks, assist the State in complying with its commitments and obligations and make such assets and properties more efficient, thus saving the State money;

WHEREAS, the Parties desire to enter into this Agreement to establish a framework to facilitate and advance the goals recited herein, as well as other goals for the public benefit of the State, through multiple Projects to be performed by one or more Affiliates of LEP (referred to as Project SPEs);

WHEREAS, the Parties intend that over the Term of this Agreement the contemplated Projects will reduce the need for State general fund expenditures necessary for the operation, maintenance, repair, renewal and enhancement of Covered Facilities, as well as creating energy efficiencies resulting in reduced energy and operating costs for the State which will have a beneficial effect on economic and operating expenditures of the State, third-parties and the environment;

WHEREAS, the State and the public will benefit from the economic development and revenue generation created pursuant to the Projects;

WHEREAS, (a) the State Investment for each Project will be for a public purpose that comports with the governmental purpose for which the State Entity party to such Project has the legal authority to pursue, (b) it is anticipated that the value of the benefits of each Project to the State and its citizens will exceed the value of the State Investment undertaken for such Project so that all expenditures by the State Entity party to a Project will not be gratuitous donations and (c) for each Project it shall be a condition precedent that the State Entity entering into such Project establish a demonstrable, objective and reasonable expectation of receiving at least equivalent value in exchange for the State Investment for such Project;

WHEREAS, any and every new Project shall satisfy the Constitutional, statutory, regulatory and jurisprudential conditions for a cooperative endeavor agreement;

## **II. Phase I Project**

WHEREAS, simultaneous with the execution and delivery of this Agreement, the Parties desire to now enter into Ancillary Agreements for the initial Project contemplated by this Agreement (the “**Phase I Project**”);

### **a. Shaw Center**

WHEREAS, the State is party to the Shaw Center CEA, pursuant to which the parties thereto designed, constructed and operate a multi-use museum, theatre and arts complex known as “The Shaw Center for the Arts”;

WHEREAS, pursuant to the Shaw Center CEA, the State provides, at the State’s cost and expense, thermal services and certain operation, maintenance, repair, renewal and enhancement services to the Shaw Center Building;

WHEREAS, the State provides thermal services to the Shaw Center Building from existing assets situated within the Shaw Center Plant located near the Shaw Center Building, and delivers the same through established distribution systems comprising piping, valves and fittings running between the Shaw Center Building and the Shaw Center Plant;

WHEREAS, LEP desires to operate and maintain the Shaw Center Plant and the assets contained therein in exchange for the exclusive lease of the Shaw Center Plant and all assets therein, and provide Thermal Services to the Shaw Center Building on a priority usage basis and thereby relieve the State of its current financial and operational undertaking of providing thermal services to the Shaw Center Building;

WHEREAS, as further consideration by LEP to lease the Shaw Center Plant and assume certain State obligations under the Shaw Center CEA, LEP desires to provide specific enhancements and improvements to the Shaw Center Building;

WHEREAS, the State expects to recognize financial benefits from the enhancements made to and improvements installed in the Shaw Center Building, including (i) utility and operational cost savings, (ii) Infrastructure Savings, and (iii) improved functionality and reliability of the Shaw Center Building;

WHEREAS, the State has obtained the prior written approval of the Commissioner to lease the Shaw Center Plant to LEP pursuant to La. R.S. 33:9036 for the purposes of economic development, as the Project is located within a downtown development district in the city of Baton Rouge;

#### **b. Office of State Buildings**

WHEREAS, the State has identified specific buildings where the operational costs and deferred maintenance and replacement costs have limited the State's ability to operate and maintain those buildings and LEP desires to provide specific enhancements and improvements to such buildings to mitigate the State's operational costs and risks therein;

WHEREAS, the State expects to recognize financial benefits from the enhancements made to and improvements installed in the buildings, including (i) utility and operational cost savings, (ii) Infrastructure Savings, and (iii) improved functionality and reliability of the buildings;

WHEREAS, the Parties desire to collaboratively support the State and its commitments and obligations to its citizens through the Phase I Project;

### **III. Future Projects**

WHEREAS, the SFO contemplated that the State or other State Entities may enter into future Projects for the type of Work and Services described therein under the terms and conditions of this Agreement; and

WHEREAS, by allowing the State and other State Entities to pursue additional future Projects under this Agreement, the State and such State Entities will benefit by relying on the framework established herein, including contractual protections afforded to the State and other State Entities herein and assurance that each such Project will have a Net Public Benefit.

### **AGREEMENT:**

THEREFORE, IT IS AGREED:

### **ARTICLE 1 DEFINITIONS; CONFLICT OF TERMS**

**Section 1.1 Defined Terms.** When used in any Contract Document, the terms contained in **Exhibit "A"** will have the meanings given in that Exhibit unless a different meaning is expressed or clearly indicated by the context in the applicable Contract Document. Defined terms will be given their common and ordinary meanings when they appear uncapitalized in the text. Undefined terms will be given their common and ordinary meanings pursuant to custom and industry parlance. Notwithstanding the foregoing, any terms defined in an Ancillary Agreement shall have the meaning set forth in such Ancillary Agreement.



## **Section 1.2     Interpretation; Use of Defined Terms.**

- a.** The definitions of terms will apply equally to the singular and plural forms of the terms defined;
- b.** Whenever the context may require, any pronoun will include the corresponding masculine, feminine and neuter forms;
- c.** The words “herein”, “hereof” and “hereunder”, and words of similar import, will be construed to refer to the applicable Contract Document in its entirety and not to any particular provision thereof;
- d.** The words “include”, “includes” and “including” will be deemed to be followed by the phrase “without limitation”;
- e.** The verb “will” shall be construed to have the same meaning and effect as the verb “shall”;
- f.** Any definition of or reference to any agreement (including a Contract Document), document, standard, principle or other instrument in a Contract Document will be construed as referring to such agreement, document, standard, principle or other instrument as from time to time amended, supplemented, substituted, novated, assigned or otherwise modified (subject to any restrictions on such amendments, supplements, substitutions, novations, assignments or modifications set forth in a Contract Document);
- g.** Any reference herein to any Person, or to any Person in a specified capacity, will be construed to include such Person’s successors and assigns or such Person’s successors in such capacity, as the case may be (subject to any restrictions on assignment set forth in a Contract Document);
- h.** All references to Articles, Sections, Exhibits and Appendices will be construed to refer to Articles, Sections, Exhibits and Appendices of or to the applicable Contract Document. The Exhibits and Appendices to a Contract Document are an integral part of that Contract Document. Notwithstanding the foregoing, the provisions of a Contract Document will prevail over the provisions of the Exhibits and Appendices to such Contract Document to the extent of any inconsistency;
- i.** The headings used are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting a Contract Document;
- j.** Any reference to time of day is a reference to Central Standard Time or Central Daylight Saving Time, as the case may be;
- k.** Any reference to a governmental authority is deemed to include a reference to any successor to such governmental authority or any Person which has taken over the responsibilities or functions of said governmental authority;
- l.** All monetary amounts are expressed in U.S. dollars;
- m.** If the time for doing an act falls or expires on a day that is not a Business Day, the time for doing such act will be extended to the next Business Day; and

n. By this reference, each “WHEREAS” clause contained in the Recitals of a Contract Document is made part of that Contract Document as if fully set forth therein.

## ARTICLE 2 SCOPE OF COOPERATIVE ENDEAVOR

**Section 2.1     State Benefits.** Projects may have one or more of the following positive impacts to the State and its citizens:

a. utility and operational cost savings to the State due to efficiencies created by Improvements made to Covered Facilities;

b. avoidance of costly operation and maintenance services, Infrastructure Savings and deferred maintenance expenses of the State with respect to Covered Facilities;

c. improved functionality and reliability of receipt of Thermal Services to and within Covered Facilities; and

d. design and construction of Improvements that provide energy cost reductions, operational cost reductions, load reductions and/or equipment upgrades or replacements to Covered Facilities.

The benefits described in this Section 2.1 are collectively known as “**Project Benefits**”, and the specific Project Benefits of each Project will be identified in the applicable Ancillary Agreements and a related Net Public Benefit Assurance Plan for such Project utilizing the principles set forth in **Exhibits “B”** and **“C”**. The Project Benefits of the Phase I Project are set forth in the Phase I Ancillary Agreements and **Exhibit “K”**.

**Section 2.2     Relationship of Parties; Independent Contractor.** Nothing in the Contract Documents will be deemed to constitute any Party a partner, agent or legal representative of any other Party or to create a joint venture, partnership, agency or any relationship between the Parties, and LEP and the Project SPEs are independent contractors of the State and will be independent contractors of any State Entities with respect to the Projects. No employees or representatives of LEP or a Project SPE shall be deemed employees or independent contractors of the State or any State Entity, and neither the State nor any State Entity shall be liable to LEP, a Project SPE or their employees for any employment benefits. It is expressly acknowledged and understood that LEP and the Project SPEs shall not be bound to comply with Louisiana’s Public Bid Laws, La. R.S. 38:2211, *et seq.*, or the Louisiana Procurement Code, La. R.S. 39:1551, *et seq.*, with respect to procurement of materials or the selection of a contractor for any Work or Services, regardless of the total amount of any such contract. It is expressly acknowledged and understood that LEP and the Project SPEs shall not be bound to comply with the Louisiana Public Records Law, the Louisiana Open Meetings Law and the Louisiana Civil Service Law with regard to the procurement of any materials or services under any Contract Document.

**Section 2.3     Net Public Benefit Assurance.** The amount of the Net Public Benefit for a specific Project shall be calculated annually throughout the term of such Project according to the principles set forth in **Exhibit “B”**. The plan to measure the annual Net Public Benefit for the Phase I Project is set forth in **Exhibit “K”**. Within ninety (90) days of the end of each Service Year of a Project, LEP and the applicable Project SPE shall provide to the State or the applicable State Entity an annual reconciliation of the Net Public Benefit of such Project for the previous Service Year. The State and applicable State Entity shall have thirty (30) days to review and approve or dispute the annual reconciliation. Failure of the State or a State Entity to respond within thirty (30) days shall be deemed approval thereof. If the State disagrees with the annual reconciliation, the disagreement shall be

considered a Dispute under ARTICLE 14 and shall be resolved pursuant to the terms contained therein. In any Service Year of a Project where there is not a Net Public Benefit, LEP and the applicable Project SPE shall pay to the State the amount that the State Investment for that Project expended for that Service Year exceeded the Project Benefits for that Service Year. Such payment shall be made within thirty (30) days of the State or the applicable State Entity's approval (or deemed approval) of the Net Public Benefit pursuant to this Section 2.3 or final resolution of any Dispute pursuant to ARTICLE 14, and shall not be in the form of a credit towards any charges for future Work or Services related to that Project. The failure of a Project to generate a Net Public Benefit for a Service Year shall not be deemed an overpayment for the purposes of La. R.S. 39:72(B). The determination of Net Public Benefit shall be determined on a Project-by-Project basis, and no deficit or surplus from any Project will affect or be taken into consideration in the determination of a Net Public Benefit, or lack thereof, for any other Project.

### **ARTICLE 3 AUTHORITY**

**Section 3.1     State Authority.** The State is granted authority, pursuant to Section 14(C) of Article VII of the Louisiana Constitution of 1974, as amended, to enter into cooperative endeavor agreements with public and private associations or corporations for a public purpose, including agreements which may require the use of State funds, personnel or other resources, provided legal guidelines are met and the Project Benefits are demonstrated to be commensurate with or greater than the investment of funds by the State. This Agreement is entered into with the expectation and belief that during the Term, the Project Benefits from each Project will exceed the obligations of the State under the applicable Ancillary Agreements for the respective Project, including the State Investment thereunder.

**Section 3.2     LEP and Project SPE Authority.** LEP has provided to the State a copy of LEP's certificate of formation, limited liability company agreement, a certificate of good standing and a duly executed unanimous consent of the board of managers of LEP, evidencing the authority and representation of LEP by the undersigned representative, such documents collectively demonstrating the authority of LEP to enter into this Agreement, to carry out the commitments made herein, and the authority of the undersigned representative to execute this Agreement on behalf of LEP. At or prior to a Project SPE entering into any Ancillary Agreement, LEP will provide to the State a copy of the Project SPE's certificate of formation, limited liability company agreement, a certificate of good standing and a duly executed certification of LEP that such Project SPE is an Affiliate, evidencing the authority and representation of the Project SPE by its undersigned representative to such Ancillary Agreement, such documents collectively demonstrating the authority of the Project SPE to enter into the Ancillary Agreement, to carry out the commitments made therein, and the authority of its undersigned representative to execute the Ancillary Agreement on behalf of the Project SPE.

### **ARTICLE 4 REPRESENTATIONS**

**Section 4.1     State's Representations.** As a material inducement to LEP to enter into this Agreement and the Phase I Ancillary Agreements, without which LEP would not have entered into this Agreement or the Phase I Ancillary Agreements, nor would LEP cause any future Project SPE to enter into any future Ancillary Agreements, the State represents and warrants to LEP as of the Effective Date and will represent and warrant to LEP and any future Project SPEs as of each subsequent Commencement Date for a Project to which the State is party:

**a.** The State has performed with respect to the Phase I Project an analysis of the Project Benefits expected to be derived from the Phase I Project and such analysis projects a Net Public Benefit to the State pursuant to Section 2.3. Prior to entering into an Ancillary Agreement with respect to a future

Project, the State (if it will be a party thereto) will perform an analysis of the Project Benefits expected to be derived from such Project in its reasonable discretion, and such analysis shall project a Net Public Benefit to the State as a condition to the State entering into such Ancillary Agreement. Notwithstanding the foregoing representations in this Section 4.1.a, the State will be entitled to reasonably rely upon any information and data provided by LEP or a Project SPE in support of the State's analysis.

**b.** The State's obligations under the Contract Documents to which the State is or will be party will be made for the public purpose of supporting the State's current obligations and are part of a bargained for exchange with LEP and the applicable Project SPE.

**c.** The State shall request adequate appropriation from the Legislature to fund the entire State Investment for the Phase I Project and each other Project to which the State will be a party throughout the entire Term of such Projects.

**d.** The State has with respect to the Phase I Ancillary Agreements, and with respect to future Ancillary Agreements to which the State will be a party will have, the requisite power and authority to enter into the Contract Documents and to carry out the terms hereof and thereof. The Commissioner will have the authority to execute such Contract Documents as the authorized representative of the State, and to bind the State to all the terms of such Contract Documents as such may be applicable to the State.

**e.** Each Contract Document to which the State is a party has been, and with respect to future Ancillary Agreements will be, duly authorized, executed and delivered by the State and constitutes or will constitute, as applicable, a legal, valid and binding obligation of the State, enforceable in accordance with its terms.

**f.** The State has obtained with respect to this Agreement and the Phase I Ancillary Agreements, and will obtain prior to the execution and delivery of any future Ancillary Agreements to which the State will be a party, all approvals required by the State, consistent with the courts of law of the State.

**g.** The State has taken or will take all necessary and proper action to authorize the execution, issuance and delivery of each Contract Document to which it is or will be a party, and the performance of the State's obligations hereunder and thereunder.

**h.** The execution of each Contract Document to which the State is or will be a party, and the performance by the State of its obligations hereunder and thereunder, are or will be within the powers of the State, and will not violate any provisions of law applicable to the State.

**i.** At the time of execution by the State of a Contract Document, the State is or will be in full compliance with all terms and conditions thereof, and no event that would constitute an event of default by the State (as described in such Contract Document) with respect thereto has occurred or will occur as of such time.

**j.** To the State's Knowledge, this Agreement contains no untrue or misleading statement of any material fact. The State has no Knowledge of any material fact or circumstance that adversely affects or, so far as the State can now reasonably foresee, will adversely affect the condition of the State or its ability to perform its obligations under any Contract Documents, that the State has not disclosed in writing to LEP. All representations made herein by the State are true and accurate and remain in full force and effect.

**k.** The State agrees and acknowledges that (i) LEP, Project SPEs and any Permitted LEP Transferees will rely upon this Agreement and all applicable Ancillary Agreements when arranging financing for a Project; and (ii) the Persons financing all or any portion of a Project, including the applicable Project SPE's Financier, will rely upon this Agreement and all applicable Ancillary Agreements in agreeing to finance all or any portion of a Project.

**Section 4.2 LEP Representations.** As a material inducement to the State to enter into this Agreement and the Phase I Ancillary Agreements, without which the State would not have entered into this Agreement or the Phase I Ancillary Agreements, LEP represents and warrants to the State as of the Effective Date and as of each subsequent Commencement Date:

**a.** LEP is, and each future Project SPE will be, a duly and legally organized Delaware limited liability company, in good standing under the laws of the state of Delaware and is qualified to do business and is in good standing in the State, and has or will have all the requisite power and authority to enter into each Contract Document to which it is or will be a party and to carry out the terms hereof and thereof, with all powers and governmental licenses, authorization, qualifications, consents and approvals required to carry on its business in the State as now conducted or will acquire and possess all such required authority to carry on the business contemplated in the Contract Documents to which it is a party, and the officer or agent signing each Contract Document to which it is or will be a party has, and with respect to future Ancillary Agreements will have, the authority to execute such Contract Document as the authorized representative of LEP and to bind LEP to all the terms hereof and thereof.

**b.** Each Contract Document to which LEP or future Project SPEs are or will be a party has been, and with respect to future Ancillary Agreements will be, duly authorized, executed and delivered by LEP or the Project SPE, as applicable, and constitutes or will constitute, as applicable, legal, valid and binding obligations of LEP or the Project SPE, as applicable, enforceable in accordance with its terms.

**c.** LEP has taken or will take, and each future Project SPE will take, all necessary and proper action to authorize the execution, issuance and delivery of each Contract Document to which they are or will be a party and any other documents required hereby or thereby, and the performance of their obligations hereunder and thereunder.

**d.** The execution of each Contract Document to which LEP or a future Project SPE is or will be a party and any other documents required hereby or thereby, and the performance by LEP or a future Project SPE of its obligations hereunder and thereunder, are or will be within the powers of LEP or the future Project SPE, as applicable, and will not violate any provisions of any law, regulation, decree or governmental authorization applicable to LEP or the future Project SPE, as applicable, or any agreements of LEP or the future Project SPE, as applicable, with any of its creditors.

**e.** At the time of execution by LEP or a future Project SPE of a Contract Document, LEP or the future Project SPE, as applicable, is or will be in full compliance with all currently applicable terms and conditions thereof, and no event that would constitute an event of default by LEP (as described in such Contract Document) with respect thereto has occurred or will occur as of such time.

**f.** Except as may be otherwise disclosed in writing, there is no action, suit, investigation or proceeding pending, or to LEP's Knowledge threatened, against LEP before any court, arbitrator, or administrative or governmental body which could reasonably be expected to result in a material adverse change in LEP's financial condition or operations, or in LEP's ability to comply with its obligations under each Contract Document to which it is or will be a party or to participate in the transactions contemplated hereby or thereby.

**g.** To LEP's Knowledge, this Agreement contains no untrue or misleading statement of any material fact. There is no material fact or circumstance known to LEP that adversely affects or, so far as LEP can now reasonably foresee, will adversely affect the condition of LEP or a future Project SPE or their ability to perform their obligations under the Contract Documents, that LEP has not disclosed in writing to the State. All representations made herein by LEP are true and accurate and remain in full force and effect.

**h.** LEP certifies that it has no outstanding audit issues or findings.

## **ARTICLE 5 OBLIGATIONS**

### **Section 5.1     State Obligations.**

**a.** Compliance with Contract Documents. The State will comply with and perform all of its obligations arising under or related to the Contract Documents, subject to the terms, obligations and conditions thereof, including granting to LEP or a Project SPE:

(1) the exclusive right to occupy, use, operate, manage, administer and maintain any Covered Facilities subject to Leases, including all Covered Assets at or within such Covered Facilities;

(2) the exclusive right to design, construct, install and finance Plant Improvements, if applicable, at Covered Facilities subject to Leases;

(3) the exclusive right to provide Services to Covered Facilities subject to Ancillary Agreements;

(4) the exclusive right to provide Thermal Services to Covered Facilities subject to Thermal Services Agreements;

(5) the exclusive right to design, construct, install and finance Energy Optimization Improvements at Covered Facilities subject to Leases or Facility Optimization Services Agreements;

(6) the exclusive right to utilize Thermal Energy-producing assets located at Covered Facilities subject to Leases to provide Thermal Energy to any Third Party Off-takers on terms and conditions as LEP and the Project SPE may accept, provided, that all such agreements with Third Party Off-Takers will expressly state that the provision of Thermal Services to such Third Party Off-taker is subordinate to LEP's and the Project SPE's obligation to provide Thermal Services to the relevant Covered Facility; and

(7) indemnify the LEP Indemnitees in accordance with Section 13.3a.

