

# City of *O*VILLA, Texas

## City Council

Rachel Huber, Place One  
Larry Stevenson, Place Two  
David Griffin, Place Three

Richard Dormier, Mayor

Doug Hunt, Place Four, Mayor Pro Tem  
Dean Oberg, Place Five  
Dennis Burn, City Manager

105 S. Cockrell Hill Road, Ovilla, TX 75154

Monday, February 22, 2016

6:00 P.M.

Council Chamber Room

## AGENDA City Council Called Special Meeting

NOTICE is hereby given of a Special Meeting of the City Council of the City of Ovilla, to be held on Monday, February 22, 2016 at 6:00 P.M. in the Ovilla Municipal Building, Council Chamber Room, 105 S. Cockrell Hill Road, Ovilla, Texas, 75154, for the purpose of considering the following item.

### I. CALL TO ORDER

**PURSUANT TO SECTION 30.06, PENAL CODE (TRESPASS BY LICENSE HOLDER WITH A CONCEALED HANDGUN), A PERSON LICENSED UNDER SUBCHAPTER H, CHAPTER 411, GOVERNMENT CODE (HANDGUN LICENSING LAW), MAY NOT ENTER THIS PROPERTY WITH A CONCEALED HANDGUN.**

**CONFORME A LA SECCIÓN 30.06 DEL CÓDIGO PENAL (ENTRADA SIN AUTORIZACIÓN POR TITULAR DE LICENCIA CON UNA PISTOLA OCULTA), UNA PERSONA CON LICENCIA BAJO EL SUBCAPÍTULO H, CAPÍTULO 411 DEL CÓDIGO DE GOBIERNO (LEY DE LICENCIAS DE PISTOLAS), NO PUEDE ENTRAR EN ESTA PROPIEDAD CON UNA PISTOLA OCULTA.**

**PURSUANT TO SECTION 30.07, PENAL CODE (TRESPASS BY LICENSE HOLDER WITH AN OPENLY CARRIED HANDGUN), A PERSON LICENSED UNDER SUBCHAPTER H, CHAPTER 411, GOVERNMENT CODE (HANDGUN LICENSING LAW), MAY NOT ENTER THIS PROPERTY WITH A HANDGUN THAT IS CARRIED OPENLY.**

**CONFORME A LA SECCIÓN 30.07 DEL CÓDIGO PENAL (ENTRADA SIN AUTORIZACIÓN POR TITULAR DE LICENCIA CON UNA PISTOLA VISIBLE), UNA PERSONA CON LICENCIA BAJO EL SUBCAPÍTULO H, CAPÍTULO 411 DEL CÓDIGO DE GOBIERNO (LEY DE LICENCIAS DE PISTOLAS), NO PUEDE ENTRAR EN ESTA PROPIEDAD CON UNA PISTOLA VISIBLE.**

- Invocation
- Pledge of Allegiance

### II. REGULAR AGENDA

- ITEM 1. DISCUSSION/ACTION** – Consideration of and Action on Resolution R2016-01 of the City Council of the City of Ovilla, Texas, authorizing the Texas Coalition for Affordable Power, Inc. (TCAP) to negotiate an electric supply agreement for five years for deliveries of electricity, effective January 01, 2018; authorizing TCAP to act as an agent on behalf of the City of Ovilla to enter into a contract for electricity; authorizing the Mayor or City Manager or City Secretary to execute an electric supply agreement for deliveries of electricity, effective January 01, 2018, and committing to budget for energy purchases in 2018 through 2022 and to honor the energy purchases in 2018 through 2022 and to honor the City's commitments to purchase power for its electrical needs in 2018 through 2022 through TCAP.