**b.** Contract Document Payments. Subject to Section 5.3, the State will timely make all payments due and owing by it under all Contract Documents, in accordance with the terms and within the time periods provided therein. The payment terms for the Phase I Project are attached hereto as **Exhibit "L"**.

**c.** No Encumbrances. The State agrees not to encumber, transfer or otherwise dispose of all or any portion or component of a Covered Facility without first receiving a subordination and non-disturbance agreement with any new interest holder acknowledging and agreeing to abide by the terms of the applicable Contract Documents.

**d. Cooperation; No Obstruction or Interference.** The State will:

(1) provide LEP, the Project SPE and all LEP Persons with reasonable access to Covered Facilities throughout the Term of the applicable Ancillary Agreement(s), including personnel access and receipt of major equipment deliveries as may be necessary to provide Work and Services at, on or for such Covered Facilities, and if applicable for a reasonable period of time following termination of the Term of an Ancillary Agreement to remove any Future Equipment; and

(2) not allow any of its actions or those of any State Person to unreasonably interfere with the performance of Work or Services at, on or for Covered Facilities.

**e. Responses to LEP Inquiries.** Unless otherwise specified in this Agreement, the State will respond in writing to all written inquiries received from LEP as soon as reasonably practicable and in any event within ten (10) days of receipt of such inquiry or such longer period as the circumstances and content of the inquiry may reasonably require.

**f. Exclusivity for Work and Services.** During the Term, the State will not contract with or otherwise permit Persons other than LEP, a Project SPE and their Affiliates and subcontractors to furnish or provide any work or services at a Covered Facility that are the same Work or Services furnished or provided by LEP or a Project SPE to such Covered Facility pursuant to a Scope of Work or an Ancillary Agreement without obtaining the prior written consent of LEP or the applicable Project SPE, which may be withheld or conditioned in LEP's sole discretion; provided, however, that the foregoing will not apply in the event of circumstances that could not have been reasonably foreseen and which requires the State to take immediate action to prevent, correct or protect such Covered Facility from substantial loss.

**Section 5.2 LEP Obligations.**

**a. Compliance with Contract Documents.** LEP will, and will cause the Project SPEs to, comply with and perform all of its obligations arising under or related to the Contract Documents, subject to the terms, obligations and conditions thereof, including:

(1) occupy, use, operate, manage, administer and maintain any Covered Facilities subject to Leases;

(2) design, construct, install and finance Plant Improvements, if applicable, at Covered Facilities subject to Leases;

(3) provide Thermal Services to Covered Facilities subject to Thermal Services Agreements;

(4) design, construct, install and finance Energy Optimization Improvements at Covered Facilities subject to Facility Optimization Services Agreements;

(5) provide M & V Services, if applicable, to Covered Facilities subject to Leases and Facility Optimization Services Agreements;

(6) furnish to the State, prior to the commencement of any Work or Services under an Ancillary Agreement, certificates of insurance effecting coverages required of LEP or a Project SPE as described in **Exhibit "E"** hereto or as provided under such Ancillary Agreement, and maintain such insurance in full force and effect for the duration specified therein;

(7) furnish to the State, prior to the commencement of any Improvements under an Ancillary Agreement, any payment and performance bonds required of LEP or a Project SPE under such Ancillary Agreement; and

(8) indemnify the State Indemnitees in accordance with Section 13.3b.

b. Contract Document Payments. LEP will, and will cause the Project SPEs to, timely make all payments due and owing by them under all Contract Documents, in accordance with the terms, and within the time periods, provided therein.

c. Cooperation; No Obstruction or Interference. LEP will not allow any of its actions or those of any Project SPE or LEP Person to unreasonably interfere with the activities of the State or any other Person on or about a Covered Facility.

d. Responses to Inquiries. Unless otherwise specified in this Agreement, LEP will respond in writing to all written inquiries received from the State as soon as reasonably practicable, and in any event within ten (10) days of receipt of such inquiry or such longer period as the circumstances and content of the inquiry may reasonably require.

**Section 5.3 Appropriation.** All State obligations under this Agreement and the other Contract Documents to which the State is a party are subject to appropriation by the Legislature of sufficient funds therefor and the availability of funds following Legislative appropriation, and subject to termination due to unavailability of complete funding. The State agrees to request that the State Budget include sufficient funds for the State Investment for all then-current Projects to which the State is a party and to use its best efforts to affect the necessary Legislative appropriations for all then-current Projects to which the State is a party. Notwithstanding the foregoing, nothing in this Section 5.3 shall require the State to specifically identify a Project in its Budget request to the Legislature. In the event of a Non-Appropriation Event with respect to a Project, and if the State elects to terminate the Ancillary Agreements evidencing such Project as a result thereof but fails to pay the entire Termination Fee due for such Project, following such terminations the State may not contract with any Person other than LEP or an Affiliate thereof for the provision of any work or services at the Covered Facility/ies for such Project that would have been provided by the applicable Project SPE to the Covered Facility/ies under the Ancillary Agreements evidencing such Project but for such terminations.

#### **Section 5.4 Title to Future Equipment.**

a. The State acknowledges and agrees that the purchase of all Future Equipment will be made in the name of LEP, a Project SPE or Project SPE's Trustee.

b. Throughout the Term of the applicable Ancillary Agreement, LEP the Project SPE or Project SPE's Trustee will retain legal title to all such Future Equipment as security for the State's or the applicable State Entity's obligations under such Ancillary Agreement (including payment of any Termination Fee that may be owed thereunder), notwithstanding the installation of that Future Equipment into a Covered Facility in connection with such Work.

c. Pursuant to La. R.S. 10:9-334, the State and each State Entity that becomes a party to an Ancillary Agreement (i) acknowledges the Future Equipment will be installed in a Covered Facility and classified as "fixtures" as defined by La. R.S. 10:9-334, (ii) disclaims any interest in all Future Equipment, (iii) acknowledges LEP, the Project SPEs or Project SPE's Trustee shall be the owner of all Future Equipment, (iv) consents to LEP, the Project SPEs or Project SPE's Trustee granting security interests in all Future Equipment to third parties, including Project SPE's Financier, and



(v) acknowledges that prior to the installation of any Future Equipment in a Covered Facility, LEP or the Project SPE will perfect a fixture filing and UCC-1 in the mortgage records of East Baton Rouge Parish and/or the Parish in which the Covered Facility is located evidencing any security interests granted by LEP, the Project SPE or Project SPE's Trustee in Future Equipment.

d. Upon the expiration or earlier termination of an Ancillary Agreement in accordance with the terms thereof, and subject to payment by the State or the applicable State Entity of the applicable Termination Fee for termination prior to expiration in accordance therewith, title to and ownership of the Future Equipment installed pursuant to such Ancillary Agreement shall vest in the State or State Entity free and clear of any security interests granted by LEP or the Project SPE.

## **ARTICLE 6**

### **INITIAL PROJECT; ADDITIONAL PROJECTS**

**Section 6.1    Phase I Project.** Simultaneous with the execution and delivery of this Agreement, the State and BREP are entering into the Phase I Project, which is evidenced by the Phase I Ancillary Agreements and the Phase I Project Adoption Agreement.

**Section 6.2    Addition of Covered Facilities.** During the period commencing on the Effective Date and continuing until the tenth (10<sup>th</sup>) anniversary thereof, any State Entity may desire that LEP provide Work and/or Services to a Proposed Covered Facility as a new Project, and from and after the tenth (10<sup>th</sup>) anniversary of the Effective Date no new Projects may be effected; provided, however, that the foregoing shall not prohibit or preclude the amendment or modification of any Projects in effect as of such date. In no event may any proposed Work or Services be outside the scope of the SFO.

**Section 6.3    Notification.** Should a State Entity desire to have LEP provide Work and/or Services on a Project, such State Entity may provide written notice to LEP identifying the Proposed Covered Facility and the scope of Work or Services the State Entity desires LEP to perform or furnish at the Proposed Covered Facility. The State Entity shall give LEP reasonable access to the Proposed Covered Facility, and provide LEP with such information reasonably requested, so that LEP may perform due diligence to determine the feasibility of the Project at the Proposed Covered Facility.

**Section 6.4    Negotiations; Ancillary Agreements.** The State hereby grants and delegates to any other State Entity the power to negotiate on that State Entity's own behalf the scope of Work and Services to be performed by LEP, and the terms and conditions of applicable Ancillary Agreements (including pricing, duration and termination fees), for Projects at Proposed Covered Facilities; provided, however, such Ancillary Agreements shall conform to the Cooperative Purchasing Provisions set forth in **Exhibit "C"**. Prior to or simultaneous with entering into the Ancillary Agreements for a Project, the State, the State Entity, LEP and the applicable Project SPE shall enter an Adoption Agreement in the form of **Exhibit "F"**. Notwithstanding anything contained herein to the contrary, the effectiveness of this Agreement and any prior Ancillary Agreements shall not relieve any Party from obtaining any requisite approvals or consents, including the Office of State Procurement of the Division of Administration (or any successor agency or entity thereto). In addition to the foregoing, if the State Entity seeking a Project pursuant to this ARTICLE 6 is a publicly funded institution of higher education within the State, such State Entity shall obtain prior to or simultaneous with entering into the Ancillary Agreements for a Project, the approval of its governing board.

**Section 6.5    Net Public Benefit.** Each Project agreed to by the Parties under this ARTICLE 6 shall have a Net Public Benefit determined by the applicable Parties consistent with **Exhibit "B"** hereto and such other terms, conditions and principles as such parties may mutually agree prior to entering into the Ancillary Agreements relating thereto, exclusive of any other Projects entered into by the Parties

under the terms of this Agreement, and the amount of Net Public Benefit for a particular Project shall be determined annually subject to Section 2.3. Prior to the execution of any future Ancillary Agreement, the State Entity seeking such Project shall cause to be performed an independent review of the anticipated Project Benefits and State Investment for such Project to confirm that (a) the State Investment for such Project will be for a public purpose that comports with the governmental purpose for which the State Entity has the legal authority to pursue, (b) the anticipated value of the benefits of the Project to the State and its citizens will exceed the value of the State Investment undertaken for the Project so that all expenditures by the State Entity will not be gratuitous donations and (c) the State Entity will have a demonstrable, objective and reasonable expectation of receiving at least equivalent value in exchange for the State Investment for the Project. Such review shall be attached to and become part of the applicable future Ancillary Agreement.

## **ARTICLE 7 INSURANCE AND BONDS**

**Section 7.1     Insurance.** Each Party shall maintain insurance of the kinds and in the amounts specified in an Ancillary Agreement on the Covered Facility thereunder and any components thereof, and any other assets and properties covered or affected by that Ancillary Agreement, and for the Work and Services to be performed thereunder.

**Section 7.2     Insurance Specifications.** For any insurance required to be obtained and maintained by LEP or a Project SPE pursuant to an Ancillary Agreement, such insurance shall comply with the terms and conditions of **Exhibit “E”**.

**Section 7.3     Bonds.** The State shall have the right, to be set forth in an Ancillary Agreement, to require LEP or a Project SPE to furnish a bond for the faithful performance of the Project and payment of obligations arising thereunder. Upon request of any Person appearing to be a beneficiary of a required bond under an Ancillary Agreement, LEP will, or will cause the Project SPE to, promptly furnish a copy of such bond. Any bonds required of LEP or a Project SPE pursuant to an Ancillary Agreement shall be recorded by LEP or the applicable Project SPE in the manner and on the conditions specified in the Ancillary Agreement.

## **ARTICLE 8 NONDISCRIMINATION**

LEP agrees, and will cause each Project SPE, to abide by the requirements of the following laws (as amended), to the extent applicable: (i) Title VI of the Civil Rights Act of 1964, Title VII of the Civil Rights Act of 1964 and Equal Employment Opportunity Act of 1972; (ii) Federal Executive Order 11246; (iii) the Rehabilitation Act of 1973; (iv) the Vietnam Era Veteran’s Readjustment Assistance Act of 1974; (v) the Uniformed Services Employment and Reemployment Rights Act of 1994; (vi) Title IX of the Education Amendments of 1972; (vii) the Age Discrimination Act of 1975; (viii) the Fair Housing Act of 1968; and (ix) the Americans with Disabilities Act of 1990. LEP further agrees that, to the extent required by Applicable Legal Requirements, it and the Project SPEs shall not discriminate in their employment practices and shall render their services without discrimination, and without regard to race, color, religion, sex, national origin, veteran status, political affiliation, or disabilities.

## **ARTICLE 9**

### **PROJECT SPEs; ASSIGNMENT AND TRANSFER**

**Section 9.1     Project SPEs.** For each Project, LEP may form or caused to be formed a Project SPE to enter into the applicable Ancillary Agreements and perform the applicable Work and Services. If formed, a Project SPE will be a Delaware limited liability company and an Affiliate of LEP.

**Section 9.2     Assignment by LEP.** Except as expressly provided in this Section, LEP will not assign or otherwise transfer this Agreement and the Project SPEs will not assign or otherwise transfer any Ancillary Agreement, or any of their Agreement Rights without the State's (or the applicable State Entity's with respect to any Ancillary Agreements) prior written consent, which consent may be withheld or conditioned in the State's (or State Entity's, as applicable) sole discretion. Notwithstanding the foregoing, LEP and Project SPEs may assign without the consent of the State (i) their rights to receive any payments from the State under this Agreement or any Ancillary Agreement to a Project SPE's Financier and (ii) all Ancillary Agreements comprising a single Project in their entirety to a Permitted LEP Transferee. In the event of any valid transfer and/or assignment of any Agreement Rights to a Permitted LEP Transferee, LEP or the Project SPE, as applicable, shall be released of any obligations and/or duties related to the transferred or assigned Agreement Rights subsequent to the effective date of such transfer.

**Section 9.3     Assignment by the State.** The State will not assign or otherwise transfer its rights or obligations under the Contract Documents without LEP's prior written consent, which consent may be withheld or conditioned in LEP's sole discretion.

**Section 9.4     Assignment to a Project SPE's Financier.** Notwithstanding anything contained in this ARTICLE 9 or elsewhere in the Contract Documents to the contrary, (a) a Project SPE's Financier may assume for itself the Contract Documents in accordance with an applicable NDA; and (b) in no event may any Ancillary Agreement for a specific Project be assigned separate and apart from all of the then-effective Ancillary Agreements for such Project.

## **ARTICLE 10**

### **TERM**

#### **Section 10.1     Term; Ancillary Agreements Coterminous.**

**a.** This Agreement shall be effective once signed by all Parties and shall extend for a term of forty (40) years; provided, however, that if the term of an Ancillary Agreement extends past the Expiry Date of this Agreement, this Agreement shall automatically extend to correspond to the term of such Ancillary Agreement.

**b.** All Ancillary Agreements entered into by the Parties under the terms and conditions of this Agreement shall terminate upon the termination (but not expiration which shall be extended as provided in Section 10.1a) of this Agreement; provided, however, that this Agreement shall not terminate upon, and as a result of, the termination of any individual Ancillary Agreement.

#### **Section 10.2     Grounds for Termination.**

**a.     This Agreement.**

**(1)     The State:** The State may terminate this Agreement prior to the Expiry Date only upon an event of default by LEP specified in Section 11.1.b, but only after compliance with the

provisions of Sections 10.3 and 10.4. The State acknowledges and agrees that it may not terminate this Agreement for any other reason, including as a result of a Non-Appropriation Event or any event of default by LEP or a Project SPE under an Ancillary Agreement.

(2) LEP: LEP may terminate this Agreement prior to the Expiry Date only upon an event of default by the State specified in Section 11.1.a, but only after compliance with the provisions of Section 10.3. LEP acknowledges and agrees that it may not terminate this Agreement for any other reason, including as a result of any event of default by the State or a Lessor an Ancillary Agreement.

b. Ancillary Agreements. An Ancillary Agreement may only be terminated by the parties thereto prior to the Expiry Date thereof only for the events described in such Ancillary Agreement, which may only include those events described on **Exhibit “D”**. The procedures for terminating an Ancillary Agreement, including notice and cure periods as applicable, shall be set forth in the Ancillary Agreement. In no event may the termination of one or more Ancillary Agreements for a specific Project affect or be grounds for termination of any Ancillary Agreement(s) for any other Projects, except upon a termination of this Agreement pursuant to Section 10.2.a.

c. Phase I Ancillary Agreements. In addition to the procedures for terminating a Phase I Ancillary Agreement as specifically provided therein, the State may terminate all of the Phase I Ancillary Agreements, but not less than all, upon either: (i) LEP’s or the Project SPE’s failure to pay any amounts that may be owed to the State for the Phase I Project pursuant to the Net Public Benefit assurance described in Section 2.3 (Termination by State for Net Public Benefit Payment Default); or (ii) a Non-Appropriation Event with respect to the entire Phase I Project (Termination by State for Phase I Non-Appropriation). The amounts that would be owed by the State in such instances is set forth on **Exhibit “M”**.

**Section 10.3 Procedures for Termination**. Should a Party seek to terminate this Agreement on the terms herein, after such Party has delivered the requisite Notices pursuant to Section 11.1 and all appropriate cure periods have expired in accordance therewith, such Party shall provide an additional Notice to the other Party of its intent to terminate this Agreement. The cancelling Party shall specify the Termination Date in its Notice, which Termination Date shall not be less than sixty (60) days from the date such additional Notice is received by the other Party.

**Section 10.4 Termination Fees**. The Termination Fees for the Phase I Project are set forth in **Exhibit “M”** attached hereto.

a. On the Termination Date of this Agreement, each Ancillary Agreement in effect as of such Termination Date shall automatically terminate. In such event, the State and each other State Entity that is party to an Ancillary Agreement will pay all applicable Termination Fees that may be due and owing under all applicable Ancillary Agreements as of such Termination Date (such terminations of the Ancillary Agreements shall be deemed Terminations by State for Cause) and all amounts that accrue under the Ancillary Agreements from the Notice of termination until the Termination Date (including all amounts owed for all Services provided thereunder for such period), by wire or ACH transfer of immediately available funds to such account(s) as the applicable Project SPE or the relevant Project SPE’s Financier(s) shall direct the State or other State Entity in writing. The amount of the Termination Fee payable under an Ancillary Agreement, if any, will be calculated in accordance with the terms and conditions of such Ancillary Agreement, except for the Termination Fee with respect to the Phase I Ancillary Agreements which is set forth on **Exhibit “M”** attached hereto.

b. THE STATE AND EACH OTHER STATE ENTITY THAT ENTERS INTO AN ANCILLARY AGREEMENT HEREUNDER AGREES THAT THEY ARE NOT ENTITLED TO

WITHHOLD, OFFSET, ABATE, OR REDUCE THE AMOUNT OF PAYMENT OF ANY TERMINATION FEE DUE BY THEM UNDER A CONTRACT DOCUMENT FOR ANY REASON WHATSOEVER. THE STATE AND EACH OTHER STATE ENTITY THAT ENTERS INTO AN ANCILLARY AGREEMENT HEREUNDER SPECIFICALLY WAIVE ANY RIGHT OF WITHHOLDING, SET-OFF, ABATEMENT OR REDUCTION OR ANY OTHER DEFENSE AT LAW OR EQUITY TO ALL TERMINATION FEES DUE UNDER THE CONTRACT DOCUMENTS, AND AGREE THEY MUST PURSUE ANY AVAILABLE REMEDIES AGAINST LEP AND/OR THE APPLICABLE PROJECT SPE WITHOUT WITHHOLDING, SET-OFF, ABATEMENT, OR REDUCTION IN AN AMOUNT LESS THAN THE ENTIRE TERMINATION FEES. IT IS THE INTENTION OF THE PARTIES THAT AT LEAST THE TERMINATION FEES WILL CONTINUE TO BE PAYABLE IN ALL EVENTS IN THE MANNER AND AT THE TIMES SET FORTH IN THE CONTRACT DOCUMENTS. NOTWITHSTANDING THE FOREGOING, NOTHING CONTAINED IN A CONTRACT DOCUMENT WILL BE DEEMED TO PREVENT THE STATE OR A STATE ENTITY FROM OFFSETTING A PREVIOUS OVERPAYMENT BY THE STATE OR A STATE ENTITY TO LEP OR A PROJECT SPE AGAINST A FUTURE PAYMENT OWED BY THE STATE OR STATE ENTITY, BUT ONLY TO THE EXTENT OF SUCH PREVIOUS OVERPAYMENT, AS REQUIRED UNDER LA. R.S. 39:72(B).

**Section 10.5 Effect of Termination.** At the end of the Term of this Agreement, except as provided in Section 11.2c, possession and use of all of Covered Facilities, and upon payment of all applicable Termination Fees and other amounts owed by the State Entities under the then-effective Ancillary Agreements, title to all Improvements constructed and Future Equipment installed in Covered Facilities pursuant thereto during the Term, will revert to the State or applicable State Entity, free and clear of any interest of LEP, a Project SPE or Project SPE's Financier or any other claim or lien arising by or through LEP or a Project SPE. No termination of this Agreement excuses either Party from any liability arising out of any default as provided in this Agreement that occurred prior to such termination.

## **ARTICLE 11 EVENTS OF DEFAULT**

### **Section 11.1 Events of Default.**

**a. By the State.** Subject to Force Majeure as provided in Section 11.5, the occurrence of any of the following events shall constitute an event of default by the State under this Agreement:

(1) The State fails to cure its breach of an obligation under this Agreement within thirty (30) days after the State receives notice from LEP of the breach; provided, that if such breach cannot reasonably be cured during such 30-day period, the State will be entitled to an additional thirty (30)-day period within which to cure its breach, so long as it will have begun to cure such breach within the initial thirty (30)-day period and is diligently pursuing such cure; or

(2) any of the State's representations or warranties herein proves to have been misleading or false in any material respect when made and, within thirty (30) days of receipt of notice from LEP, the State does not cure the underlying facts so as to make the representation or warranty correct and not misleading.

The Parties acknowledge and agree that under no circumstances shall any event of default by the State, a Lessor or a State Entity under (i) this Agreement that pertains to a specific Project cause or be deemed to cause an event of default by the State, a Lessor or a State Entity with respect to any other Project and (ii) one or more Ancillary Agreements for a specific Project constitute an event of default by the State or another State Entity under any Ancillary Agreements for any other Projects. Upon the occurrence of an

event of default with respect to a particular Project, LEP's and the applicable Project SPE's remedies shall be limited to the Contract Documents relating to that particular Project and shall not give rise to any termination rights of LEP under Section 10.2.a(2).

**b.** By LEP. Subject to Force Majeure as provided in Section 11.5, the occurrence of any of the following events shall constitute an event of default by LEP under this Agreement:

(1) LEP fails to cure its breach of an obligation under this Agreement (other than an obligation specified in Section 5.2.a or 5.2.b) within thirty (30) days after LEP receives notice from the State of the breach; provided, that if such breach cannot reasonably be cured during such 30-day period, LEP will be entitled to an additional thirty (30)-day period within which to cure its breach, so long as it will have begun to cure such breach within the initial thirty (30)-day period and is diligently pursuing such cure; provided, that if a Project SPE's Financier gives the State notice prior to the expiration of a cure period that such Project SPE's Financier intends to cure all such LEP breaches, the State shall give such Project SPE's Financier thirty (30) days (or sixty (60) days if such breach cannot reasonably be cured during such 30-day period) following the State's receipt of such notice to cure breaches; provided, further, that the Parties acknowledge and agree that any breach by LEP of its obligations specified in Sections 5.2.a and 5.2.b shall only constitute an event of default under the applicable Ancillary Agreement(s) and the State's or State Entity's, as applicable, remedies shall be those specified in the applicable Ancillary Agreement(s), and shall not constitute grounds to terminate this Agreement; or

(2) any of LEP's representations or warranties herein proves to have been misleading or false in any material respect when made and, within thirty (30) days of receipt of notice from the State, LEP does not cure the underlying facts so as to make the representation or warranty correct and not misleading.

The Parties acknowledge and agree that under no circumstances shall any event of default by LEP or a Project SPE under (i) this Agreement that pertains to a specific Project cause or be deemed to cause an event of default by LEP or such Project SPE with respect to any other Project and (ii) one or more Ancillary Agreements for a specific Project constitute an event of default by LEP or another Project SPE under any Ancillary Agreements for any other Projects. Upon the occurrence of an event of default with respect to a particular Project, the State's and the applicable State Entity's remedies shall be limited to the Contract Documents relating to that particular Project and shall not give rise to any termination rights of the State under Section 10.2.a(1).

## **Section 11.2 Remedies.**

**a.** For State. Upon the occurrence of an event of default by LEP under this Agreement described in Section 11.1.b, the State may: (i) seek specific performance of LEP's obligations hereunder; (ii) seek any other remedy available to the State in law, including injunctive relief and claims for damages; and (iii) seek to terminate this Agreement. The State's ability to terminate this Agreement for an event of default by LEP under this Agreement described in Section 11.1.b shall be subject to the State's and any State Entities' party to Ancillary Agreements obligations to pay all applicable Termination Fees pursuant to Section 10.4.

**b.** For LEP. Upon the occurrence of an event of default by the State under this Agreement described in Section 11.1.a that has not been cured within the time period specified in Section 11.1.a, LEP may file a claim with the Commissioner in accordance with La. R.S. 39:1673; provided, however, that if such claim has not been heard within thirty (30) days of LEP's submission, LEP may pursue any remedy as provided in the Louisiana Procurement Code or as provided for under this Agreement.

c. **Repossession of Future Equipment.** If either Party exercises its remedy to terminate this Agreement resulting in the simultaneous termination of all Ancillary Agreements then in effect, and the State or another State Entity fails to pay a Termination Fee that is payable in connection therewith, the State will cooperate with LEP and the Project SPEs and grant LEP, the Project SPEs or Project SPE's Trustee (as applicable) reasonable access (which may be outside normal business hours and include non-Business Days) to the Covered Facilities for the purpose of repossessing and removing the Future Equipment, and the State acknowledges and agrees that neither LEP, the Project SPEs nor Project SPE's Trustee shall have any obligation to replace any Future Equipment so removed, but LEP will repair any damage caused by LEP, a Project SPE or Project SPE's Trustee in the process of such removal; provided, that neither LEP, the Project SPEs, Project SPE's Trustee nor any of their agents or representatives shall have any obligation to replace any Future Equipment so removed.

**Section 11.3 Waiver of Consequential Damages.** In no event, whether based on contracts, indemnity, warranty, tort (including, as the case may be, a Party's own negligence) or otherwise, will any Party be liable to any other Party or any other Party's Affiliates for or with respect to any claims for consequential, indirect, punitive, exemplary, special or incidental damages, lost profits or lost revenues arising out of or related to any Contract Document except as specified in a Termination Fee or to the extent such consequential, indirect, punitive, exemplary, special or incidental damages, lost profits or lost revenues are payable to a third party in connection with an indemnification claim covered by ARTICLE 13.

**Section 11.4 Delay or Omission; Waiver.** No delay or omission in the exercise of any right or remedy accruing to any Party upon any breach of a Contract Document by another Party shall impair such right or remedy or be construed as a waiver of any breach theretofore or thereafter occurring. No provision of a Contract Document will be considered waived unless the waiver is in writing and signed by an authorized representative of the Party granting the waiver. The waiver of any condition or the breach of any term, covenant, or condition herein or therein contained shall not be deemed to be a waiver of any other condition or of any subsequent breach of the same or any other term, covenant or condition herein or therein contained.

**Section 11.5 Force Majeure.**

a. Subject to the provisions of Sections 11.5b and 11.5c, to the extent a Party is prevented by an event of Force Majeure from carrying out any of its obligations under a Contract Document and such Party gives Notice and details of the event of Force Majeure and the obligations it is prevented from performing to the other Party as soon as practicable (and in any event within five (5) Business Days after such event of Force Majeure first prevents performance by that Party), then the Party seeking relief will be temporarily excused during the continuance of the Force Majeure event from the performance of such of its obligations under the Contract Documents as are affected by the event of Force Majeure; provided, however, that no event of Force Majeure will excuse the monetary obligations of the Parties.

b. The Party affected by the event of Force Majeure will use Commercially Reasonable Efforts to eliminate or avoid the effects thereof and resume performing those obligations for which it was excused pursuant to Section 11.5a.

c. Notwithstanding the foregoing, LEP acknowledges that a Covered Facility may be used from time to time as a shelter facility in events of extreme weather conditions, disasters or other catastrophic events (including hurricanes, flooding and fires), and that for such events LEP and the Project SPEs will not be relieved of their obligations to perform Work or Services under Ancillary Agreements unless such event has created conditions at the Covered Facility that endanger life or

property. Further, LEP shall comply with the State's comprehensive fire, emergency, disaster preparedness, post-disaster operational and contingency response plans for the Covered Facility.

## **ARTICLE 12 AUDITS**

**Section 12.1 Audit.** LEP shall make its and the Project SPEs books and records as may be necessary to verify compliance with its respective obligations under the Contract Documents available to the State and the Legislative Auditor for the State for audit upon request. To the extent permitted by law, all information provided shall be treated as confidential and privileged information, and if permitted by law such information shall not be disclosed to third parties without their consent. LEP and all subcontractors under the Contract Documents shall maintain all books and records pertaining to the Contract Documents for a period of four (4) years after the date of final payment under the applicable Contract Document.

**Section 12.2 Confidential Proprietary or Trade Secret Information.** To the extent permitted by law, all records containing proprietary or trade secret information which LEP intends to be maintained by the State as confidential pursuant to La. R.S. 44:3.2 shall be submitted with a cover sheet that provides in bold type "DOCUMENT CONTAINS CONFIDENTIAL PROPRIETARY OR TRADE SECRET INFORMATION", and with each instance of information which LEP believes to be proprietary or trade secret information clearly marked.

## **ARTICLE 13 EFFECT; LIABILITY; INDEMNIFICATION; CHOICE OF LAW; JURISDICTION**

**Section 13.1 Effects.** This Agreement shall be binding upon and inure to the benefit of each of the Parties, including successors and assigns. Except for Project SPEs and State Entities that may enter into Ancillary Agreements with LEP or a Project SPE, there are no third-party beneficiaries to this Agreement. Except as expressly stated herein (including the preceding sentence), no Person not a Party (including any owners or tenants of Covered Facilities, but excluding a Project SPE's Financier to the extent of assignment of any Agreement Rights to it pursuant to Section 9.4) shall be entitled to rely on or enforce any provision of this Agreement.

**Section 13.2 No Personal Liability.** Except to the extent provided by law, no covenant or agreement contained in a Contract Document shall be deemed to be the covenant or agreement of any official, officer, agent or employee of any Party hereto in his/her individual capacity, and neither the officers of any Party hereto nor any official or agent executing a Contract Document shall be liable personally with respect to a Contract Document or be subject to any personal liability or accountability by reason of the execution and delivery of such Contract Document. However, any Person may be held personally liable for such Person's individual fraudulent acts.

### **Section 13.3 Indemnification.**

**a. Indemnification by the State.** The State will indemnify, defend and hold harmless the LEP Indemnitees from and against any and all Losses, to the extent arising, directly or indirectly, from or in connection with (i) any breach by the State of its obligations, covenants, representations or warranties contained in any Contract Document; (ii) any negligent actions or negligent omissions by the State or a State Person in connection with State's performance of the Contract Documents; (iii) any Hazardous Materials introduced onto, or Environmental Condition created at, a Covered Facility other than by LEP or a LEP Person, including the Excluded Environmental Conditions; or (iv) any claims arising from or based on the violation by the State or a State Person of Applicable Legal Requirements in connection with



the performance of State's obligations under the Contract Documents. Notwithstanding any provision to the contrary, if there is joint, concurrent or contributing fault, negligence, gross negligence or intentional misconduct by LEP or any LEP Indemnitee, as determined through a final adjudication, including any appeals, then the State's indemnity obligations hereunder will be limited to the proportionate fault of the State or any State Persons.

**b. Indemnification by LEP.** LEP will indemnify, defend and hold harmless the State Indemnitees from and against any and all Losses to the extent arising, directly or indirectly, from or in connection with (i) any breach by LEP of its obligations, covenants, representations or warranties contained in any Contract Document; (ii) any negligent actions or negligent omissions by LEP or a LEP Person in connection with LEP's performance of the Contract Documents; (iii) any Hazardous Materials introduced onto, or Environmental Condition created at, the Shaw Center Plant by LEP or a LEP Person; or (iv) any claims arising from or based on the violation by LEP or a LEP Person of Applicable Legal Requirements in connection with the performance of LEP's obligations under the Contract Documents. Notwithstanding any provision to the contrary, if there is joint, concurrent or contributing fault, negligence, gross negligence or intentional misconduct by the State or any State Indemnitee, as determined through a final adjudication, including any appeals, then LEP's indemnity obligations hereunder will be limited to the proportionate fault of LEP or any LEP Persons.

**Section 13.4 Choice of Law.** This Agreement shall be construed in accordance with and governed by the laws of the State of Louisiana. Any action for injunctive relief, damages, or any other purpose other than those set forth in ARTICLE 14 shall be brought in the Nineteenth Judicial District Court in Baton Rouge, Louisiana.

## **ARTICLE 14 DISPUTE RESOLUTION**

**Section 14.1 Notice of Dispute.** Prior to filing a claim with the Commissioner in accordance with La. R.S. 39:1673, any Claimant having a Dispute with a Respondent will provide a Notice, stating plainly and concisely:

- a.** the nature of the Dispute, including the Persons involved and Respondent's role in the Dispute;
- b.** the legal basis of the Dispute (*i.e.*, the specific authority out of which the Dispute arises);
- c.** Claimant's proposed remedy; and
- d.** that Claimant will meet with Respondent to discuss in good faith ways to resolve the Dispute.

**Section 14.2 Negotiation.** The Parties will make every reasonable effort to have their respective senior employees or representatives meet "in person" and negotiate in good faith to attempt to resolve the Dispute within the thirty (30)-day period commencing on the date of such Notice. If the Parties are unable resolve the Dispute during such thirty (30)-day period, the chief procurement officer of such State Entity (if applicable, and if none, the State Procurement Directors (or successor position thereto)) shall issue a decision of the State Entity to LEP and the Project SPE pursuant to La. R.S. 39:1673 (the "**State's Decision**") which shall (i) define the State Entity's resolution to the Dispute, (ii) provide the reasons for the action taken, and (iii) inform LEP and the Project SPE of the right to administrative review and judicial review of the State's Decision.

**Section 14.3 Administrative Review.** If LEP disagrees with the State's Decision or if the State's Decision is not rendered within sixty (60) days of written request for such State's Decision, LEP or the Project SPE shall have the right to administrative review by the Commissioner pursuant by La. R.S. 39:1685. LEP or the Project SPE shall file its appeal of the State's Decision within fourteen (14) days of the receipt of the State's Decision (or expiration of such 60-day period). If the Commissioner upholds the State's Decision after Administrative review, LEP shall have the right to appeal the adverse decision of the Commissioner to the Nineteenth Judicial District Court pursuant to LA. R.S. 39:1691(C). EACH PARTY AGREES TO WAIVE A TRIAL BY JURY IN ANY DISPUTE GOVERNED BY THIS SECTION 14.3.

**Section 14.4 Continuity of Service.** Except as set forth in a Contract Document or prohibited by Applicable Legal Requirement, during the pendency of any Dispute, the Parties will nonetheless honor their commitments under the Contract Documents.

**Section 14.5 Independent Engineer.**

**a.** The Parties may jointly appoint an Independent Engineer from time to time. The Parties inability to agree on an Independent Engineer within ten (10) Business Days will constitute a Dispute that may be resolved in accordance with this ARTICLE 14.

**b.** In the event of a Dispute relating to the Work, the Services, or any other Dispute relating to the performance or non-performance by a Party of its obligations under a Contract Document (but specifically excluding a Party's indemnification obligations pursuant to Section 13.3), either Party may submit such Dispute to the Independent Engineer. The Independent Engineer will be instructed by both Parties that he or she is to act as an expert in engineering (and not as an arbitrator or mediator) to resolve in accordance with Applicable Standards only the Dispute submitted to the Independent Engineer.

**c.** As promptly as practicable, but no later than fifteen (15) days after submission of a Dispute to the Independent Engineer, each of State and LEP will submit to the Independent Engineer a position paper in support of, or further explaining, its position with respect to a referred Dispute, a copy of which will be delivered to the other Party. The Independent Engineer will deliver to the Parties a written decision as promptly as practicable but: (i) not sooner than (A) the submission deadline for the Parties' position papers described in the preceding sentence or (B) if supporting position papers are submitted, ten (10) days after the Independent Engineer's receipt of them; and (ii) in any event within thirty (30) days after the submission of a Dispute to the Independent Engineer.

**d.** A decision of an Independent Engineer under this Section 14.5 will not be binding on the Parties, but is intended to assist the Parties in reaching an agreement to resolve a Dispute in an expedited manner during the performance of Work or Services. A decision of an Independent Engineer will be without prejudice in any subsequent proceedings and will not prevent a Party from submitting the Dispute to the Nineteenth Judicial District Court pursuant to LA R.S. 39:1672.4.

**e.** An Independent Engineer will conduct an impartial review of the Dispute in such manner as the Independent Engineer thinks fit, including carrying out site inspections, review of documents and interviews with any relevant individuals, as necessary or prudent to rule on the Dispute. The Parties will comply with all reasonable requests from an Independent Engineer for additional information or documents. Any submission or documentation in respect to the Dispute will also be provided to the other Parties.

f. If requested by an Independent Engineer, the Parties will execute a reasonable engagement letter, including customary confidentiality provisions. Any retainer and other fees and expenses payable to an Independent Engineer will be split evenly between State and LEP.

## **ARTICLE 15 PRIOR AGREEMENTS**

**Section 15.1 Prior Agreements.** Any prior memorandum of understanding, offer, representation or agreement between the Parties hereto relating to the Projects is superseded by this Agreement and the other Contract Documents, and shall cease to be in effect upon the Effective Date. The Parties hereto agree that the submission of a draft of this Agreement or any other Contract Document by one Party to the other is not intended by either Party to be an offer to enter into a legally binding contract with respect to the Project. The Parties shall be legally bound with respect to the Projects only if and when the Parties have negotiated all of the terms and provisions of this Agreement and the Ancillary Agreements in a manner acceptable to each of them, and each of the Parties shall have fully executed and delivered to the other at least one original counterpart of each of the Contract Documents.

## **ARTICLE 16 NOTICE**

**Section 16.1 Notice.** Any Notice required or permitted to be given under or in connection with this Agreement shall be in writing and shall be delivered by: (i) hand-delivered by courier, with signed receipt; (ii) mailed through the United States Postal Service, postage prepaid, first-class, with return receipt requested; or (iii) delivered by private, commercial carrier, such as Federal Express, with signature for delivery. All such communications shall be delivered to the officer, agent or representative (or their respective successor) identified in this Section at the address set forth below, or to such other Person and address as may be subsequently designated by such Party upon five (5) days written Notice to the other Parties.

To the State: [Name]  
The State of Louisiana  
[Address]  
Telephone: (\_\_\_\_) \_\_\_\_-\_\_\_\_

With a copy to: [Name]  
[Company]  
[Address]  
Telephone: (\_\_\_\_) \_\_\_\_-\_\_\_\_

To LEP: Michael T. Durham  
LA Energy Partners, LLC  
8555 United Plaza Boulevard, Suite 201  
Baton Rouge, Louisiana 70809  
Telephone: (225) 706-9280

With a copy to: Charles A. Landry  
Fishman Haygood, LLP  
100 North Street, Suite 800Baton Rouge, Louisiana 70802  
Telephone: (225) 706-4080

## **ARTICLE 17 MISCELLANEOUS**

**Section 17.1    Counterparts.** This Agreement may be executed in counterparts, each of which will be deemed an original and all of which will constitute one agreement. The signatures of any Party to a counterpart will be deemed to be a signature to, and may be appended to, any other counterpart. Digital signatures and other electronic signatures and copies of manual signatures transmitted by facsimile, e-mail or other electronic means will be binding and considered fully effective as if they were authentic original signatures.

**Section 17.2    Severability.** To the fullest extent possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under law, but if any provisions of this Agreement shall be prohibited or invalid under any law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Agreement.

**Section 17.3    Further Assurances.** From time to time, and at any time, at and after the Effective Date, each Party will execute, acknowledge and deliver such documents and assurances, reasonably requested by any other Party (in such form reasonably acceptable to the requested Party) and will take any other action consistent with the terms of any Contract Document that may be reasonably requested by a Party for the purpose of effecting or confirming any of the transactions contemplated hereby or thereby.

**Section 17.4    Amendment.** This Agreement may be amended only upon the written consent and approval of each Party, the Office of State Procurement and the Commissioner.

**Section 17.5    Commercially Reasonable Efforts.**

**a.**        The Parties agree to use Commercially Reasonable Efforts to take or cause to be taken all actions and to do or cause to be done all things necessary or appropriate to consummate and make effective the transactions contemplated by the Contract Documents.

**b.**        The Parties acknowledge that Commercially Reasonable Efforts will not be interpreted as requiring the initiation or settlement of litigation or the payment of money (other than usual and customary expenses associated with negotiating and closing transactions of the nature set forth herein, including fees and expenses required to be paid under existing contractual obligations and processing or review fees and reimbursement for legal fees and other out-of-pocket expenses customarily required).