### EXECUTIVE SESSION

*The City Council of the City of Ovilla, Texas, reserves the right to meet in a closed session on any item listed on this Agenda should the need arise, pursuant to authorization by Texas Government Code, Sections 551.071 (consultation with attorney), 551.072 (deliberations about real property), 551.073 (deliberations about gifts and donations), 551.074 (personnel matters), 551.076 (deliberations about security devices), 551.087 (economic development), 418.183 (homeland security).*

# City of *O*VILLA, Texas

## City Council

Rachel Huber, Place One  
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Richard Dormier, Mayor

Doug Hunt, Place Four, Mayor Pro Tem  
Dean Oberg, Place Five  
Dennis Burn, City Manager

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### III. ADJOURNMENT

THIS IS TO CERTIFY THAT A COPY OF THE NOTICE OF the February 22, 2016 Special City Council Agenda was posted on the City Hall bulletin board, a place convenient and readily accessible to the general public at all times, and to the City's website, [www.cityofovilla.org](http://www.cityofovilla.org), on the 18<sup>th</sup> day of February 2016 prior to 6:00 p.m., in compliance with Chapter 551, Texas Government Code.

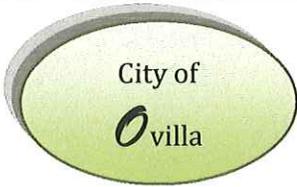


*Pamela Woodall*

\_\_\_\_\_  
Pamela Woodall, City Secretary

DATE OF POSTING: 2-18-2016 TIME: 11:00  am/pm  
DATE TAKEN DOWN: \_\_\_\_\_ TIME: \_\_\_\_\_ am/pm

This facility is ADA compliant. If you plan to attend this public meeting and have a disability that requires special arrangements, please call 972-617-7262 at least 48 hours in advance. Reasonable accommodation will be made to assist your needs. PLEASE SILENCE ALL PAGERS, CELL PHONES & OTHER ELECTRONIC EQUIPMENT WHILE THE CITY COUNCIL MEETING IS IN SESSION.



# Ovilla City Council

## AGENDA ITEM REPORT

Item: 1

Meeting Date: February 22, 2015

Department: Administration/Finance

Discussion  Action

Budgeted Expense:  YES  NO  N/A

Submitted By: Dennis Burn

Amount: \$N/A

Reviewed By:  City Manager  City Secretary  City Attorney  
 Accountant  Other: Staff

### Attachments:

- 1. Resolution R2016-01

### Agenda Item / Topic:

**ITEM 2.**      **DISCUSSION/ACTION** – Consideration of and Action on Resolution R2016-01 of the City Council of the City of Ovilla, Texas, authorizing the Texas Coalition for Affordable Power, Inc. (TCAP) to negotiate an electric supply agreement for five years for deliveries of electricity, effective January 01, 2018; authorizing TCAP to act as an agent on behalf of the City of Ovilla to enter into a contract for electricity; authorizing the Mayor or City Manager or City Secretary to execute an electric supply agreement for deliveries of electricity, effective January 01, 2018, and committing to budget for energy purchases in 2018 through 2022 and to honor the energy purchases in 2018 through 2022 and to honor the City’s commitments to purchase power for its electrical needs in 2018 through 2022 through TCAP.

### Discussion / Justification:

The City of Ovilla has been a member of the Texas Coalition for Affordable Power (TCAP) since May, 2011. Our current pricing agreement expires December 31, 2017. Though this is almost two years in advance it is now time to provide ample opportunity to lock a fixed-price benchmark.

TCAP is a non-profit, political subdivision corporation, owned and controlled by its 171 political subdivision members. TCAP, as a political subdivision corporation, can go directly to the wholesale market. There is no legal requirement that Ovilla engage in a competitive bidding process prior to contracting for electricity.

By picking option 1, Ovilla is guaranteed a price not to exceed \$0.041 per kWh. We are currently paying \$0.06850 per kWh. The new price will save Ovilla \$15,487.00 based on our 2013 usage of 545,323 kWh per year and based on the future indicative price of \$0.0401 per kWh. The price as of Friday, February 12 was \$0.03737 per kWh for a contract starting on January 1, 2018.

The City Council took no action on the Resolution at their February 8, 2016 meeting and directed staff to bring the agenda item back with the contract.

As a reminder this resolution is for the energy needs of City of Ovilla owned facilities only. The City attorney has reviewed and approved the resolution. The contract was reviewed and revised by the City Attorney. TCAP legal counsel has approved the revisions made by the City Attorney.