**Section 17.6    No Authorship Presumption.** Each of the Parties has had, or will have, an opportunity to obtain legal advice and negotiate the language of this Agreement and all other Contract Documents. No presumption shall arise, or adverse inference be drawn by virtue of authorship, and each Party hereby waives the benefit of any rule of law that might otherwise be applicable in connection with the interpretation of this Agreement or any other Contract Document, including to any rule of law to the effect that any provision of this Agreement shall be interpreted or construed against the Party whose counsel drafted that provision.

**Section 17.7    Survival.** Expiration or termination of this Agreement for any reason will not relieve the Parties of any obligation accrued or accruing prior to such expiration or termination, all of which will survive the expiration or termination of the Agreement.

**Section 17.8 Good Faith.** All rights, duties and obligations established by the Contract Documents will be exercised in good faith and in a commercially reasonable manner.

**Section 17.9 Time of the Essence.** Time is of the essence of this Agreement.

**Section 17.10 No Third Party Benefit.** Except as set forth in ARTICLE 13, no provisions in this Agreement are for the benefit of, or may be enforceable by, any Person other than the Parties hereto or to an Adoption Agreement and their permitted successors and assigns.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK.]

IN WITNESS WHEREOF, this Cooperative Endeavor Agreement has been signed in four originals by the undersigned duly authorized representative, in the presence of the undersigned competent witnesses, on the dates indicated below.

**WITNESSES:**

**STATE OF LOUISIANA**

\_\_\_\_\_  
Signature

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

\_\_\_\_\_  
Signature

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

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

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

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

Dated: [●], 2019

IN WITNESS WHEREOF, this Cooperative Endeavor Agreement has been signed in four originals by the undersigned duly authorized representative, in the presence of the undersigned competent witnesses, on the dates indicated below.

**WITNESSES:**

**LA ENERGY PARTNERS, LLC**

\_\_\_\_\_  
Signature

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

\_\_\_\_\_  
Signature

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

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

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

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

Dated: [●], 2019

## **EXHIBIT “A”**

### **DEFINED TERMS**

“Additional Works” means any design and construction work arising from a Material Change.

“Adoption Agreement” means, for each Project, an Adoption Agreement entered into by and among the State, the applicable State Entity (if different from the State), LEP and the Project SPE in the form attached as **Exhibit “F”**.

“Affiliate” means as applied to a Person, any other Person directly or indirectly controlling, controlled by, or under common control with, that Person, where “control” means, with respect to the relationship between or among two or more Persons, the possession, directly or indirectly or as trustee, personal representative or executor, of the power to direct or cause the direction of the affairs or management of a Person, whether through the ownership of voting rights, as trustee, personal representative or executor, by statute, contract, credit arrangement or otherwise, including the ownership, directly or indirectly, of securities having the power to elect a majority of the board of directors or similar body governing the affairs of such Person.

“Agreement” or “CEA” means this Cooperative Endeavor Agreement by and between LEP and the State dated [●], 2019, as may be amended from time to time in accordance herewith.

“Agreement Rights” means the rights and benefits accruing under this Agreement and the Ancillary Agreements and the benefits accruing thereunder.

“Ancillary Agreements” means any Adoption Agreements, Leases, Thermal Services Agreements, Facility Optimization Services Agreements and other agreements that the Parties or other Persons may enter into with respect to the performance of Work or Services at Covered Facilities.

“Annual Service Plan” means the annual plan for performing the Operation and Maintenance Services presented by a Project SPE to the State or a State Entity.

“Applicable Legal Requirements” means any law, act, rule, requirement, order, bylaw, ordinance, regulation, judgment, decree, or injunction of, or by any authority having jurisdiction over any Party or its obligations under the Contract Documents, or any Covered Facility subject to or upon which Work or Services are provided under a Contract Document, and all licenses, permits, tariffs, and other governmental consents, which may at any time be applicable to a Party’s rights and obligations under a Contract Document.

“Applicable Standards” means with respect to a Party, or any of the performance obligations of a Party under the Contract Documents, as may be applicable, and as may be adjusted from time to time: (i) standards, practices, methods and procedures to a reasonable commercial standard, conforming to Applicable Legal Requirements and consistent with that degree of skill, care, diligence and prudence which would reasonably and ordinarily be expected from a qualified, skilled and experienced Person engaged in a similar type of undertaking under the same or similar circumstances; (ii) practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry in the country and State during the relevant time period; (iii) practices, methods and acts that, in the exercise of reasonable



judgment on the facts known (or that reasonably should have been known) at the time a decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition; (iv) standards, practices, methods and procedures set from time-to-time by the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) and any successor organization thereto; and (v) the standards of licensure set by the State, including the Louisiana Office of State Fire Marshal.

“Baseline Adjustment” means an adjustment to either the Baseline Consumption or Contract Baseline Consumption models that may be described in a Thermal Services Agreement associated with a Material Change. Baseline Adjustments, if applicable, will be established by a Project SPE, and agreed to by the State, in accordance with the methodology established by the International Performance Measurement and Verification Protocol for Non-Routine Baseline Adjustments.

“Base Rent” means the monthly rental payment made by LEP or a Project SPE under a Lease.

“Billing and Measurement Meters” means meters that may be installed or utilized by a Project SPE to measure the consumption, temperature, and pressures of the Thermal Services made available to a Covered Facility and returned to the applicable Plant.

“Billing Month” means any whole or partial calendar month during which a Project SPE performs Services at a Covered Facility.

“BREP” means Baton Rouge Energy Partners, LLC, a Delaware limited liability company, and its permitted successors and assigns, which is the Project SPE for the Phase I Project.

“Business Day” means a day other than a Saturday, Sunday or day on which Federal Reserve member banks in Louisiana are authorized to close.

“Casualty Event” means any loss, damage or destruction of Covered Assets or any portion thereof (but specifically excluding any loss, damage or destruction of a Thermal Services Distribution System), or any other occurrence or event that prevents or limits the Covered Assets from operating in whole or in part, other than as a result of a Project SPE’s failure to perform any Services it is obligated to do pursuant to an Ancillary Agreement.

“Change Directive” means a written directive, order or instruction by a lessor to LEP to make a Construction Change pursuant to a Lease.

“Change in Law” means the coming into effect of, or any change, amendment or modification (including repeal) to, any Applicable Legal Requirement (including any interpretation thereof) after the Effective Date of a Contract Document, of which compliance therewith would impact a Party’s ability to perform its obligations thereunder or require a variation in the quality, scope, methodology, cost or timing of the performance of services by any Party thereunder.

“Change Order” means with respect to any Improvements, a written instrument that is executed by the Parties and states their agreement with respect to a change in the construction or performance of the Improvements.

“Change Request” means a request by LEP or a Project SPE to make a Construction Change.

“Claimant” means any Party having a Dispute with another Party.

“Commencement Date” means the effective date of an Ancillary Agreement. For a specific Project, all Ancillary Agreements evidencing such Project shall have the same Commencement Date.

“Commercially Reasonable Efforts” of a Party means those efforts consistent with the exercise of prudent business judgment of a Party when compared with that of a reasonable Person in like circumstances, specifically taking into consideration the operations conducted at a Covered Facility.

“Commissioner” means the State Commissioner of Administration.

“Concealed Condition” means, with respect to:

a. Any Covered Facility, any condition that is: (i) a concealed physical condition that differs materially from those indicated in any surveys or reports delivered by the applicable Lessor to LEP or the Project SPE pursuant to the applicable Ancillary Agreement, or any surveys, reports, plans or other materials otherwise furnished by such Lessor to LEP or the Project SPE during any applicable inspection period or the Term; or (ii) an unknown physical condition of an unusual nature, that differs materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character of the Work. Examples of conditions that would constitute Concealed Conditions with respect to a Covered Facility are cracked foundations and underground storage tanks; and examples of conditions that would not constitute Concealed Conditions with respect to a Covered Facility are tree roots, soil conditions and any conditions or requirements (including Applicable Legal Requirements) affecting any Improvements to be made at such Covered Facility; and

b. Any Covered Assets, components or materials that would not ordinarily be expected to be contained in a similarly situated and constructed utility plant as those located at the Covered Facility. Examples of conditions that would constitute Concealed Conditions with respect to Covered Assets are fuel tanks contained within a component that is not discoverable unless or until disassembling the component piece.

In all cases: (x) a condition shall only be deemed a Concealed Condition to the extent such condition materially and adversely affects LEP’s ability or cost to perform any Work or Services at the Covered Facility; and (y) no condition shall be deemed a Concealed Condition to the extent it is reasonably inferable or foreseeable, given, as applicable, the nature of the Work, the Improvements or the Covered Assets.

“Construction Change” means a change to the work of designing and constructing Improvements from the Scopes of Work.

“Contract Documents” shall mean:

a. generally any and all of the documents, individually and collectively, contemplated by or in furtherance of the Projects, including:

- i. This Agreement and all Exhibits attached hereto;
- ii. any Adoption Agreements;

- iii. any Leases and all Exhibits attached thereto;
- iv. any Thermal Services Agreements and all Exhibits attached thereto;
- v. any Facility Optimization Services Agreements and all Exhibits attached thereto;
- vi. any resolutions or other authorizing documents of a Party; and
- vii. other instruments and agreements to be executed and delivered by the Parties as contemplated or otherwise permitted hereunder.

b. with respect to a specific Project, this Agreement (but excluding **Exhibits “H” through “J”**, which are the Phase I Ancillary Agreements) and all Ancillary Agreements entered into with respect to such Project, and shall not include any Ancillary Agreements relating to any other Projects.

“Covered Asset” means any equipment, asset or other property located at or within a Covered Facility that LEP or a Project SPE has an obligation to provide any Services on pursuant to an Ancillary Agreement.

“Covered Asset Loss” means any loss, damage or destruction of the Covered Assets under a Lease or any portion thereof (but specifically excluding any loss, damage or destruction of the Thermal Services Distribution System), or any other occurrence or event that prevents or limits the Covered Assets from operating in whole or in part.

“Covered Facility” means any immovable property and/or improvements thereon that the State either owns or has an obligation or commitment to maintain that becomes subject to an Ancillary Agreement.

“Discounted Cash Flow Valuation” means the method used to estimate the value of an investment based on its future cash flows. Discounted Cash Flow Valuation analysis finds the present value of expected future cash flows using a discount rate. A present value estimate is then used to evaluate a potential investment.

“Dispute” means any dispute arising out of or relating to any Contract Document.

“Effective Date” means (a) with respect to this Agreement, the date this Agreement is executed by both Parties, and (b) with respect to an Ancillary Agreement, the stated effective date of such Ancillary Agreement specified therein.

“Electronic Document Archive” means an electronic repository created and maintained by LEP or a Project SPE pursuant to a Lease, and includes all applicable drawings and reports concerning the applicable Covered Assets and Interior Facilities; M & V Services reports; written operating instructions for the Covered Assets; Covered Asset warranty information; applicable permits concerning the operation of the Covered Assets; the Operations Manual; and other records and information related to the Covered Facility and the Services performed for the Lessor thereunder.

“Emergency” means a circumstance that could not have been reasonably foreseen, and which requires a Party to take immediate action to prevent, correct or protect a Covered Facility or the assets therein and thereon from substantial loss or to prevent or minimize an interruption in Thermal Services.

“Energy Optimization Improvements” means Improvements performed within or to a Covered Facility intended to provide energy cost reductions, operational cost reductions, Thermal Energy load reductions, or capital renewal and deferred maintenance equipment replacements.

“Environmental Conditions” means, with respect to a Covered Facility, the presence to the extent not in compliance with Applicable Legal Requirements of any Hazardous Materials (i) due to release to the environment, (ii) under conditions indicative of a release to the environment or (iii) under conditions that pose a material threat of a future release to the environment.

“Excluded Asset” means any equipment, asset or other property located at or within a Covered Facility that LEP or a Project SPE has no obligation to provide any Services on pursuant to an Ancillary Agreement.

“Excluded Environmental Conditions” means any Environmental Condition (i) existing on or under a Covered Facility as of the date such Covered Facility became subject to or covered by an Ancillary Agreement or (ii) not caused by LEP, a Project SPE or a LEP Person.

“Existing Covered Assets” means the Covered Assets existing and located within a Plant as of the Effective Date of the applicable Lease.

“Excused Interior Distribution System Malfunction” means a malfunction of any component located within, or incapacity or destruction of, a Covered Facility receiving Thermal Services pursuant to a Thermal Services Agreement that materially and adversely affects the provision of such Thermal Services.

“Excused Loss of Availability” means a Loss of Availability that is excused pursuant to the terms and conditions of the applicable Thermal Services Agreement.

“Excused Pipe Malfunction” means the malfunction of any piping equipment comprising part of the Thermal Services Distribution Systems.

“Expiry Date” means (a) with respect to this Agreement, the fortieth (40<sup>th</sup>) anniversary of the Effective Date; provided, however, if the term of any Ancillary Agreement extends past the fortieth (40<sup>th</sup>) anniversary of the Effective Date, this Agreement shall automatically extend to correspond to the term of such Ancillary Agreement, and (b) with respect to an Ancillary Agreement, the stated expiration date of such Ancillary Agreement specified therein.

“Extended Force Majeure Event” means an event of Force Majeure that lasts longer than thirty (30) consecutive days or for a period otherwise defined in an Ancillary Agreement.

“Facility Optimization Services Agreement” means an agreement between the State or a State Entity and LEP or a Project SPE for the design and the construction of Energy Optimization Improvements to a Covered Facility.

“Fixtures” means goods, other than consumer goods and manufactured homes, that after placement on or incorporation in an immovable have become a component part of such immovable as provided in Civil Code Articles 463, 465, and 466, or that have been declared to be a component part of an immovable under Civil Code Article 467.

“Force Majeure” means any cause not within the reasonable control of the affected Party which precludes that Party from carrying out, in whole or in part, its obligations under any Contract Document, including Acts of God; hurricanes; tornadoes; fires; epidemics; landslides; earthquakes; floods; acts of public enemies; acts, failures to act or orders of any kind of any governmental authority acting in its regulatory or judicial capacity (but a violation by a Party of Applicable Legal Requirements shall not be an event of Force Majeure); changes in laws; insurrections; military action; war, whether or not declared; acts of terrorism; acts of sabotage; strikes, labor stoppages, or slowdowns or other industrial disturbances; or a shortage or unavailability of equipment, parts, materials, electricity, natural gas, water, communications, fuel or sanitary sewage capacity, whether or not caused by a supplier of such commodities. Nothing in this provision is intended to excuse either Party from performing due to any governmental act, failure to act, or order, where it was reasonably within such Party’s power to prevent such act, failure to act, or order. Notwithstanding anything in the Contract Documents to the contrary, Force Majeure will not mean any nonpayment under a Contract Document or any third-party agreement.

“FOSA Charge” means the periodic payments to a Project SPE for the Work and the Services performed by such Project SPE or a Project SPE Person under a Facility Optimization Services Agreement pursuant to the terms thereof.

“Future Covered Assets” means any Covered Asset purchased during the Term of a Lease as part of any Plant Improvements, Future Plant Improvements or renewals or replacements thereof as part of the Operation and Maintenance Services performed under an Ancillary Agreement for a Covered Facility.

“Future Equipment” means all equipment and asset purchases made by LEP, a Project SPE or a Project SPE’s Trustee during the Term of an Ancillary Agreement as a part of any Improvements, Renewal Work or Replacement Work under such Ancillary Agreement.

“Future Plant Improvements” means future Plant Improvements that LEP or a Project SPE deems necessary or beneficial in furtherance of providing Thermal Services to a Covered Facility or Third Party Off-takers.

“Governor” means the Governor of the State of Louisiana.

“Hazardous Materials” means any substance, material, or waste which is (i) defined now or hereafter as a “pollutant,” “contaminant,” “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “restricted hazardous waste,” “industrial waste,” or other similar term or phrase under any Applicable Legal Requirement, (ii) any substance, the presence of which is on, under, or in a Covered Facility, or contained in any structure thereon, is prohibited or regulated by any Applicable Legal Requirement, or which requires investigation, removal, response or remediation under any Applicable Legal Requirement, and (iii) petroleum or any fraction or by-product thereof, asbestos, any polychlorinated biphenyl, urea formaldehyde foam insulation, radon or any other radioactive or explosive substance, methane, volatile hydrocarbons, or an industrial solvent.

“Improvements” means collectively Energy Optimization Services and Plant Improvements.

“Independent Engineer” means an individual who:

a. has not had a professional employment relationship during the five (5) years preceding, and at the time of, his or her engagement, with any Party or any Party's Affiliates, or a professional consulting relationship during the three (3) years preceding, and at the time of, his or her engagement, with any Party or any Party's Affiliates;

b. is a certified professional recognized by the American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE) and registered Professional Engineer with a minimum of five (5) years' experience in the design, construction, maintenance, and operation of chilled water and heating water systems serving public buildings/multi-purpose buildings;

c. has sufficient educational and professional experience to opine as an expert on any Dispute submitted to him or her; and

d. is a registered professional engineer by the State.

"Infrastructure Savings" means avoided capital costs realizable by the State or a State Entity pursuant to a Project.

"Interior Distribution System" means those portions of a Thermal Services Distribution System serving a Covered Facility that begin at the Points of Demarcation where Thermal Energy enters the Covered Facility and end at the Points of Demarcation where Thermal Energy leaves the Covered Facility.

"Investment Grade Audit Services" means the performance of a detailed and economic analysis performed by LEP concerning a Covered Facility.

"Knowledge" means:

a. with respect to the State or a State Entity, the actual knowledge after reasonable inquiry of the individuals appointed as State Representatives or Lessor Representatives; and

b. with respect to LEP or a Project SPE, the actual knowledge after reasonable inquiry of the individuals appointed as LEP Services Period Representatives.

"Lease" means an agreement between the State or a State Entity and LEP or a Project SPE for exclusive use of a Covered Facility containing Covered Assets capable of providing Thermal Energy.

"Lease Year" means each one-year period commencing from the Effective Date of a Lease to the date immediately preceding the anniversary thereof.

"Leased Property" means property leased to LEP or a Project SPE by a Lessor for the provision of Thermal Services to Covered Facilities.

"Legislature" means the Legislature of the State of Louisiana.

"LEP" means LA Energy Partners, LLC, a Delaware limited liability company, and its permitted successors and assigns.

“LEP Hazardous Materials” means any Hazardous Materials that LEP or a Project SPE uses in providing Work or Services.

“LEP Indemnatee” means LEP, the Project SPEs, the Project SPE’s Financiers, their parent, subsidiaries, and Affiliated entities, and its and their respective members, directors, officers, employees, and agents, and any other LEP Persons that are indemnified by the State pursuant to the terms of this Agreement or any Ancillary Agreement.

“LEP Person” means any of the following:

- a. employees of LEP and Project SPEs;
- b. any member of LEP or a Project SPE and any of their or LEP’s respective directors, officers, employees or agents in each case acting as such;
- c. any consultant or contractor engaged by LEP or a Project SPE and any representative, advisor of LEP or a Project SPE, in any such person’s capacity as a provider of services, work or materials directly or indirectly to LEP Project SPE in connection with a Project, and any of their respective directors, officers, employees or agents; or
- d. any invitee of LEP Project SPE or any LEP Person referred to in clause a, b, or c above who enters upon a Project Site.

“LEP Representative” means an individual appointed by LEP or a Project SPE to serve as its representative under a Contract Document. A LEP Representative with respect to a specific Ancillary Agreement shall not be deemed a LEP Representative with respect to any other Ancillary Agreements unless LEP states so in writing.

“LEP Services Period Representative” means an individual appointed by LEP or a Project SPE to serve as its representative on the Services Period Committee under a Contract Document. A LEP Services Period Representative with respect to a specific Ancillary Agreement shall not be deemed a LEP Services Period Representative with respect to any other Ancillary Agreements unless LEP states so in writing.

“LEP’s Plan of Correction” means a reasonably detailed plan formulated by LEP or a Project SPE setting forth the actions LEP or such Project SPE intends to undertake to resolve a Loss of Availability.

“Lessor” means the State or a State Entity that leases a Covered Facility to LEP or a Project SPE under a Lease.

“Lessor Event of Default” means an occurrence specifically described in a Lease.

“Lessor Representative” means an individual appointed by a Lessor to serve as its representative for matters related to a Lease.

“Lessor Service Period Representative” means an individual appointed by a Lessor as its representative on the Services Period Committee under a Contract Document. A Lessor Representative with respect to a specific Ancillary Agreement shall not be deemed a Lessor Representative with respect to any other Ancillary Agreements unless Lessor states so in writing.

“Liquidated Damages” means those certain damages recoverable by a State Entity due to the failure by LEP or a Project SPE to provide Thermal Services to the State Entity, as further set forth in a Thermal Services Agreement.

“Lockbox” means the account designated by a Project SPE’s Financier for receipt of all payments owed by the State or a State Entity to LEP or a Project SPE under any Contract Documents, which shall be established in the applicable Ancillary Agreement and may be changed from time to time only upon prior written approval of the applicable Project SPE’s Financier.

“Loss of Availability” means a concurrent failure to make Thermal Services available to a Covered Facility at the applicable Points of Demarcation in accordance with applicable Performance Standards and a space temperature or humidity not in compliance with Applicable Standards, all as set forth in the applicable Thermal Services Agreement.

“Losses” means any and all claims, liabilities, losses, damages, injuries, demands, actions, causes of action, suits, proceedings, judgments, and expenses, including reasonable attorneys’ fees, court costs, and other expenses, including those costs incurred at the trial and appellate levels and in any bankruptcy, reorganization, insolvency, or other similar proceedings, and other expenses.

“M & V Services” means measurement and verification services that may be provided by LEP or a Project SPE to a Covered Facility pursuant to an Ancillary Agreement.

“Maintenance Event” means an event, occurrence or circumstance causing the need for Maintenance Repairs of any assets located at a Covered Facility for which LEP or a Project SPE is responsible pursuant to, and subject to the terms and conditions of, an Ancillary Agreement, including to conform to Applicable Legal Requirements or Applicable Standards.

“Maintenance Repairs” means any repair or maintenance work (but not Renewal Work or Replacement Work) on any Covered Assets for which LEP or a Project SPE is responsible pursuant to, and subject to the terms and conditions of, an Ancillary Agreement, including all necessary work to keep the applicable Covered Assets in good and safe working order in conformity with Applicable Legal Requirements and Applicable Standards in effect as of the Effective Date.

“Major Casualty Event” means a Covered Asset Loss under a Lease that in the reasonable judgment of LEP constitutes fifty percent or greater ( $\geq 50\%$ ) of the Thermal Services Capacity at such Covered Facility that was in place immediately prior to such Covered Asset Loss.

“Material Change” means a change in facts or circumstances that materially increased or decreases the amount of Thermal Services required at a Covered Facility as specifically identified in the applicable Thermal Services Agreement.

“Material Change Adjustment” means an adjustment to Thermal Services Charges pursuant to the Thermal Services Rate Design and the terms and conditions of a Thermal Services Agreement to reflect increases or decreases in the costs of providing Services thereunder as a result of a Material Change or as otherwise defined in an Ancillary Agreement.

“Material Change Notice” means Notice provided by LEP or a Project SPE to the State or a State Entity of a Material Change under an Ancillary Agreement.



“Meters” means any Billing and Measurement Meters and/or the Utility Meters, to be installed under an Ancillary Agreement to measure the usage of Utilities, the provision of the Thermal Services, the Performance Standards and the Return Standards thereunder.

“Mortgage” means a mortgage, pledge or hypothecation by LEP or a Project SPE of LEP’s or such Project SPE’s interests in (a) a Lease, and/or (b) any Improvements under an Ancillary Agreement to the extent they constitute fixtures.

“Mortgagee” means Project SPE’s Financier(s) with respect to a specific Project.

“NDA” means a non-disturbance and attornment agreement or similar agreement between or among parties as described in an Ancillary Agreement.

“Net Public Benefit” means, for a specific Project, the amount in U.S. Dollars that the Project Benefits from such Project for a Service Year exceed the State Investment for such Project for the same Service Year.

“Non-Appropriation Event” means the failure by the Legislature to timely appropriate sufficient funds for the entire State Investment with respect to a Project, a veto of appropriated funding, or a reduction of such an appropriation required by law. A Non-Appropriation Event is determined on a Project by Project basis, and in no event shall the Non-Appropriation of one Project under an Ancillary Agreement affect the obligation of the State for the State Investment under any other Ancillary Agreements.

“Non-LEP Hazardous Materials” means Hazardous Materials that may be present at a Covered Facility, but not including any LEP Hazardous Materials.

“Notice” means notice required or permitted to be given under or in connection with a Contract Document, pursuant to the terms thereof.

“Operation and Maintenance Services” means (i) operation and monitoring and (ii) regular or scheduled maintenance as recommended by a manufacturer or otherwise consistent with Applicable Standards, in all instances to be performed by LEP or a Project SPE on Covered Assets pursuant to an Ancillary Agreement.

“Operations Manual” means comprehensive manuals setting forth the operating procedures for the Covered Assets, which will be consistent with Applicable Standards.

“OSB” means the Office of State Buildings.

“OSB Buildings” means all facilities under the jurisdiction of the State’s Division of Administration operated and maintained by OSB.

“Party” and “Parties” means, with respect to a Contract Document, the specified Persons party thereto.

“Performance Standards” means the performance standards for the performance of Thermal Services under a Thermal Services Agreement.

“Permitted LEP Transferee” means: (i) a Person that is an Affiliate of LEP, Bernhard, LLC or Johnson Controls, Inc.; (ii) a Project SPE’s Financier pursuant to an NDA; or (iii) any Person approved by the State, which approval may be withheld or conditioned in the State’s sole discretion.

“Person” means and includes all juridical persons, whether corporate or natural, including individuals, corporations, limited liability companies, partnerships, limited liability partnerships, limited partnerships, joint ventures, proprietorships, trusts, governmental entities and unincorporated or informally organized associations.

“Phase I Ancillary Agreements” means the Phase I Project Adoption Agreement, the Shaw Center Plant Lease, the Shaw Center Thermal Services Agreement and the Phase I OSB Facility Optimization Services Agreement.

“Phase I OSB Buildings” means those State-owned office buildings in which Energy Optimization Improvements will be performed pursuant to the Phase I OSB Facility Optimization Services Agreement. A list of the Phase I OSB Buildings is attached as Schedule 2 of the Phase I OSB Facility Optimization Services Agreement.

“Phase I OSB Facility Optimization Services Agreement” means the Facility Optimization Services Agreement attached to this Agreement as **Exhibit “H”**, pursuant to which LEP (through a Project SPE) will perform Energy Optimization Improvements to those State-owned office buildings identified therein.

“Phase I Project” means collectively, the projects, transactions, Work and Services described in the Phase I Ancillary Agreements.

“Phase I Project Adoption Agreement” means the Adoption Agreement entered into by and among the State, LEP and BREP in the form attached as **Exhibit “G”**.

“Phase I Termination Fee” means the amount payable by the State in the event of the termination of any of the Phase I Ancillary Agreements or the CEA prior to the Expiry Date of the Phase I Ancillary Agreements, without regard to any amounts LEP may be obligated to pay to or reimburse the State as provided in any Phase I Ancillary Agreement or the CEA, which amount is set forth on **Exhibit “M”**.

“Plant” means any central energy plant that may be leased to LEP or a Project SPE pursuant to a Lease, which is comprised of the immovable property and Covered Assets and other assets located therein or thereon.

“Plant Improvements” means design, construction, installation and other improvements performed by LEP or a Project SPE to or within a Covered Facility that is subject to a Lease.

“Plant Premises” means the immovable property that contains a Plant that is a Covered Facility, as may be more fully described on an exhibit to the applicable Ancillary Agreement.

“Points of Demarcation” means the points on a Thermal Services Distribution System at which responsibility for the operation and maintenance of such Thermal Services Distribution System and the risk of loss of Thermal Energy flowing through such Thermal Services Distribution System is allocated between the State or a State Entity, on the one hand, and LEP or a Project SPE, on the other hand.

“Project Benefits” means the positive impacts to the State and its citizens described in Section 2.1.

“Project Site” means where Work and Services are to be performed under an Ancillary Agreement.

“Project SPE” means an Affiliate of LEP that has one or more of the same members as LEP formed solely for the purpose of entering into Ancillary Agreements with respect to a Project, and performing the Work and Services relating to such Project.

“Project SPE’s Financier” means any lenders or third parties, and successors thereto, providing financing to a Project SPE relating to the performance of such Project SPE’s obligations under any Contract Documents. A Project SPE’s Financier may be comprised of a consortium of lenders, each providing financing to a Project SPE for specific Ancillary Agreements and/or Projects.

“Project SPE’s Trustee” means any collateral agent or third party, and successors thereto, designated by a Project SPE or a Project SPE’s Financier to hold legal title to any Plant Improvements and/or Future Equipment acquired by or on behalf of a Project SPE during the term of an Ancillary Agreement. Project SPE’s Trustee may be a different Person for each Project.

“Projects” means projects entered into under the terms of this Agreement, including arrangements to, among other things, convey exclusive leasehold or concession rights to LEP or a Project SPE over certain State-owned or -controlled utility plants and engage LEP or a Project SPE to undertake Improvements to State-owned or -controlled buildings in order to derive Net Public Benefit and make such assets and properties more efficient and thus save the State significant amounts of money.

“Proposed Covered Facility” means a facility owned, leased, operated, managed and/or otherwise controlled by the State Entity where a State Entity may desire that LEP or a Project SPE provide Work and/or Services under the terms of this Agreement.

“Public Services Invoice” means a public service provider’s invoice for water, electricity or natural gas consumption (demand and usage) at a Covered Facility.

“Remote Monitoring Services” means remote monitoring services performed by LEP or a Project SPE with respect to the performance of Covered Assets pursuant to an Ancillary Agreement.

“Renewal Work” means corrective action to be performed by LEP or a Project SPE to restore normal operation of a Covered Asset.

“Replacement Work” means corrective action to be performed by LEP or a Project SPE to restore normal operation of a Covered Asset involving the complete replacement of such Covered Asset with new equipment of similar quality, capacity and performance.

“Respondent” means a Party with whom a Claimant has a Dispute.

“Return Standards” means the standards for Thermal Services returned to Covered Facilities at the Points of Demarcation, as may be set forth in a Thermal Services Agreement.

“Scheduled Maintenance Services” means the preventative maintenance of Covered Assets subject to a Lease.

“Scope of Work” means a description of the Work and or Services to be performed by LEP or a Project SPE constituting Improvements.

“Service Year” means each one-year period during the term of an Ancillary Agreement commencing on the Commencement Date of such Ancillary Agreement or such other date specified in such Ancillary Agreement.

“Services” means all services to be performed by LEP or a Project SPE under an Ancillary Agreement, which may include Thermal Services, M & V Services, Remote Monitoring Services, Operation and Maintenance Services, Maintenance Repairs, Renewal Work or Replacement Work.

“SFO” means Solicitation for Offers for a Cooperative Endeavor Agreement Number 300000812, for a public-private partnership regarding statewide chiller facilities and building energy conservation measures.

“Shaw Center” means the Shaw Center for the Arts, L.L.C., a Louisiana limited liability company.

“Shaw Center Building” means that certain building where BREP shall provide Thermal Services pursuant to the Shaw Center Thermal Services Agreement.

“Shaw Center Building Improvements” means the Improvements made to the Shaw Center Building by BREP as described in Exhibit “B” to the Shaw Center Plant Lease.

“Shaw Center CEA” means that certain Cooperative Endeavor Agreement dated effective as of November 15, 2002, by and among the State, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the City of Baton Rouge, Parish of East Baton Rouge, Shaw Center (formerly known as Arts Block Development, L.L.C.), Douglas Manship Sr. Theater Complex, L.L.C. (formerly known as Arts Block Theater, L.L.C.), Downtown Redevelopment, L.L.C., LSU Museum, L.L.C., The Baton Rouge Area Foundation, LSU Foundation and LSU Property Foundation.

“Shaw Center Plant” means that central energy plant that will be leased to BREP or a Project SPE by the State pursuant to the Shaw Center Plant Lease. The Shaw Center Plant is comprised of the immovable property, improvements and Covered Assets described on **Exhibit “A”** attached to the Shaw Center Plant Lease and any other assets located therein or thereon as of the Commencement Date of the Shaw Center Plant Lease.

“Shaw Center Plant Improvements” means the Improvements made to the Shaw Center Plant by BREP as described in Exhibit “B” to the Shaw Center Plant Lease.

“Shaw Center Plant Lease” means the Lease for the Shaw Center Plant, the Shaw Center Plant Improvements and the Shaw Center Covered Assets, the form of which is attached as **Exhibit “I”**.

“Shaw Center Thermal Services Agreement” means the Thermal Services Agreement by and between BREP or a Project SPE and the State for the provision of Thermal Services by BREP or a Project SPE for the Shaw Center Building, the form of which is attached as **Exhibit “J”**.

“State” means the State of Louisiana.

“State Budget” means the annual executive budget submitted each year by the Governor to the Legislature setting forth all proposed State expenditures.

“State Entity” means the State of Louisiana and all of the entities defined as an “Agency” under La. R.S. 39:2 (or any successor statute); provided, however, that the term “State Entity” will always include a publicly funded institution of higher education within the State.

“State Event of Default” means (a) with respect to this Agreement an occurrence described in Section 11.1.a, and (b) with respect to an Ancillary Agreement, an event of default by the State or a State Entity pursuant to the terms and conditions thereof.

“State Indemnitee” means the State, its Affiliated entities, and its and their respective officers, employees and agents, and any other State Persons that are indemnified by LEP pursuant to this Agreement.

“State Investment” means the aggregate amount of payments owed by the State to LEP or a Project SPE during the term of a Project pursuant to the relevant Contract Documents.

“State Person” means any of the following:

- a. employees of State or a State Entity;
- b. any agent of State or a State Entity in each case acting as such;
- c. any representative or advisor of the State or a State Entity in any such person’s capacity as a provider of services, work or materials directly or indirectly to LEP or a Project SPE in connection with the Project; or
- d. any invitee of the State, a State Entity or any State Person referred to in clause a, b, or c above who enters upon a Project Site.

“State Representative” means an individual appointed by the State to serve as its representative.

“State Services Period Representative” means an individual appointed by the State as its representative on the Services Period Joint Committee under a Contract Document. A State Representative with respect to a specific Ancillary Agreement shall not be deemed a State Representative with respect to any other Ancillary Agreements unless the State states so in writing.

“State Step-In Rights” means the rights of the State to “step into the shoes” of LEP and take certain actions to provide Thermal Services under certain circumstances described in a Thermal Services Agreement.

“State’s Decision” means the decision of the State concerning the resolution of a Dispute pursuant to La. R.S. 39:1673.

“State’s Plan of Correction” means a reasonably detailed plan formulated by the State setting forth the actions the State intends to undertake, and anticipated timing therefor, to resolve a Loss of Availability of Thermal Services under a Thermal Services Agreement.

“Step-In Damages” means any direct expenses incurred to third parties by a State Entity exercising Commercially Reasonable Efforts in furtherance of, and directly related to, the repair or replacement of Covered Assets for the resolution of an Unexcused Loss of Availability pursuant to the State Step-In Rights in accordance with the terms and conditions of a Thermal Services Agreement.

“Substantial Completion Date” with respect to a Facility Optimization Services Agreement means the date specified therein.

“Term” means (a) with respect to this Agreement, the period from the Effective Date until the Expiry Date unless earlier terminated as provided herein, and (b) with respect to an Ancillary Agreement, the stated term of such Ancillary Agreement unless earlier terminated as provided therein.

“Termination Date” means the date on which (a) this Agreement (and in such instance all Ancillary Agreements thereunder) terminates prior to the Expiry Date pursuant to and in accordance with ARTICLE 10 hereof, or (b) an Ancillary Agreement terminates prior to the Expiry Date thereof pursuant to and in accordance with the provisions of such Ancillary Agreement.

“Termination Fee” individually and “Termination Fees” collectively mean the amount or amounts payable by the State in event of termination of an Ancillary Agreement prior to the Expiry Date of such Ancillary Agreement, in accordance with the terms and conditions of the applicable Ancillary Agreement and without regard to any amounts LEP may be obligated to pay to or reimburse the State as provided in any Contract Document.

“Thermal Energy” means, as applicable for a Covered Facility, chilled water, steam and/or heating water.

“Thermal Services” means the provision by LEP or a Project SPE of Thermal Energy for cooling, conditioning and heating of Covered Facilities under Thermal Services Agreements and to Third Party Off-takers.

“Thermal Services Agreement” means an agreement between the State or any subdivision thereof and LEP or a Project SPE for the provision of Thermal Services to a Covered Facility.

“Thermal Services Capacity” means, from time to time throughout the Term of an Ancillary Agreement, the volume of Thermal Services that the applicable Plant is capable of delivering, after completion of any applicable Plant Improvements, and after completion of any future Additional Works that may be performed, in all cases taking into account any redundancies required by Applicable Legal Requirements or Applicable Standards.

“Thermal Services Charge” means, for any given Billing Month, the sum of the charges described in a Thermal Services Rate Design attached to a Thermal Services Agreement related to a Covered Facility.

“Thermal Services Distribution System” means, with respect to a Covered Facility, the distribution system and any interconnected extensions thereof, including all tower water piping, heating water piping and chilled water piping commencing and ending at Points of Demarcation, existing as of the applicable Commencement Date and any additions, improvements and replacements thereto installed by or on behalf of the State, LEP or a Project SPE during the term of an Ancillary Agreement wherever located, providing Thermal Services to such Covered Facility.

“Thermal Services Invoice” means, for any given Billing Month, the invoice stating the Thermal Services Charge for a Covered Facility.

“Thermal Services Payment” means, for any given Billing Month, the amount the State actually pays on account of that Billing Month’s Thermal Services Invoice.

“Thermal Services Rate Design” means the rate design attached as an exhibit to a Thermal Services Agreement or any other Ancillary Agreement.

“Thermal Services Requirements” means the peak amount of Thermal Services necessary for the operation of a Covered Facility as adjusted from time to time in accordance with the Contract Documents.

“Third Party Distribution Systems” means any additions or modifications made to the Thermal Services Distribution System by LEP or a Project SPE to deliver Thermal Services to Third Party Off-takers pursuant to Third Party Agreements.

“Third Party Off-taker” means any third party that receives Thermal Services from LEP or a Project SPE utilizing the assets of a Covered Facility.

“Unexcused Loss of Availability” means any Loss of Availability under a Thermal Services Agreement or other Ancillary Agreement that is not an Excused Loss of Availability, as specified in such Ancillary Agreement.

“Utilities” means the following services:

- a. Energy and emergency power, including electricity and natural gas;
- b. Water;
- c. Storm water; and
- d. Telephone and data cabling.

“Utility Meters” means the meters that measure the usage of Utilities.

“Work” means any design, construction and installation work related to any Plant Improvements, Energy Optimization Improvements, Renewal Work or Replacement Work performed by LEP or a Project SPE pursuant to an Ancillary Agreement.

## FORM OF ADOPTION AGREEMENT FOR PROJECTS

This **ADOPTION AGREEMENT** (this “**Agreement**”) dated effective [●], 20[●] (the “**Effective Date**”), by **THE STATE OF LOUISIANA** (the “**State**”), appearing herein through [●], the Commissioner of Administration, Division of Administration, duly authorized and empowered by the State, [[**STATE ENTITY**], a [●] (“**State Entity**”), **LA ENERGY PARTNERS, LLC**, a Delaware limited liability company (“**LEP**”), and [**PROJECT SPE**], a Delaware limited liability company (“**Project SPE**”). Each of State, [State Entity], LEP and Project SPE is sometimes individually or collectively referred to as a “**Party**” or the “**Parties**”.

### RECITALS

**WHEREAS**, the State and LEP have entered into a Cooperative Endeavor Agreement dated [●], 2019 (the “**CEA**”), which establishes a framework pursuant to which the State and LEP may collaborate on [the lease or concession of State-owned or -controlled facilities for/conservation measures for State-owned or -controlled facilities through] the provision of Work and Services by LEP, directly or indirectly through Affiliates of LEP;

**WHEREAS**, pursuant to ARTICLE 6 of the CEA, the Parties desire to enter into the Project described in Section 2;

**WHEREAS**, pursuant to the Project, Project SPE will provide certain Work and/or Services to the [State/State Entity] under the terms and conditions of the CEA and the Project Ancillary Agreements described in Section 3;

**NOW, THEREFORE**, in consideration of the mutual covenants and conditions set forth below, the Parties, each intending to be legally bound, hereby agree as follows:

1. **Defined Terms.** Capitalized terms used but not otherwise defined in this Agreement have the meanings ascribed to them in **Exhibit “A”** of the CEA. Defined terms will be given their common and ordinary meanings when they appear uncapitalized in the text. Undefined terms will be given their common and ordinary meanings pursuant to custom and industry parlance. Notwithstanding the foregoing, any terms defined in this Agreement that conflict with the definition provided in **Exhibit “A”** of the CEA shall have the meanings provided herein.

2. **Project.** [Description of the Project.]

3. **Project Ancillary Agreements.** The [State’s/State Entity’s] and Project SPE’s rights and obligations relating to the Project are set forth in this Agreement, and the following Ancillary Agreements (the “**Project Ancillary Agreements**”):

(a) [list of all Ancillary Agreements comprising the Project].

4. **Project SPE.** Project SPE is an Affiliate of LEP and has been formed solely for the purpose of entering into the Project Ancillary Agreements and performing the Work and/or Services thereunder.