**Recommendation / Staff Comments:**

**Sample Motion(s):**

*I move that Council APPROVE/DENY Resolution R2016-01 of the City Council of the City of Ovilla, Texas, authorizing the Texas Coalition for Affordable Power, Inc. (TCAP) to negotiate an electric supply agreement for five years for deliveries of electricity, effective January 01, 2018; authorizing TCAP to act as an agent on behalf of the City of Ovilla to enter into a contract for electricity; authorizing the Mayor or City Manager or City Secretary to execute an electric supply agreement for deliveries of electricity, effective January 01, 2018, and committing to budget for energy purchases in 2018 through 2022 and to honor the energy purchases in 2018 through 2022 and to honor the City's commitments to purchase power for its electrical needs in 2018 through 2022 through TCAP.*

## RESOLUTION NO. R2016-01

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OVILLA, TEXAS, AUTHORIZING THE TEXAS COALITION FOR AFFORDABLE POWER, INC. ("TCAP") TO NEGOTIATE AN ELECTRIC SUPPLY AGREEMENT FOR FIVE YEARS FOR DELIVERIES OF ELECTRICITY, EFFECTIVE JANUARY 1, 2018; AUTHORIZING TCAP TO ACT AS AN AGENT ON BEHALF OF THE CITY OF OVILLA TO ENTER INTO A CONTRACT FOR ELECTRICITY; AUTHORIZING THE MAYOR OR CITY MANAGER OR CITY SECRETARY TO EXECUTE AN ELECTRIC SUPPLY AGREEMENT FOR DELIVERIES OF ELECTRICITY, EFFECTIVE JANUARY 1, 2018, AND COMMITTING TO BUDGET FOR ENERGY PURCHASES IN 2018 THROUGH 2022 AND TO HONOR THE CITY'S COMMITMENTS TO PURCHASE POWER FOR ITS ELECTRICAL NEEDS IN 2018 THROUGH 2022 THROUGH TCAP

**WHEREAS**, the City of Ovilla, Texas (City), is a member of the Texas Coalition For Affordable Power, Inc. (TCAP), a non-profit, political subdivision corporation dedicated to securing electric power for its more than 170 members in the competitive retail market; and

**WHEREAS**, TCAP has unique rights under Texas law to negotiate directly in the wholesale market and arrange separate contracts for power supply and retail services which provides TCAP leverage to achieve contract provisions that single city negotiations with a Retail Electric Provider (REP) would be unlikely to produce; and

**WHEREAS**, TCAP's geographic diversity across all four ERCOT zones produces an aggregated peak load that is lower than the total of individual peak loads of the individual TCAP members, allowing price benefits in the wholesale market that are not likely to be available to any given TCAP member alone; and

**WHEREAS**, TCAP and its predecessor organizations, Cities Aggregation Power Project, Inc. (CAPP) and South Texas Aggregation Project, Inc. (STAP), negotiated favorable contract terms that resulted in rebates from wholesale supplier and reasonable prices for delivered electricity since 2002 resulting in stable budgets for electricity for members; and

**WHEREAS**, commodity prices for electricity experienced significant volatility between 2002 and 2009, with prices ranging from 4 cents to over 13 cents per kWh, causing CAPP and STAP members to welcome a five year contractual commitment that came close to cutting the 2008 prices in half, with that contract being extended until December 31, 2017, with a negotiated price reduction of about 1 cent per kWh; and

**WHEREAS**, TCAP has become a forceful voice for consumer protections and market reform to benefit the public and well as cities and other political subdivisions; and

**WHEREAS**, TCAP is owned by its members and distributes monetary and other resources according to relative load size of members and is controlled by a 15 member Board of Directors, all of whom must be city employees of members who represent diversity in size and geography; and

**WHEREAS**, wholesale power prices within the deregulated Texas market are largely determined by the NYMEX gas futures prices for natural gas which are currently low and relatively stable, but which change daily; and

**WHEREAS**, daily price changes require retail customers to execute a contract immediately upon receipt of a favorable offer; and

**WHEREAS**, pursuant to Texas Local Government Code Section 252.022(a) (15) expenditures for electricity are exempt from competitive bidding requirements; and

**WHEREAS**, on any given day, TCAP is able to capture a favorable wholesale price for any period of time, comparable to or better than any given REP or broker; and

**WHEREAS**, TCAP intends to continue to contract with its current wholesale supplier, NextEra, because the relationship with NextEra is such that NextEra is willing, after it knows the size of a given load, to execute a contract at or below prescribed price and terms; and