5. **Adoption of the CEA.** The terms and conditions of the CEA are adopted as if otherwise set forth herein. Further, each of the [State Entity] and Project SPE hereby



acknowledge and agree to be bound by the terms and conditions thereof as if each were a party thereto, it being understood that the State Entity shall abide by and be subject to the terms and conditions of the CEA applicable to the State, and Project SPE shall abide by and be subject to the terms and conditions of the CEA applicable to LEP. Notwithstanding the foregoing, each of the State and LEP acknowledges and agrees that any breach or default by the State Entity or Project SPE hereunder or under any Project Ancillary Agreement shall not constitute or be deemed to constitute a breach or default by the State or LEP under the CEA, respectively.

**6. Continuing Disclosure Obligations.** [Any disclosure obligations of the State or State Entity to be identified here.]

**7. Net Public Benefit.** Prior to entering into this Agreement and the Project Ancillary Agreements, the [State/State Entity] has performed the independent review described in Section 6.5 of the CEA. A copy of such review is attached hereto as **Exhibit “A”**.

**8. Assignment.** No Party will assign or otherwise transfer its rights or obligations under this Agreement except in accordance with the provisions of ARTICLE 9 of the CEA.

**9. Governing Law; Dispute Resolution.** This Agreement, and all matters arising out of or relating to it shall be construed in accordance with and governed by the laws of the State of Louisiana. Any Dispute arising under or related to this Agreement or the Project will be resolved pursuant to the dispute resolution provisions contained in ARTICLE 14 of the CEA.

**10. Counterparts.** This Agreement may be executed in counterparts, each of which will be deemed an original and all of which will constitute one agreement. The signatures of any Party to a counterpart will be deemed to be a signature to, and may be appended to, any other counterpart. Digital signatures and other electronic signatures and copies of manual signatures transmitted by facsimile, e-mail or other electronic means will be binding and considered fully effective as if they were authentic original signatures.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK.]

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

**STATE OF LOUISIANA**

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

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

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

**[STATE ENTITY]**

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

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

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

**LA ENERGY PARTNERS, LLC**

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

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

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

**[PROJECT SPE]**

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

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

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

## ADOPTION AGREEMENT

This **ADOPTION AGREEMENT** (this “**Agreement**”) dated effective [●], 2019 (the “**Effective Date**”), by **THE STATE OF LOUISIANA** (the “**State**”), appearing herein through Jay Dardenne, the Commissioner of Administration, Division of Administration, duly authorized and empowered by the State, **LA ENERGY PARTNERS, LLC**, a Delaware limited liability company (“**LEP**”), and **BATON ROUGE ENERGY PARTNERS, LLC**, a Delaware limited liability company (“**BREP**”). Each of State, LEP and BREP is sometimes individually or collectively referred to as a “**Party**” or the “**Parties**”.

### RECITALS

**WHEREAS**, the State and LEP have entered into a Cooperative Endeavor Agreement dated [●], 2019 (the “**CEA**”), which establishes a framework pursuant to which the State and LEP may collaborate on the lease or concession of State-owned or -controlled facilities and conservation measures for State-owned or -controlled facilities through the provision of Work and Services by LEP, directly or indirectly through Affiliates of LEP;

**WHEREAS**, pursuant to ARTICLE 6 of the CEA, the Parties desire to enter into the Project described in Section 2;

**WHEREAS**, pursuant to the Project, BREP will provide certain Work and/or Services to the State under the terms and conditions of the CEA and the Project Ancillary Agreements described in Section 3;

**NOW, THEREFORE**, in consideration of the mutual covenants and conditions set forth below, the Parties, each intending to be legally bound, hereby agree as follows:

1. **Defined Terms.** Capitalized terms used but not otherwise defined in this Agreement have the meanings ascribed to them in **Exhibit “A”** of the CEA. Defined terms will be given their common and ordinary meanings when they appear uncapitalized in the text. Undefined terms will be given their common and ordinary meanings pursuant to custom and industry parlance. Notwithstanding the foregoing, any terms defined in this Agreement that conflict with the definition provided in **Exhibit “A”** of the CEA shall have the meanings provided herein.

2. **Project.**

(a) **Shaw Center.** The State is party to the Shaw Center CEA, pursuant to which the parties thereto designed, constructed and operate a multi-use museum, theatre and arts complex known as “The Shaw Center for the Arts”. Pursuant to the Shaw Center CEA, the State provides, at the State’s cost and expense, thermal services and certain operation, maintenance, repair, renewal and enhancement services to the Shaw Center Building. The State provides thermal services to the Shaw Center Building from existing assets situated within the Shaw Center Plant located near the Shaw Center Building, and delivers the same through established distribution systems comprising piping, valves and fittings running between the Shaw Center Building and the Shaw Center Plant. LEP desires to operate and maintain the Shaw Center Plant and the assets contained therein in exchange for the exclusive lease of the Shaw Center Plant and all assets therein, and provide Thermal Services to the Shaw Center Building on a priority usage basis and thereby relieve the State of its current financial and operational undertaking of

providing thermal services to the Shaw Center Building. As further consideration by LEP to lease the Shaw Center Plant and assume certain State obligations under the Shaw Center CEA, LEP desires to provide specific enhancements and improvements to the Shaw Center Building. The State expects to recognize financial benefits from the enhancements made to and improvements installed in the Shaw Center Building, including (i) utility and operational cost savings, (ii) Infrastructure Savings, and (iii) improved functionality and reliability of the Shaw Center Building (the “**Shaw Center Project**”).

(b) **OSB Facility Optimization Services.** The State has identified specific buildings where the operational costs and deferred maintenance and replacement costs have limited the State’s ability to operate and maintain those buildings and LEP desires to provide specific enhancements and improvements to such buildings to mitigate the State’s operational costs and risks therein. The State expects to recognize financial benefits from the enhancements made to and improvements installed in the buildings, including (i) utility and operational cost savings, (ii) Infrastructure Savings, and (iii) improved functionality and reliability of the buildings (the “**OSB Project**”, collectively with the Shaw Center Project, the “**Project**”).

3. **Project Ancillary Agreements.** The State’s and BREP’s rights and obligations relating to the Project are set forth in this Agreement, and the following Ancillary Agreements (together with this Agreement, the “**Project Ancillary Agreements**”):

- (a) Shaw Center Plant Lease;
- (b) Shaw Center Thermal Services Agreement; and
- (c) Phase I Facility Optimization Services Agreement.

4. **Project SPE.** BREP is an Affiliate of LEP and has been formed solely for the purpose of entering into the Project Ancillary Agreements and performing the Work and/or Services thereunder.

5. **Adoption of the CEA.** The terms and conditions of the CEA are adopted as if otherwise set forth herein. Further, BREP hereby acknowledges and agrees to be bound by the terms and conditions thereof as if it were a party thereto, it being understood that BREP shall abide by and be subject to the terms and conditions of the CEA applicable to LEP. Notwithstanding the foregoing, the State acknowledges and agrees that any breach or default by BREP hereunder or under any Project Ancillary Agreement shall not constitute or be deemed to constitute a breach or default by LEP under the CEA.

6. **Continuing Disclosure Obligations.** During the Term of the Project, the State shall deliver or cause to be delivered to BREP within two hundred ten (210) days of the State’s fiscal year end, comprehensive annual financial reports, prepared by the Division of Administration and audited by an independent certified public accountant within the Office of the Legislative Auditor. Such reports shall be prepared in accordance with generally accepted accounting principles as prescribed by the Governmental Accounting Standards Board.

7. **Net Public Benefit.** Prior to entering into this Agreement and the Project Ancillary Agreements, the State has performed the independent review described in Section 2.3 and **Exhibit “K”** to the CEA.

8. **Assignment.** No Party will assign or otherwise transfer its rights or obligations under this Agreement except in accordance with the provisions of ARTICLE 9 of the CEA.

9. **Governing Law; Dispute Resolution.** This Agreement, and all matters arising out of or relating to it shall be construed in accordance with and governed by the laws of the State of Louisiana. Any Dispute arising under or related to this Agreement or the Project will be resolved pursuant to the dispute resolution provisions contained in ARTICLE 14 of the CEA.

10. **Counterparts.** This Agreement may be executed in counterparts, each of which will be deemed an original and all of which will constitute one agreement. The signatures of any Party to a counterpart will be deemed to be a signature to, and may be appended to, any other counterpart. Digital signatures and other electronic signatures and copies of manual signatures transmitted by facsimile, e-mail or other electronic means will be binding and considered fully effective as if they were authentic original signatures.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY BLANK.]

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

**STATE OF LOUISIANA**

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

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

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

**LA ENERGY PARTNERS, LLC**

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

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

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

**BATON ROUGE ENERGY PARTNERS, LLC**

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

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

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

## **EXHIBIT “B”**

### **MASTER NET PUBLIC BENEFIT ASSURANCE**

1. The Net Public Benefit for each Service Year is equal to Annual Savings minus the Annual Costs.
2. The Annual Savings is equal to the sum of the Annual Utility Savings, Annual Operation and Maintenance Savings, and Annual Infrastructure Savings.
3. The Annual Costs is equal to the Annual Project SPE charges.
4. The Annual Utility Savings is equal to the Covered Facilities Utility Savings for the applicable Service Year.
5. The Project SPE shall measure and verify the Covered Facilities Utility Savings for each Service Year in accordance with a measurement and verification plan developed by the Project SPE and approved by the State Entity (“Measurement and Verification Plan”).
6. The Measurement and Verification Plan shall comply with the procedures established by the then most current version of the International Performance Measurement and Verification Protocol (“IPMVP”), the Federal Energy Management Protocol (“FEMP”), or such other protocols that may be mutually agreed upon by the parties, as of the Effective Date of the Ancillary Agreement.
7. The Measurement and Verification Plan shall convert measured utility consumption savings to measured cost savings using utility unit costs established by the Measurement and Verification Plan for the applicable Service Year.
8. The Annual Operation and Maintenance Cost Savings shall be equal to the amounts established by the Measurement and Verification Plan for the applicable Service Year.
9. The Annual Infrastructure Savings is equal to the amounts established by the Measurement and Verification Plan for the applicable Service Year.

## EXHIBIT “C”

### MASTER COOPERATIVE PURCHASING PROVISIONS

1. Opt-In Provisions: Pursuant to the terms and conditions of the CEA and this **Exhibit “C”**, any State Entity shall be able to opt into the CEA and enter into future Ancillary Agreements pursuant to ARTICLE 6 of the CEA or any other agreement necessary to facilitate a Project pursuant to the terms and conditions of the CEA.
2. Net Public Benefit Assurance: For each Project, a Project SPE shall provide the State Entity with a Net Public Benefit assurance pursuant to the requirements of **Exhibit “B”**.
3. Non-Appropriation: All State obligations related to any Project are subject to appropriation by the Legislature of sufficient funds therefor and the availability of funds following appropriation by the Legislature, and a Project may be terminated due to non-appropriation of complete funding.
4. Thermal Services: The following guidelines shall apply to any Project whereby a Project SPE provides Thermal Services pursuant to a Lease and Thermal Services Agreement:
  - a. Lease: When assets are leased (“**Leased Plant**”) as a part of a Project pursuant to a Lease, the Lease Value and Base Rent thereunder shall be calculated as follows:
    - i. Lease Value: The fair value of the lease of Covered Assets (the “**Lease Value**”) shall be established using the Discounted Cash Flow Valuation Method based on the term of the Lease, equipment capacity, market firm and non-firm rates for Thermal Services, and an appropriate capitalization rate (overall rate of return) not exceeding eight percent (8%).
    - ii. Base Rent: The annual Base Rent payments shall be established using the Lease Value, the term of the Lease, and an appropriate interest rate not less than four and one-half percent (4.5%).
    - iii. Utilities: The State Entity will be responsible for the provision and payment of all Utilities to and used by the Covered Assets.
  - b. Thermal Services Agreement: When a Thermal Services Agreement is utilized as part of a Project, the Thermal Services Charges thereunder shall be established as follows:
    - i. Base Thermal Services Charge: The Base Thermal Services Charge shall be established by using the estimated Thermal Services consumption of the Covered Facility(ies) under the applicable Thermal Services Agreement and the market firm and non-firm rates for Thermal Services used to establish the Lease Value.
    - ii. Thermal Services Charge: The Thermal Services Charge shall be equal to the Base Thermal Services Charge less the Rent Payment.
    - iii. Third Party Off-Taker Purchased Utility Cost Reimbursement: The Project SPE shall reimburse the State Entity for any additional utility costs incurred by the State Entity



as a result of the SPE's use of the Covered Assets to produce Thermal Services for Third Party Off-takers.

- iv. Most Favored Nations Clause: In the event Thermal Services are provided to a Third Party Off-taker from a Covered Asset, the Project SPE shall reduce the State Entity's Thermal Services Charges to the lowest rate for Thermal Services charged by the Project SPE to a Third-Party Off-taker provided by the same Covered Asset.
- v. Net Payment: The net payment due from a State Entity under a Thermal Services Agreement shall be equal to the Thermal Services Charge for the applicable Covered Facility(ies) minus the Third Party Off-taker Purchased Utility Cost Reimbursement.

5. Project Terms and Conditions.

- a. Transparent Pricing: The Project SPE shall price all Work and Services under an Ancillary Agreement in an open-book pricing manner.
- b. Termination Provisions: The State Entity and the Project SPE have the right to terminate Ancillary Agreements prior to the Expiry Date thereof under the terms and conditions set forth in **Exhibit "D"** – Master Termination Provisions.
- c. Step-In Rights: The State Entity has the right to step-in and operate Covered Assets in the event of an Unexcused Loss of Availability of Thermal Services after expiration of an appropriate grace period not exceeding four (4) hours.
- d. Liquidated Damages: The State Entity has the right to assess and collect reasonable liquidated damages ("Liquidated Damages"). The Project SPE shall be liable to the State Entity for Liquidated Damages in the event of an Unexcused Loss of Availability that exceeds a five (5) hour grace period. In no event shall the Liquidated Damages within a single Service Year exceed the total Thermal Services Charge within the same Service Year.
- e. Hudson Initiative Sub-Contractor Participation: The Project SPE shall use reasonable efforts to utilize Hudson Initiative sub-contractors in the provision of Work or Services under an Ancillary Agreement as appropriate.
- f. Operation and Maintenance Costs: The amounts charged by the Project SPE for Operation and Maintenance Services shall be competitive in the market.

6. Project Costs. Costs of a Project under the CEA shall be allocated to the Parties as follows:

- a. Development Costs: The Project SPE shall recover its actual out of pocket development costs.
- b. Investment Grade Audit Fees and Expenses: The Project SPE shall charge fees for Investment Grade Audit Services based on the Project's scale. The total Project SPE charge for Investment Grade Audit Service fees and expenses shall not exceed twenty-five cents (\$0.25) per square foot of floor space, subject to reasonable adjustments for inflation not exceeding the corresponding change in the applicable Consumer Price Index.

- c. Savings Assurances: The Project SPE shall charge fees for providing Savings Assurances. The total Project SPE charge for Savings Assurances shall not exceed five percent (5%) of the Assurance amount.
- d. Design Fees: The Project SPE shall charge fees for design services. The total charge for design services by the Project SPE shall not exceed the State of Louisiana fee scale in effect on the Effective Date of the Ancillary Agreements for the Project.
- e. Commissioning Fees and Expenses: The Project SPE shall charge fees for commissioning services based on the Project's scale. The total charges for commissioning fees and expenses by the Project SPE shall not exceed three percent (3%) of the total cost of the Project (inclusive of all costs and fees under this Section 6) (the "**Project Costs**").
- f. Retro-Commissioning Fees and Expenses: The Project SPE shall charge fees for retro-commissioning services based on the Project's scale. The total charge for retro-commissioning fees and expenses by the Project SPE shall not exceed fifty cents (\$0.50) per square foot of floor space of the Covered Facility, subject to reasonable adjustments for inflation not exceeding the corresponding change in the applicable Consumer Price Index.
- g. Project Management Fees and Expenses: The Project SPE shall charge fees for project management services based on the Project's scale. The total charge for project management fees and expenses by the Project SPE shall not exceed five percent (5%) of the total Project Costs.
- h. Performance and Payment Bonds: The State Entity has the right to require the Project SPE to furnish performance and payment bonds for the implementation of Improvements; provided, however, the Project SPE shall recover the costs thereof.
- i. General and Administrative Costs: The Project SPE shall recover its general and administrative costs; provided, however, the total Project SPE charge for general and administrative costs shall not exceed ten percent (10%) of the total Project Costs.
- j. General Conditions: The Project SPE shall recover its general conditions costs; provided, however, the total Project SPE charge for general conditions shall not exceed eight percent (8%) of the total Project Costs.
- k. Insurance: The Project SPE shall procure insurance in accordance with the requirements set forth in **Exhibit "E"** – Master Insurance Requirements and the applicable Ancillary Agreements.
- l. Prime Contractor Fee: The Project SPE shall charge a Prime Contractor Fee; provided, however, the Prime Contractor Fee shall not exceed five percent (5%) of the total Project Costs.
- m. Contingency: The Project SPE may include a contingency allowance in its pricing; provided, however, the contingency allowance shall not exceed seven percent (7%) of the total Project Costs.

**EXHIBIT “D”**  
**MASTER TERMINATION PROVISIONS**

An Ancillary Agreement may be terminated by a party thereto prior to the Expiry Date of such Ancillary Agreement only upon the following circumstances:<sup>1</sup>

1. By the State or the applicable State Entity.
  - a. Termination by State for Cause.
  - b. Termination by State for Convenience.
  - c. Termination by State for Necessity.
    - i. Upon a Major Casualty Event affecting an applicable Covered Facility.
    - ii. Upon a Change in Law that substantially prevents the State or the applicable State Entity from continuing its performance of substantially all of its obligations under the Ancillary Agreement for the remainder of the Term.
    - iii. Upon an Extended Force Majeure Event that substantially prevents a party to the Ancillary Agreement from continuing its performance of substantially all of its obligations under the Ancillary Agreement.
  - d. Termination by State for Non-Appropriation.
2. By LEP/Project SPE.
  - a. Termination by LEP/Project SPE for Cause.
  - b. Termination by LEP/Project SPE for Necessity.
    - i. Upon a Major Casualty Event affecting an applicable Covered Facility.
    - ii. Upon a Change in Law that substantially prevents the Project SPE from continuing its performance of substantially all of its obligations under the Ancillary Agreement for the remainder of the Term.
    - iii. Upon an Extended Force Majeure Event that substantially prevents a party to the Ancillary Agreement from continuing its performance of substantially all of its obligations under the Ancillary Agreement.

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<sup>1</sup> Notwithstanding anything contained in this Exhibit “D”, an Ancillary Agreement may expressly limit or expand the circumstances upon which such Ancillary Agreement may be terminated.

**EXHIBIT “E”**  
**MASTER INSURANCE REQUIREMENTS**

When a Party is required under an Ancillary Agreement to procure and maintain insurance, such policies shall conform to the following requirements, unless otherwise waived in writing by the Commissioner and the applicable State Entity:

**1. GENERAL**

- (a) Prior to commencing any Work or Services under an Ancillary Agreement for which Project SPE is required to provide insurance (“Required Insurance”), Project SPE shall provide the Commissioner and the applicable State Entity proof of the Required Insurance coverages. All insurers shall be authorized to do business in the State, and shall have an A. M. Best’s rating of no less than A-:VI; provided, however, that the foregoing rating requirement will be waived for any workers’ compensation coverage.
- (b) Thirty (30) days prior notice of cancellation shall be given to the Commissioner and the applicable State Entity by registered mail, return receipt requested, on each policy of Required Insurance. All notices will name Project SPE and any applicable subcontractor and identify the applicable Ancillary Agreement.

**2. INSURANCE REQUIREMENTS**

- (a) Insurance coverage specified in the GENERAL CONDITIONS (AIA Document A 201, 2017 Edition) to be provided by Project SPE, and any other insurance described below shall be furnished, if required by an Ancillary Agreement, with the following minimum limits:
  - (i) Workers’ Compensation - Statutory - in compliance with the workers’ compensation law of the State. Exception: Employer’s liability to be \$1,000,000 when Work or Services to be provided under an Ancillary Agreement are over water and involve maritime exposures.
  - (ii) Commercial General Liability Insurance with a combined single limit per occurrence for bodily injury and property damage on Insurance Services Office Commercial General Liability coverage (“occurrence”) form CG 0001. (Current form approved for use in the State). The “Claims Made” form is unacceptable. This insurance shall include coverage for bodily injury and property damage, and indicate on the certificate of insurance which of the seven (7) coverages required below are not included in the policy, if any:
    - (1) Premises - Operations;
    - (2) Broad Form Contractual Liability;
    - (3) Products and Completed Operations;
    - (4) Use of Contractors and Subcontractors;
    - (5) Personal Injury;
    - (6) Broad Form Property Damage; and
    - (7) Explosion, Collapse and Underground (XCU) Coverage.

*NOTE: On the certificate of insurance, under the description of operations, the following wording will be provided: THE AGGREGATE LOSS LIMIT APPLIES TO EACH PROJECT, or a copy of ISO form CG2503 (Current form approved for use in the State) shall be submitted.*

**COMBINED SINGLE LIMIT (CSL) - AMOUNT OF INSURANCE REQUIRED**

|   | Projects Under<br>\$100,000                   | Projects \$100,001-<br>\$1,000,000              | Projects Over<br>\$1,000,000                    |
|---|---|---|---|
| Each Occurrence/<br>Minimum Limit               | \$500,000***<br>(Depends On<br>Project Value) | \$1,000,000***<br>(Depends On<br>Project Value) | \$3,000,000***<br>(Depends On<br>Project Value) |
| Aggregate (Applicable to<br>this Contract ONLY) | \$500,000***<br>(Depends On<br>Project Value) | \$1,000,000***<br>(Depends On<br>Project Value) | \$3,000,000***<br>(Depends On<br>Project Value) |

*\*\*\*While the minimum combined single limit of \$500,000 is required for all Projects, the value of a Project shall be multiplied by 10% and insurance requirements will be increased at \$1,000,000 intervals and rounded to the nearest \$1,000,000. Example: A \$33,000,000 Project would require \$3,000,000 minimum combined single limit of coverage. Maximum limit required is \$5,000,000.00 regardless of Project value.*

- (b) Business Automobile Liability Insurance with a combined single limit of \$1,000,000 per occurrence for bodily injury and property damage, unless otherwise indicated. This insurance shall include for bodily injury and property damage the following coverages:
  - (i) Owned automobiles;
  - (ii) Hired automobiles; and
  - (iii) Non-owned automobiles.
- (c) Property Insurance
  - (i) Project SPE shall purchase and maintain property insurance upon the entirety of the Work or Services included in the applicable Ancillary Agreement for an amount equal to the greater of the fully completed value or the amount of the Ancillary Agreement including any amendments thereto (with the exception of the following sub-limit for flood.) Contractor's policy shall provide "ALL RISK" Builder's Risk insurance (extended to include the perils of flood, collapse, vandalism/malicious mischief, and theft, including theft of materials whether or not attached to any structure.) Flood sub-limit shall equal an amount no lower than ten percent (10%) of the total Ancillary Agreement value per occurrence. The "All Risk" Builder's Risk Insurance must also cover architects' and engineers' fees that may be necessary to provide plans and specifications and supervision of Work for the repair and/or replacement of property damage caused by a covered peril not to exceed ten percent (10%) of the cost of those repair and/or replacements.
  - (ii) A specialty contractor shall purchase and maintain property insurance upon the specialty system to be installed for an amount equal to the greater of the fully completed value of the specialty system or the amount of the contract for the

system installation including any amendments thereto. The specialty contractor may provide an installation floater with the same coverage as the “ALL RISK” Builder’s Risk insurance policy.

- (iii) The policy shall include the interest of the contracting State Entity, the Division of Administration (“DOA”), Project SPE and any applicable subcontractors as their interest may appear.
- (iv) Policies insuring Projects involving additions, alterations or repairs to existing buildings or structures must include an endorsement providing the following:

In the event of a disagreement regarding a loss covered by this policy which may also be covered by the State of Louisiana policy of self-insurance or any commercial property insurance policy purchased by the State of Louisiana, Office of Risk Management (“ORM”) covering in excess of the State of Louisiana, policy of self-insurance, this company agrees to follow the following procedure to establish coverage and/or the amount of loss:

Any party to a loss may make written demand for an appraisal of the matter in disagreement. Within 20 days of receipt of written demand, this company and either ORM or its commercial insurance company shall each select a competent and impartial appraiser and notify the other of the appraiser selected. The two appraisers will select a competent and impartial umpire. The appraisers will then identify the policy or policies under which the loss is insured and, if necessary, state separately the value of the property and the amount of the loss that must be borne by each policy. If the two appraisers fail to agree, they shall submit their differences to the umpire. A written decision by any two shall determine the policy or policies and the amount of the loss. Each insurance company (or ORM) agrees that the decision of the appraisers and the umpire if involved, will be binding and final and that neither party will resort to litigation. Each of the two parties shall pay its chosen appraiser and bear the cost of the umpire equally.

- (v) All property losses shall be made payable to and adjusted with the applicable State Entity party to the Project.
- (d) Other insurance to be provided by Project SPE:
  - (i) State Entity’s Protective Liability Insurance shall be furnished by Project SPE and naming the contracting State Entity and the State as the Insured.

|                       | Projects Under<br><u>\$100,000</u> | Projects \$100,001-<br><u>\$1,000,000</u> | Projects Over<br><u>\$1,000,000</u> |
|-----------------------|------------------------------------|---|-------------------------------------|
| CSL - Each Occurrence | \$500,000                          | \$1,000,000                               | \$3,000,000                         |

- (ii) Asbestos Abatement Liability (required only when asbestos abatement is specifically included in the Work or Services): Project SPE or a subcontractor who will be doing the asbestos abatement as outlined in the applicable Ancillary Agreement shall obtain and maintain such liability coverage for the asbestos

abatement hazard and exposure with minimum limits of \$1,000,000 per occurrence for the duration of the Project. The policy shall name the State of Louisiana, the contracting State Entity, all State departments, agencies, boards and commissions as an additional insured for the Project. The policy shall be written on an “occurrence” form. Claims-made coverage is unacceptable. The insurance company shall have an A.M. Best rating of at least A-:VI or better.

- (e) Any deductibles or self-insured retentions must be declared to and approved by the Commissioner. At the option of the Commissioner, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the contracting State Entity, the DOA, and their respective officers, officials, employees and volunteers; or Project SPE shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- (f) An umbrella policy may be used to meet minimum requirements.

### **3. RISKS AND INDEMNIFICATIONS ASSUMED BY PROJECT SPE**

- (a) Neither the acceptance of the completed Work or Services nor payment therefor shall release Project SPE and its subcontractor(s) from their obligations from the insurance requirements or indemnifications contained in this Agreement or an applicable Ancillary Agreement.
  - (i) Additional insurance may be required on an individual basis for specific Ancillary Agreements.
  - (ii) If such additional insurance is required for a specific Ancillary Agreement, that requirement will be described in the “Insurance” provisions of the applicable Ancillary Agreement (or an exhibit thereto).
- (b) All property losses shall be made payable to and adjusted with the contracting State Entity.
- (c) All policies and certificates of insurance shall be approved by the Commissioner and the contracting State Entity prior to the inception of any Work or Services.
- (d) If at any time any of the foregoing policies shall be or become unsatisfactory to the Commissioner, as to form or substance, or if a company issuing any such policy shall be or become unsatisfactory to the Commissioner, Project SPE shall, upon notice to that effect from the Commissioner, promptly obtain a new policy, submit the same to the Commissioner for approval and submit a certificate thereof as hereinabove provided. Failure of Project SPE to take out and/or maintain or the taking out and/or maintenance of any required insurance, shall not relieve Project SPE from any liability under this Agreement or the applicable Ancillary Agreement, nor shall the insurance requirements be construed to conflict with or otherwise limit the obligations of Project SPE concerning indemnification. The Commissioner reserves the right to require complete, certified copies of all required insurance policies, at any time.

#### **4. SUBCONTRACTORS**

Project SPE shall include all subcontractors as insureds under its policies or shall furnish separate certificates from each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

#### **5. CERTIFICATE OF INSURANCE**

Project SPE shall furnish the Commissioner with certificates of insurance for the Required Insurance. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The certificates of insurance must also contain the following in the “Description of Operations” section:

- (a) If Project SPE is acting as a General Contractor, then so state.
- (b) If Project SPE is a specialty contractor, then so state and provide the list of specialties for which Project SPE is insured.

#### **6. OTHER INSURANCE PROVISIONS**

- (a) The policies of Required Insurance are to contain, or be endorsed to contain, the following provisions:
  - (i) General Liability and Automobile Liability Coverages
    - (1) The contracting State Entity, the DOA, and their respective officers, officials, employees, Boards and Commissions and volunteers are to be added as “additional insureds” as respects liability arising out of activities performed by or on behalf of Project SPE; products and completed operations of Project SPE, premises owned, occupied or used by Project SPE. The coverage shall contain no special limitations on the scope of protection afforded to the contracting State Entity, the DOA, and their officers, officials, employees or volunteers.
    - (2) It is understood that the business auto policy under “Who is an Insured” automatically provides liability coverage in favor of the State.
    - (3) Any failure to comply with reporting provisions of the policy shall not affect coverage provided to the contracting State Entity, the DOA, and their officers, officials, employees, Boards and Commissions or volunteers.
    - (4) Project SPE’s insurance shall apply separately to each insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer’s liability.
  - (ii) Workers’ Compensation and Employer’s Liability Coverage: The insurer shall agree to waive all rights of subrogation against the contracting State Entity, the DOA, and their respective officers, officials, employees and volunteers for losses arising from Work or Services performed by Project SPE under an Ancillary Agreement.



- (iii) All Coverages: Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled by either Party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the Commissioner.
- (iv) Project SPE or the applicable subcontractor's insurer will have no right of recovery or subrogation against the State or the contracting State Entity, it being the intention of the Parties that Required Insurance shall protect both Parties and be the primary coverage for any and all losses covered by the Required Insurance.
- (v) The contracting State Entity and the DOA shall be named as an additional insured as regards to negligence by Project SPE (ISO Forms CG 20 10, Current form approved for use in Louisiana).
- (vi) The insurance companies issuing the policy or policies shall have no recourse against the contracting State Entity and the DOA for payment of any premiums or for assessments under any form of policy.

## EXHIBIT “K”

### PHASE I NET PUBLIC BENEFIT ASSURANCE PROVISIONS

1. The Net Public Benefit for each Service Year is equal to the Annual Savings minus the Annual Costs.
2. The Annual Savings is equal to the sum of the Annual Utility Savings, Annual Operation and Maintenance Savings, and Annual Infrastructure Savings.
3. The Annual Utility Savings is equal to the sum of the Annual Shaw Utility Savings and the Annual FOSA Utility Savings.
4. BREP shall measure and verify the Annual Shaw Utility Savings and the Annual FOSA Utility Savings for each Service Year in accordance with the Phase I Measurement and Verification Plan.
5. The Phase I Measurement and Verification Plan shall be developed by BREP and approved by the State as follows:
  - a. BREP shall develop the Phase I Measurement and Verification Plan in a manner compliant with the procedures established by the most current version of the International Performance Measurement and Verification Protocol (“IPMVP”) as of the Effective Date of the Phase I Ancillary Agreements.
  - b. The Phase I Measurement and Verification Plan shall utilize either IPMVP Option A: Partially Measured Retrofit Isolation or IPMVP Option C: Whole Meter as indicated in **Figure 1** below:

| Building                      | Building Location | IPMVP Option        |                     |                |
|-------------------------------|-------------------|---------------------|---------------------|----------------|
|                               |                   | Electricity Savings | Natural Gas Savings | Water Savings  |
| State Capitol                 | Baton Rouge       | C                   | A                   | Not Applicable |
| Capitol Annex                 | Baton Rouge       | C                   | C                   | Not Applicable |
| Pentagon Barracks             | Baton Rouge       | C                   | A                   | Not Applicable |
| OSB Service Center            | Baton Rouge       | C                   | A                   | Not Applicable |
| Information Services Building | Baton Rouge       | C                   | A                   | Not Applicable |
| Livingston Building           | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Poydras Building              | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| First Circuit Court of Appeal | Baton Rouge       | C                   | A                   | A              |
| Claiborne Building            | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Welcome Center                | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| State Museum                  | Baton Rouge       | C                   | A                   | Not Applicable |
| State Library                 | Baton Rouge       | C                   | A                   | Not Applicable |
| LaSalle Building              | Baton Rouge       | C                   | Not Applicable      | A              |
| Iberville Building            | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Bienville Building            | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Galvez Building               | Baton Rouge       | C                   | Not Applicable      | Not Applicable |

| Building                          | Building Location | IPMVP Option        |                     |                |
|-----------------------------------|-------------------|---------------------|---------------------|----------------|
|                                   |                   | Electricity Savings | Natural Gas Savings | Water Savings  |
| Governor's Mansion                | Baton Rouge       | A                   | A                   | Not Applicable |
| OPH Lab                           | Baton Rouge       | A                   | A                   | Not Applicable |
| Claiborne Garage                  | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| LaSalle Garage                    | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Galvez Garage                     | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Welcome Center Garage             | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Central Plant-South               | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| Central Plant-North               | Baton Rouge       | C                   | Not Applicable      | Not Applicable |
| State Supreme Court               | New Orleans       | A                   | A                   | Not Applicable |
| Sen. Chris Ullo Building          | Harvey            | A                   | Not Applicable      | Not Applicable |
| Brandywine State Office Buildings | Lafayette         | C                   | Not Applicable      | A              |
| Alexandria State Office Building  | Alexandria        | C                   | A                   | Not Applicable |
| Shreveport State Office Building  | Shreveport        | C                   | C                   | Not Applicable |
| Second Circuit Court of Appeal    | Shreveport        | C                   | C                   | A              |
| NELSOB                            | Monroe            | A                   | A                   | Not Applicable |
| Shaw Center Building and Plant    | Baton Rouge       | C                   | C                   | A              |

**Figure 1 - IPMVP Option**

- c. The Phase I Measurement and Verification Plan shall convert measured utility consumption savings to measured cost savings using utility unit costs established by the Phase I Measurement and Verification Plan for the applicable Service Year.
- d. The Phase I Measurement and Verification Plan shall establish individual meter specific Service Year 1 Baseline Utility Unit Costs for each utility meter serving the Covered Facilities, Shaw Center Building, and Shaw Center Plant.
- e. The individual meter specific Service Year 1 Baseline Utility Unit Costs shall be equal to the greater of: (i) the average utility unit cost for the applicable utility meter established by BREP during its audit of the Covered Facilities, Shaw Center Building, and Shaw Center Plant completed prior to the Effective Date; or (ii) the average utility unit cost for the applicable utility meter during the Baseline Period escalated one (1) year at the annual escalation rates indicated in **Figure 2** below:

| Utility         | Annual Escalation Rate (%) |
|-----------------|----------------------------|
| Electricity     | 3.12                       |
| Natural Gas     | 5.17                       |
| Water and Sewer | 2.20                       |

**Figure 2 - Utility Average Unit Cost Annual Escalation Rates**

- f. The individual meter Baseline Utility Unit Costs for future Service Years shall be equal to the Service Year 1 Baseline Utility Unit Costs escalated the appropriate number of years at the escalation rates indicated in **Figure 2**.
  - g. The Baseline Period shall be the twelve (12) most recent utility billing months prior to the Effective Date.
  - h. In compliance with industry standards, the Phase I Measurement and Verification Plan shall contain customary provisions with regard to Baseline Adjustments.
  - i. BREP shall submit the Phase I Measurement and Verification Plan to the State for review and approval not later than one hundred twenty (120) calendar days after the Effective Date of the Phase I Ancillary Agreements.
  - j. The State shall review the Phase I Measurement and Verification Plan developed by BREP and either submit written approval of the Phase I Measurement and Verification Plan or a list of issues to BREP within thirty (30) calendar days after receiving the Phase I Measurement and Verification Plan from BREP.
  - k. Should the State fail to provide written approval or a list of issues to BREP within thirty (30) calendar days after receiving the Phase I Measurement and Verification Plan from BREP, the Phase I Measurement and Verification Plan shall be deemed approved by the State.
  - l. In the event the State submits a written list of issues to BREP within thirty (30) calendar days after receiving the Phase I Measurement and Verification Plan, BREP and the State shall collaboratively develop a Phase I Measurement and Verification Plan acceptable to both parties. In this event, the plan approved by both parties shall be the Phase I Measurement and Verification Plan.
6. The Annual Operation and Maintenance Savings are equal to the sum of the Annual FOSA Operation and Maintenance Savings and Annual Shaw Operation and Maintenance Savings amounts indicated for the applicable Service Year in **Figure 3** below:

| Service Year | FOSA Operation and Maintenance Savings (\$) | Shaw Operation and Maintenance Savings (\$) | Annual Operation and Maintenance Savings |
|--------------|---|---|--|
| 1            | 0   | 40,000                                      | 40,000                                   |
| 2            | 0   | 40,880                                      | 40,880                                   |
| 3            | 81,079                                      | 41,779                                      | 122,858                                  |
| 4            | 83,511                                      | 42,699                                      | 126,210                                  |
| 5            | 86,017                                      | 43,638                                      | 129,655                                  |
| 6            | 88,597                                      | 44,598                                      | 133,195                                  |
| 7            | 91,255                                      | 45,579                                      | 136,834                                  |
| 8            | 93,993                                      | 46,582                                      | 140,575                                  |
| 9            | 96,813                                      | 47,607                                      | 144,419                                  |
| 10           | 99,717                                      | 48,654                                      | 148,371                                  |
| 11           | 102,708                                     | 49,724                                      | 152,433                                  |
| 12           | 105,790                                     | 50,818                                      | 156,608                                  |

| Service Year | FOSA Operation and Maintenance Savings (\$) | Shaw Operation and Maintenance Savings (\$) | Annual Operation and Maintenance Savings |
|--------------|---|---|--|
| 13           | 0   | 51,936                                      | 51,936                                   |
| 14           | 0   | 53,079                                      | 53,079                                   |
| 15           | 0   | 54,247                                      | 54,247                                   |
| 16           | 0   | 55,440                                      | 55,440                                   |
| 17           | 0   | 56,660                                      | 56,660                                   |
| 18           | 0   | 57,906                                      | 57,906                                   |
| 19           | 0   | 59,180                                      | 59,180                                   |
| 20           | 0   | 60,482                                      | 60,482                                   |
| <b>Total</b> | <b>929,480</b>                              | <b>991,488</b>                              | <b>1,920,967</b>                         |

**Figure 3 - Operation and Maintenance Savings**

7. The Annual Infrastructure Savings are equal to the FOSA Infrastructure Savings and Shaw Infrastructure Savings indicated for the applicable Service Year in **Figure 4** below:

| Service Year | FOSA Infrastructure Savings (\$) | Shaw Infrastructure Savings (\$) | Annual Infrastructure Savings (\$) |
|--------------|----------------------------------|----------------------------------|------------------------------------|
| 1            | 549,047                          | 114,175                          | 663,223                            |
| 2            | 564,256                          | 117,338                          | 681,594                            |
| 3            | 547,454                          | 120,588                          | 668,042                            |
| 4            | 562,544                          | 123,928                          | 686,473                            |
| 5            | 578,050                          | 127,361                          | 705,411                            |
| 6            | 593,983                          | 130,889                          | 724,872                            |
| 7            | 610,355                          | 134,515                          | 744,869                            |
| 8            | 627,177                          | 138,241                          | 765,418                            |
| 9            | 644,464                          | 142,070                          | 786,534                            |
| 10           | 662,226                          | 146,005                          | 808,232                            |
| 11           | 680,478                          | 150,050                          | 830,528                            |
| 12           | 699,233                          | 154,206                          | 853,439                            |
| 13           | 762,090                          | 158,478                          | 920,567                            |
| 14           | 783,200                          | 162,868                          | 946,067                            |
| 15           | 804,894                          | 167,379                          | 972,273                            |
| 16           | 827,190                          | 172,015                          | 999,205                            |
| 17           | 850,103                          | 176,780                          | 1,026,883                          |
| 18           | 873,651                          | 181,677                          | 1,055,328                          |
| 19           | 897,851                          | 186,709                          | 1,084,560                          |
| 20           | 922,722                          | 191,881                          | 1,114,603                          |
| <b>Total</b> | <b>14,040,968</b>                | <b>2,997,154</b>                 | <b>17,038,123</b>                  |

**Figure 4 - Infrastructure Savings**

8. The Annual Costs are equal to the sum of the Annual Thermal Service Charges for the applicable Service Year plus the sum of the Annual FOSA Charges for the applicable Service Year, as further set forth in **Exhibit “L”**.
9. BREP shall calculate the Annual Savings within sixty (60) days of receipt of all necessary invoices and other required information to calculate the Annual Savings from the State, and thereafter provide an annual report concerning the Net Public Benefit Assurance.
10. In the event the Annual Savings are greater than the Annual Costs, then BREP shall have met the Net Public Benefit Assurance. In the event the Annual Savings are less than the Annual Costs, then BREP shall pay the State the shortfall amount within sixty (60) days of completing the final reconciliation report.