**WHEREAS**, the City desires to execute a contract for electricity for the period beyond the expiration of its current contract on December 31, 2017, that locks-in favorable wholesale prices under one of three different supply options:

Option 1- fixed-price, full-requirements at a price not to exceed 4.1 cents per kWh for the North and West zones or 4.25 cents per kWh for the South and Houston zones;

Option 2 - fixed price for on-peak hours and variable spot market prices for off-peak hours;

Option 3 - block energy at a fixed price to cover the base load hours, a fixed price for solar energy to cover mid-day peak hours (approximately 10% of total load) and variable spot market prices for all remaining consumption; and

**WHEREAS**, TCAP will allow members six weeks from receipt of this resolution to consider whether to participate in this second opportunity to contract for post-2017 electrical supply, and thereafter allow NextEra until June 30, 2016 to contact for power for five years at a price not to exceed 4.1 cents per kWh in the North and West zones and a price not to exceed 4.25 cents per kWh in the South and Houston zones for Option 1, so long as the aggregated load for any of the three supply options reaches at least 50 megawatts; and

**WHEREAS**, wholesale suppliers demand assurance that TCAP will pay for all contracted load; and

**WHEREAS**, the City needs to assure TCAP that it will sign a Commercial Electric Supply Agreement (CESA) reflecting the contract extension and budget for energy purchases for the post-2017 period and honor its commitment to purchase power for its electrical needs for 2018 through 2022 through TCAP.

***NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF OVILLA, TEXAS, THAT:***

**Section 1.** The TCAP Board of Directors and its consultants and advisors are agents authorized to negotiate for the City's electricity needs as a member of TCAP for the period 2018 through 2022 at a price not to exceed 4.1 cents per kWh for the North and West zones and a price not to exceed 4.25 cents per kWh in the Houston and South zones for supply Option 1.

**Section 2.** The City prefers to participate in supply Option 1 with the following understanding: a) while supply Option 1 is a full-requirements, fixed-price option, Options 2 (fixed price on-peak, variable spot prices for off-peak usage) and 3 (fixed price for base load, fixed price for a portion of peak load, and variable spot market for remainder) have variable

**RESOLUTION NO. R2016-01**

price components and savings over Option 1 cannot be guaranteed, and b) if there is insufficient desire among members to achieve a 50 MW threshold for either Option 2 or 3, the member selecting the inadequately subscribed option will be placed in the Option 1 category. If no option is selected, TCAP will assume that a passed Resolution approves of Option 1.

**Section 3.** Assuming this resolution is passed before February 25, 2016 and the combined load of TCAP members passing this resolution exceeds 50 megawatts for the preferred Option and NextEra is able to provide TCAP an opportunity prior to June 30, 2016 to contract for power to be delivered to members at a price not to exceed 4.1 cents per kWh for the North and West zones and not to exceed 4.25 cents per kWh in the Houston and South zones for supply Option 1 for the period January 1, 2018 through December 31, 2022, any one of the following individuals is hereby authorized to sign an electric supply agreement for the City within 24 hours of receipt of a contract that has been approved and recommended by the TCAP Board of Directors: the Mayor or City Manager or City Secretary.

**Section 4.** The City will commit to purchase power to meet all of its electricity needs eligible for competition pursuant to the TCAP approved supply agreement and approve funds necessary to pay electricity costs proportionate to the City's load under the supply agreement (whether wholesale or retail) arranged by TCAP and signed by TCAP's Executive Director or President or other TCAP representative authorized by the TCAP Board.

**Section 5.** A copy of this Resolution shall be sent to Jay Doegey, Executive Director, TCAP, 15455 Dallas Parkway, Suite 600, Addison, Texas 75001 and Geoffrey M. Gay, legal counsel to TCAP at 816 Congress Avenue, Suite 1900, Austin, Texas 78701.

**RESOLVED, PASSED and APPROVED** the 22nd day of February 2016.

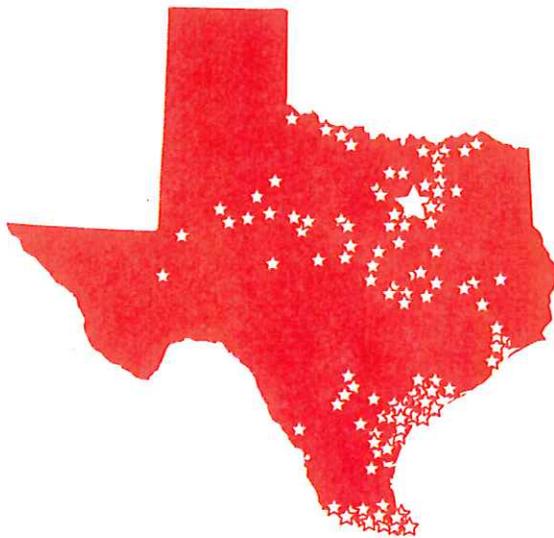
\_\_\_\_\_  
Richard Dormier, Mayor

ATTEST:

\_\_\_\_\_  
Pamela Woodall, City Secretary

# Texas Coalition for Affordable Power

## Membership in Texas



Abilene  
Acton MUD  
Addison  
Alamo  
Alice  
Allen  
Alton  
Anna  
Aquila Water Supply  
Aransas County MUD  
Aransas Pass  
Arlington  
Aubrey  
Austwell  
Bangs  
Beeville  
Bellmead  
Belton  
Benbrook  
Benbrook Library District  
Benbrook Water Authority  
Bishop  
Brownwood  
Burkburnett  
Burlson  
Calhoun Port Authority  
Carrizo Springs  
Cedar Hill  
Celina  
Charlotte  
Cisco

Cleburne  
Clute  
Clyde  
Colleyville  
Colorado City  
Comanche  
Commerce  
Copperas Cove  
Corinth  
Corpus Christi  
Corpus Christi Housing Authority  
Corpus Christi Regional Transit Authority  
Crockett  
Decatur  
Denison  
DeSoto  
Dickinson  
Dilley  
Dublin  
Duncanville  
Eastland  
Edgecliff Village  
Edna  
Eules  
Everman  
Falfurrias  
Farmersville  
Flower Mound  
Forest Hill

Fort Stockton  
Frisco  
Fulton  
Gainesville  
George West  
Godley  
Grand Prairie  
Grapevine  
Haltom City  
Hamilton  
Harker Heights  
Harlingen  
Harlingen Housing Authority  
Henrietta  
Highland Park  
Howe  
Hurst  
Ingleside  
Ingleside on the Bay  
Jackson County Emergency Services District #3  
Johnson County SUD  
Kaufman  
Keller  
Kenedy  
Kennedale  
Kingsville  
La Feria  
La Marque  
Laguna Vista  
Lake Jackson  
Lancaster  
Lewisville  
Lorena  
Los Fresnos  
Lovelady  
Lyford  
Mansfield  
Manvel  
McAllen  
McAllen Housing Authority  
Mercedes  
Merkel  
Midlothian  
Mission  
Mission Housing Authority  
Missouri City  
Murphy  
North Richland Hills  
Oak Point  
Odem  
Odessa  
Orange Grove  
Ovilla  
Palestine  
Palmer

Pantego  
Paris  
Pearland  
Plano  
Pleasanton  
Point Comfort  
Port Aransas  
Port Lavaca  
Portland  
Premont  
Prosper  
Red Oak  
Refugio  
Richland Hills  
Rio Grande City  
Roanoke  
Robinson  
Rockport  
Rockwall  
Rotan  
Rowlett  
Royse City  
Sachse  
Saginaw  
San Angelo  
San Juan  
Seadrift  
Sherman  
Sinton  
Snyder  
South Padre Island  
South Texas Water Authority  
Spring Valley Village  
Springtown  
Sugar Land  
Sunnyvale  
Sweetwater  
Taft  
The Colony  
Tomball  
Trophy Club  
University Park  
Upper Leon River MWD  
Venus  
Vernon  
Victoria  
Watauga  
Webster  
West Central Texas MWD  
White Settlement  
Whitney  
Wichita Falls  
Willow Park  
Woodsboro  
Woodway  
Wylie

**Redlined Version**

# COMMERCIAL ELECTRICITY SERVICE AGREEMENT

(Fixed Price Around the Clock)

This Commercial Electricity Service Agreement, including all of the Attachments, Schedules, and Exhibits, which are attached and incorporated (collectively, the "**Agreement**"), is entered into between Gexa Energy, LP ("**Gexa**"), a Texas limited partnership, and \_\_\_\_\_ ("**Customer**"). Gexa and Customer may be referred to individually as a "**Party**" or collectively as the "**Parties**".