## EXHIBIT “L”

### PHASE I PAYMENT TERMS

The Phase I Payment Terms are equal to the sum of Thermal Services Charge, as set forth in **Exhibit “D”** of the Thermal Services Agreement, and the Facility Optimization Services Charge, as set forth in **Schedule 3** of the Facility Optimization Services Agreement. The Phase I Payment for each Billing Month in a given Service Year are equal to the values indicated in **Figure 1** below:

| Year         | Thermal Services Charge (\$ Annual) | Facility Optimization Services Charge (\$ Annual) | Phase I Payment (\$ Annual) | Phase I Payment (\$ Month) |
|--------------|-------------------------------------|---|-----------------------------|----------------------------|
| 1            | 75,489                              | 390,000   | 465,489                     | 38,791                     |
| 2            | 113,469                             | 1,703,500   | 1,816,969                   | 151,414                    |
| 3            | 110,823                             | 2,277,650   | 2,388,473                   | 199,039                    |
| 4            | 113,822                             | 2,340,741   | 2,454,563                   | 204,547                    |
| 5            | 116,902                             | 2,405,579   | 2,522,482                   | 210,207                    |
| 6            | 120,067                             | 2,472,214   | 2,592,281                   | 216,023                    |
| 7            | 123,318                             | 2,540,694   | 2,664,012                   | 222,001                    |
| 8            | 126,657                             | 2,611,072   | 2,737,729                   | 228,144                    |
| 9            | 130,088                             | 2,683,398   | 2,813,486                   | 234,457                    |
| 10           | 133,612                             | 2,757,728   | 2,891,340                   | 240,945                    |
| 11           | 137,232                             | 2,834,117   | 2,971,349                   | 247,612                    |
| 12           | 140,951                             | 2,912,622   | 3,053,573                   | 254,464                    |
| 13           | 144,771                             | 2,993,302   | 3,138,073                   | 261,506                    |
| 14           | 148,696                             | 3,076,217   | 3,224,912                   | 268,743                    |
| 15           | 152,727                             | 3,161,428   | 3,314,155                   | 276,180                    |
| 16           | 156,869                             | 3,248,999   | 3,405,868                   | 283,822                    |
| 17           | 161,124                             | 3,338,997   | 3,500,120                   | 291,677                    |
| 18           | 165,494                             | 3,431,487   | 3,596,981                   | 299,748                    |
| 19           | 169,984                             | 3,526,539   | 3,696,523                   | 308,044                    |
| 20           | 174,596                             | 3,624,224   | 3,798,820                   | 316,568                    |
| <b>Total</b> | <b>2,716,689</b>                    | <b>54,330,509</b>                                 | <b>57,047,198</b>           | <b>N/A</b>                 |

**Figure 1 – Phase I Payment Terms**

## **EXHIBIT “M”**

### **PHASE I TERMINATION**

The following tables set forth the fees that will be payable by the State to BREP in the event of termination of all of the Phase I Ancillary Agreements. Initially capitalized terms used in this Exhibit and not defined in Section 10.2c or **Exhibit “A”** to the CEA shall have the meanings ascribed at the end of this Exhibit.

| <b>Schedule</b> | <b>Description</b>  |
|-----------------|---|
| 1               | Make-Whole Amount   |
| 2               | Termination by State for Net Public Benefit Payment Default |
| 3               | Termination by State for Phase I Non-Appropriation          |



Schedule 1 – Make-Whole Amount<sup>1</sup>

| Service Year | Estimated Called Principal (\$) | Interest Earned on Principal Balance (\$) | Estimated Average Debt Life Remaining at Termination (Years) | Estimated Treasury Yield Curve Rate for Average Debt Life Remaining at Termination (%) | Interest Earned on Principal Balance at Treasury Rate plus 50 BPS (\$) | Difference in Interest Earned on Principal Balance (\$) | Estimated Make Whole Amount* (\$) |
|--------------|---------------------------------|---|--|--|--|---|-----------------------------------|
| 1            | 25,681,477                      | 1,424,083                                 | 14.13  | 2.687  | 818,403  | 605,680   | 7,371,212                         |
| 2            | 27,167,189                      | 1,506,469                                 | 14.13  | 2.687  | 865,749  | 640,720   | 7,000,433                         |
| 3            | 27,277,232                      | 1,512,571                                 | 13.13  | 2.666  | 863,528  | 649,043   | 6,592,153                         |
| 4            | 26,811,705                      | 1,486,756                                 | 12.13  | 2.645  | 843,160  | 643,597   | 6,160,084                         |
| 5            | 26,263,340                      | 1,456,348                                 | 11.32  | 2.628  | 821,455  | 634,893   | 5,716,081                         |
| 6            | 25,625,922                      | 1,421,003                                 | 10.54  | 2.611  | 797,285  | 623,718   | 5,264,931                         |
| 7            | 24,892,849                      | 1,380,352                                 | 9.77   | 2.592  | 769,772  | 610,581   | 4,809,882                         |
| 8            | 24,057,103                      | 1,334,009                                 | 9.03   | 2.568  | 737,958  | 596,051   | 4,353,437                         |
| 9            | 23,111,230                      | 1,281,558                                 | 8.30   | 2.543  | 703,364  | 578,195   | 3,895,300                         |
| 10           | 22,047,311                      | 1,222,562                                 | 7.60   | 2.520  | 665,807  | 556,756   | 3,439,127                         |
| 11           | 20,856,939                      | 1,156,554                                 | 6.91   | 2.496  | 624,878  | 531,676   | 2,989,052                         |
| 12           | 19,531,188                      | 1,083,039                                 | 6.24   | 2.466  | 579,298  | 503,741   | 2,549,690                         |
| 13           | 18,060,581                      | 1,001,491                                 | 5.60   | 2.437  | 530,407  | 471,084   | 2,123,598                         |
| 14           | 16,435,062                      | 911,353                                   | 4.96   | 2.409  | 478,174  | 433,180   | 1,716,255                         |
| 15           | 14,643,960                      | 812,033                                   | 4.35   | 2.400  | 424,713  | 387,320   | 1,333,328                         |
| 16           | 12,675,952                      | 702,904                                   | 3.75   | 2.391  | 366,500  | 336,404   | 984,878                           |
| 17           | 10,519,029                      | 583,299                                   | 3.17   | 2.383  | 303,220  | 280,079   | 677,063                           |
| 18           | 8,160,452                       | 452,511                                   | 2.61   | 2.392  | 235,984  | 216,527   | 416,439                           |
| 19           | 5,586,714                       | 309,793                                   | 2.06   | 2.408  | 162,479  | 147,314   | 211,910                           |
| 20           | 2,783,490                       | 154,349                                   | 1.52   | 2.429  | 81,533   | 72,816  | 70,744                            |

<sup>1</sup> The calculation of the estimated Make Whole Amount is based on hypothetical Treasury Rates and is provided for illustrative purposes only. The actual Make Whole Amount will be calculated at the time of termination.

Schedule 2 – Termination by State for Net Public Benefit Payment Default

| Service Year | Estimated Notes Pay-Off Amount (\$) | Estimated BREP Reimbursement to State of the Make-Whole Amount (\$) | Estimated BREP Reimbursement to State of the Unearned Facility Optimization Services Amount (\$) | Estimated BREP Reimbursement to State of the Unearned Shaw Center Improvements Amount (\$) | Total Estimated Termination Cost (\$) |
|--------------|-------------------------------------|---|--|--|---------------------------------------|
| 1            | N/A                                 | N/A   | N/A  | N/A  | N/A                                   |
| 2            | 34,167,622                          | (7,000,433)   | (5,300,000)  | 362,713  | 22,229,901                            |
| 3            | 33,869,384                          | (6,592,153)   | 0  | 0  | 27,277,232                            |
| 4            | 32,971,789                          | (6,160,084)   | 0  | 0  | 26,811,705                            |
| 5            | 31,979,421                          | (5,716,081)   | 0  | 0  | 26,263,340                            |
| 6            | 30,890,854                          | (5,264,931)   | 0  | 0  | 25,625,922                            |
| 7            | 29,702,731                          | (4,809,882)   | 0  | 0  | 24,892,849                            |
| 8            | 28,410,540                          | (4,353,437)   | 0  | 0  | 24,057,103                            |
| 9            | 27,006,529                          | (3,895,300)   | 0  | 0  | 23,111,230                            |
| 10           | 25,486,438                          | (3,439,127)   | 0  | 0  | 22,047,311                            |
| 11           | 23,845,991                          | (2,989,052)   | 0  | 0  | 20,856,939                            |
| 12           | 22,080,878                          | (2,549,690)   | 0  | 0  | 19,531,188                            |
| 13           | 20,184,179                          | (2,123,598)   | 0  | 0  | 18,060,581                            |
| 14           | 18,151,317                          | (1,716,255)   | 0  | 0  | 16,435,062                            |
| 15           | 15,977,288                          | (1,333,328)   | 0  | 0  | 14,643,960                            |
| 16           | 13,660,830                          | (984,878)   | 0  | 0  | 12,675,952                            |
| 17           | 11,196,092                          | (677,063)   | 0  | 0  | 10,519,029                            |
| 18           | 8,576,892                           | (416,439)   | 0  | 0  | 8,160,452                             |
| 19           | 5,798,623                           | (211,910)   | 0  | 0  | 5,586,714                             |
| 20           | 2,854,234                           | (70,744)  | 0  | 0  | 2,783,490                             |

Schedule 3 – Termination by State for Phase I Non-Appropriation

| Service Year | Estimated Notes Pay-Off Amount (\$) | Estimated BREP Reimbursement to State of the Unearned Facility Optimization Services Amount (\$) | Estimated BREP Reimbursement to State of the Unearned Shaw Center Improvements Amount (\$) | Encumbered Operating Expenses (\$) | Estimated Additional Taxes (\$) | Stranded Off-Taker Extension Investment (\$) | TSA Termination Cost (\$) | FOSA Termination Cost (\$) | Total Estimated Termination Cost (\$) |
|--------------|-------------------------------------|--|--|------------------------------------|---------------------------------|--|---------------------------|----------------------------|---------------------------------------|
| 1            | 33,052,688                          | (21,464,141)   | 0  | 349,483                            | 690,880                         | 0  | 2,000,000                 | 4,020,000                  | 18,648,910                            |
| 2            | 34,167,622                          | (5,300,000)  | 362,713  | 357,172                            | 2,756,382                       | 3,370,710                                    | 2,000,000                 | 3,900,000                  | 41,614,598                            |
| 3            | 33,869,384                          | 0  | 0  | 365,029                            | 3,663,358                       | 5,171,692                                    | 1,970,000                 | 3,800,000                  | 48,839,464                            |
| 4            | 32,971,789                          | 0  | 0  | 373,060                            | 3,733,116                       | 5,567,819                                    | 1,650,000                 | 3,600,000                  | 47,895,784                            |
| 5            | 31,979,421                          | 0  | 0  | 381,267                            | 3,824,282                       | 5,923,743                                    | 1,400,000                 | 3,500,000                  | 47,008,713                            |
| 6            | 30,890,854                          | 0  | 0  | 389,655                            | 3,606,275                       | 5,553,509                                    | 1,350,000                 | 3,400,000                  | 45,190,294                            |
| 7            | 29,702,731                          | 0  | 0  | 398,228                            | 3,374,219                       | 5,183,275                                    | 1,250,000                 | 3,350,000                  | 43,258,453                            |
| 8            | 28,410,540                          | 0  | 0  | 406,989                            | 3,128,113                       | 4,813,042                                    | 1,100,000                 | 3,300,000                  | 41,158,684                            |
| 9            | 27,006,529                          | 0  | 0  | 415,942                            | 2,896,164                       | 4,442,808                                    | 1,000,000                 | 3,250,000                  | 39,011,443                            |
| 10           | 25,486,438                          | 0  | 0  | 425,093                            | 2,680,065                       | 4,072,574                                    | 965,000                   | 3,150,000                  | 36,779,170                            |
| 11           | 23,845,991                          | 0  | 0  | 434,445                            | 2,456,126                       | 3,702,340                                    | 900,000                   | 2,900,000                  | 34,238,902                            |
| 12           | 22,080,878                          | 0  | 0  | 444,003                            | 2,231,681                       | 3,332,106                                    | 830,000                   | 2,600,000                  | 31,518,667                            |
| 13           | 20,184,179                          | 0  | 0  | 453,771                            | 2,007,577                       | 2,961,872                                    | 760,000                   | 2,450,000                  | 28,817,398                            |
| 14           | 18,151,317                          | 0  | 0  | 463,754                            | 1,784,097                       | 2,591,638                                    | 690,000                   | 2,215,000                  | 25,895,806                            |
| 15           | 15,977,288                          | 0  | 0  | 473,957                            | 1,559,552                       | 2,221,404                                    | 615,000                   | 1,900,000                  | 22,747,200                            |
| 16           | 13,660,830                          | 0  | 0  | 484,384                            | 1,332,249                       | 1,851,170                                    | 530,000                   | 1,750,000                  | 19,608,632                            |
| 17           | 11,196,092                          | 0  | 0  | 495,040                            | 1,106,703                       | 1,480,936                                    | 450,000                   | 1,515,000                  | 16,243,772                            |
| 18           | 8,576,892                           | 0  | 0  | 505,931                            | 882,916                         | 1,110,702                                    | 375,000                   | 1,250,000                  | 12,701,441                            |
| 19           | 5,798,623                           | 0  | 0  | 517,061                            | 656,376                         | 740,468                                      | 290,000                   | 1,050,000                  | 9,052,529                             |
| 20           | 2,854,234                           | 0  | 0  | 528,437                            | 420,251                         | 370,234                                      | 200,000                   | 1,030,000                  | 5,403,156                             |

Any amounts owed by BREP to the State set forth in this **Exhibit “M”** (either directly or as reimbursement) shall be due and payable within five (5) Business Days after the State has paid all amounts owed by the State to BREP’s Financier or BREP, as applicable.

**DEFINITIONS:**

- a. “Additional Taxes” represents the additional taxes to be incurred by BREP as a result of a termination prior to the Expiry Date. The Additional Taxes is equal to the amount indicated on Schedule 3.
- b. “Encumbered Operating Expenses” represents the encumbered expenses for which BREP will be liable incurred in furtherance of the Project. The Encumbered Operating Expenses is equal to the actual amount not to exceed the amount indicated on Schedule 3.
- c. “FOSA Termination Cost” means the BREP opportunity cost (loss of potential gain from investing its development efforts and equity in the Facility Optimization Services Agreement, instead of other opportunities) caused by the termination of the Facility Optimization Services Agreement prior to the Expiry Date. The FOSA Termination Cost is equal to the amount indicated in Schedule 5 of the Facility Optimization Services Agreement – **Schedule 4**.
- d. “Make Whole Amount” means, with respect to any BREP Note, an amount equal to the excess, if any, of the Discounted Value of the Remaining Scheduled Payments with respect to the Called Principal over the amount of such Called Principal; provided, that the Make Whole Amount may in no event be less than zero dollars (\$0). Below are the defined components of the Make Whole Amount.
  - i. “BREP Note Purchase Agreement” means the Note Purchase Agreement entered into between BREP, BREP Parent and BREP’s Financier contemporaneously with this Agreement. In the event of a refinancing by BREP and BREP Parent, the term “BREP Note Purchase Agreement” will refer to any note purchase, loan or similar agreement entered into pursuant to that refinancing.
  - ii. “BREP Notes” means the senior secured notes of BREP issued and sold to BREP’s Financier pursuant to the provisions of the BREP Note Purchase Agreement. In the event of a refinancing, the term “BREP Notes” will mean the notes or other evidence of indebtedness issued pursuant to the replacement of the BREP Note Purchase Agreement.
  - iii. “Called Principal” means, with respect to any BREP Note, the principal of such BREP Note that is to be prepaid or has become or is declared to be immediately due and payable pursuant to the provisions of the BREP Note Purchase Agreement.
  - iv. “Discounted Value” means, with respect to the Called Principal of any BREP Note, the amount obtained by discounting all Remaining Scheduled Payments with respect to such Called Principal from their respective scheduled due dates to the Settlement Date with

respect to such Called Principal, in accordance with accepted financial practice and at a discount factor (applied on the same periodic basis as that on which interest on the BREP Notes is payable) equal to the Reinvestment Yield with respect to such Called Principal.

- v. “Reinvestment Yield” means, with respect to the Called Principal of any BREP Note, the sum of (a) 0.50% plus (b) the yield to maturity implied by the “Ask Yield” reported as of 10:00 a.m. (New York City time) on the second Business Day (as defined in the BREP Note Purchase Agreement” preceding the Settlement Date with respect to such Called Principal, on the display designed as “Page PX1” ( or such other display as may replace Page PX1) on Bloomberg Financial Markets for the most recently issued actively traded on-the-run U.S. Treasury securities (“Reported”) having a maturity equal to the Remaining Average Life of such Called Principal as of such Settlement Date. If there are no such U.S. Treasury securities Reported having a maturity equal to such Remaining Average Life, then such implied yield to maturity will be determined by (i) converting U.S. Treasury bill quotations to bond equivalent yields in accordance with accepted financial practice and (ii) interpolating linearly between the “Ask Yields” Reported for the applicable most recently issued and actively traded on-the-run U.S. Treasury securities with maturities (1) closest to and greater than such Remaining Average Life and (2) closest to and less than such Remaining Average Life. The Reinvestment Yield shall be rounded to the number of decimal places as appears in the interest rate of the applicable BREP Note.
- vi. If such yields are not Reported or the yields Reported as of such time are not ascertainable (including by way of interpolation), then “Reinvestment Yield” means, with respect to the Called Principal of any BREP Note, the sum of (x) 0.50% plus (y) the yield to maturity implied by the U.S. Treasury constant maturity yields reported, for the latest day for which such yields have been so reported as of the second Business Day (as defined in the BREP Note Purchase Agreement) preceding the Settlement Date with respect to such Called Principal, in Federal Reserve Statistical Release H.15 (or any comparable successor publication) for the U.S. Treasury constant maturity having a term equal to the Remaining Average Life of such Called Principal as of such Settlement Date. If there is no such U.S. Treasury constant maturity having a term equal to such Remaining Average Life, such implied yield to maturity will be determined by interpolating linearly between (1) the U.S. Treasury constant maturity so reported with the term closest to and greater than such Remaining Average Life and (2) the U.S. Treasury constant maturity so reported with the term closest to and less than such Remaining Average Life. The Reinvestment Yield shall be rounded to the number of decimal spaces as appears in the interest rate of the applicable BREP Note.
- vii. “Remaining Average Life” means, with respect to any Called Principal, the number of years obtained by dividing (i) such Called Principal into (ii) the sum of the products obtained by multiplying (a) the principal component of each Remaining Scheduled Payment with respect to such Called Principal by (b) the number of years, computed on the basis of a three hundred sixty (360)-day year comprised of twelve (12) thirty (30)-day months and calculated to two (2) decimal places, that will elapse between the Settlement

Date with respect to such Called Principal and the scheduled due date of such Remaining Scheduled Payment.

- viii. “Remaining Scheduled Payments” means, with respect to the Called Principal of any BREP Note, all payments of such Called Principal and interest thereon that would be due after the Settlement Date with respect to such Called Principal if no payment of such Called Principal were made prior to its scheduled due date, provided that is such Settlement Date is not a date on which interest payments are due to be made under the BREP Notes, then the amount of the next succeeding scheduled interest payment will be reduced by the amount of interest accrued to such Settlement Date and required to be paid on such Settlement Date pursuant to the provisions of the BREP Note Purchase Agreement.
- ix. “Settlement Date” means, with respect to the Called Principal of any BREP Note, the date on which such Called Principal is to be prepaid or has become or is declared to be immediately due and payable pursuant to the provisions of the BREP Note Purchase Agreement.
- e. “Notes Pay-Off Amount” means the Called Principal, interest (including any default interest), Make-Whole Amount and any fees, costs and other liabilities of BREP due and owing to BREP’s Financier pursuant to the terms of BREP Note Purchase Agreement.
- f. “Stranded Off-Taker Extension Investment” is equal to the actual book basis of BREP’s stranded investment in Off-taker Improvements not to exceed \$5,923,743.
- g. “Stranded Shaw Center Improvements Investment” is equal to the actual book basis of BREP’s stranded investment in Shaw Center Improvements not to exceed \$604,521.
- h. “TSA Termination Cost” means the BREP opportunity cost (loss of potential gain from investing its development efforts and equity in the Thermal Services Agreement, instead of other opportunities) caused by the termination of the Thermal Services Agreement prior to Expiry Date. The TSA Termination Cost equals the amount indicated in Schedule 6 of the Thermal Services Agreement – **Exhibit “G”**.
- i. “Unearned Facility Optimization Services Amount” is equal to the cost of completing the remainder of the Facility Optimization Services, i.e. the portion of the Facility Optimization Services that is incomplete as of the Termination Date.
- j. “Unearned Shaw Center Improvements Amount” is equal to the cost of completing the remainder of the Shaw Center Improvements, i.e. the portion of the Shaw Center Improvements that is incomplete as of the Termination Date.