## SECTION 1: RETAIL ELECTRIC SALES AND SERVICES

**1.1 Appointment and Scope.** Customer appoints Gexa as its Retail Electric Provider ("**REP**") for the ESI ID(s) served under this Agreement. Customer authorizes Gexa to: (i) act as Customer's REP for all purposes; and (ii) provide the services required of a REP including, without limitation, the procurement, scheduling and delivery of electricity throughout the Term to each of the ESI ID(s). Customer's appointment imposes no other duties on Gexa other than those specified in this Agreement and the REP Services Agreement.

**1.2 Agreement to Purchase.** Customer shall purchase its electricity requirements from Gexa throughout the Term for each of the ESI ID(s) except as otherwise provided. The electricity and services Customer receives from Gexa is for Customer's exclusive proprietary use. Customer alone shall pay for electricity and services provided and for electricity and services Customer fails to take pursuant to its contractual obligations. If Gexa fails to deliver sufficient quantities of electricity to the TDSP for delivery to Customer or fails to schedule the delivery of sufficient quantities of electricity (collectively, a "**Scheduling Failure**") the TDSP is obligated by law and by its tariff to deliver sufficient electricity to satisfy Customer's needs. If a Scheduling Failure occurs, Gexa shall financially settle, at no additional cost or expense to Customer, with its Qualified Scheduling Entity (as defined by ERCOT) for the purchase of electricity necessary to cover the Scheduling Failure.

### 1.3 Term.

**(a) Effective Date.** Gexa shall provide retail electric service under this Agreement to each ESI ID beginning on the Effective Date, which will occur either on or after the Expected Start Date stated in Attachment B for any new customer or if Customer is an existing customer then the Expected Start Date is the meter read date following the expiration of the Customer's prior Agreement with Gexa, until December 31, 2022 (that period, the "**Term**"). The end of the Term for each respective ESI ID is the meter read date occurring in December 2022. As a result of variations in the timing of the Effective Date described in this Section 1.3 the Term may include a partial calendar month in addition to the number of months set forth in Attachment B, if any.

**(b) Delayed Effective Date.** Gexa shall use commercially reasonable efforts to cause the Effective Date for each ESI ID to occur on the Expected Start Date. If the Effective Date for an ESI ID occurs more than 20 days after the Expected Start Date, Customer may provide Gexa with evidence of the amount of electricity purchased by Customer from its current REP in connection with that ESI ID during the period on and after the 21st day after the Expected Start Date until the Effective Date (the "**Delayed Effective Date Period**"), and the total amount paid by Customer to its current REP for the electricity it purchased during the Delayed Effective Date Period (the "**Delayed Effective Date Electricity Amount**"). Upon receipt of evidence from Customer Gexa shall calculate and provide Customer a credit against future purchases under this Agreement equal to the positive amount resulting from the following calculation: (a) the Delayed Effective Date Electricity Amount minus (b) the amount that Customer would have paid to Gexa pursuant to this Agreement during the Delayed Effective Date Period for the same amount of electricity purchased by Customer from its current REP during that period in connection with the affected ESI ID(s); provided, that any credit is subject to the aggregate limit for all TCAP customers stated in Exhibit A to the First Amendment of the REP Services Agreement between Gexa and TCAP, and that Gexa shall not be required to provide a credit with respect to any period during a Delayed Effective Date Period where the delay was caused by an event outside of Gexa's control.

**(c) Service After Term.** If service continues beyond the Term, it will be on a month-to-month basis, and the Agreement will continue in effect for the ESI ID(s) except that the Energy Price will be the greater of: (i) the Energy Price as set forth in Section 2.1 below, or (ii) the aggregate weighted average of the Market Rate (as defined herein) as determined for all of the ESI ID(s), for as long as service continues. If Customer has not switched from Gexa to another supplier at the expiration of the Term, Gexa shall serve Customer at the rate set forth in this Section for a minimum of 60 days. After those 60 days, Gexa may continue to serve Customer or terminate the Agreement and disconnect Customer.

**1.4 Modifications to ESI IDs.** Gexa shall work with Customer in good faith during the Term to reasonably accommodate and assist Customer with the management of its electricity needs. If at any time during the Term, Customer wants to i) add or delete one or more ESI IDs, ii) otherwise modify the ESI ID information as a result of a decision by Customer to open, close or sell a facility owned or leased by Customer, iii) expand an existing facility, or iv) increase an existing facility's metered load, then Customer shall provide written notice to Gexa of such change. If, in

Gexa's reasonable judgment, i) the addition is a separately metered load having (a) a peak demand expected to be less than 0.25 MW at all times during the first twelve months following commercial operation or (b) an annual average expected to be less than 0.125 MW during the first twelve months following commercial operation; or ii) does not result in a net increase of (a) 0.25 MW in peak demand or (b) 0.125 MW in average usage for an existing facility, Gexa shall use commercially reasonable efforts to promptly implement such changes, including providing required notices to ERCOT. If the addition is a separately metered load having (a) a peak demand expected to be in excess of 0.25 MW at any time during the first twelve months following commercial operation, (b) an annual average expected to be in excess of 0.125 MW during the first twelve months following commercial operation, or (c) results in a net increase of 0.25 MW in peak usage or 0.125 MW of average annual usage after consideration of any contemporaneous offsetting load decreases, as per the Letter Agreement (defined below), Gexa shall provide service to that account in accordance with the terms and conditions for Special Loads as stated in the April 27, 2011 Letter Agreement, as amended [REDACTED], 2016 (and via a Special Load Addendum thereto), among NEPM II, LLC, as assignee of NextEra Energy Power Marketing, LLC, ("PMI"), and Texas Coalition for Affordable Power ("TCAP") and Gexa (the "**Letter Agreement**"), and the April 27, 2011 Master Power Purchase and Sale Agreement Confirmation between PMI and Gexa, as amended [REDACTED], 2016 (the "**Confirmation**"). Gexa shall make periodic reports regarding changes to the billing status of any ESI ID(s) available to Customer and TCAP. Amendments that add or remove ESI ID(s) as a result of changes made pursuant to this section are incorporated into this Agreement, and are effective on the Effective Date for each ESI ID(s) added to this Agreement or the date that retail electric service for any removed ESI ID(s) ceases or is transferred to another REP.

## **SECTION 2: RETAIL ELECTRIC ENERGY SERVICE CHARGES**

### **2.1 Energy Price.**

(a) The Energy Price for the period commencing January 1, 2018 and ending December 31, 2022 is equal to \$ [REDACTED] /MWh. For the purposes of Section 3 the Energy Price shall be converted to dollars per kWh.

(b) The Energy Price shall include a charge intended to reflect (i) the anticipated Ancillary Services charges and (ii) the anticipated difference between the Load Zone price for the applicable load zone(s) in which the load is located and the appropriate trading hub price for those zone(s) (that charge the "**Ancillary Services and Nodal Basis Rate**"). Gexa shall charge or credit Customer, as appropriate, for the difference between the Ancillary and Nodal Basis Rate and the actual costs for each item incurred to serve TCAP customers (that charge or credit the "**Ancillary Services and Nodal Basis Adjustment**"). Ancillary Services and Nodal Basis Adjustments are calculated and charged or credited on a quarterly basis. Gexa shall collect or credit them in the manner specified in the Letter Agreement.

(c) If, during the Term, the aggregate TCAP load within an ERCOT defined load zone is greater than the Excess Load Amount under Schedule I of the Letter Agreement or less than the Shortfall Load Amount under Schedule I of the Letter Agreement, the Customer may be subject to its pro-rata share of the TCAP Aggregate Load Threshold Adjustment. Load Threshold Adjustments are calculated on a monthly basis and charged or credited on a quarterly basis and Gexa shall collect or credit them in the manner specified in the Letter Agreement.

(d) If, during the Term, the Loss Factor as provided in the Letter Agreement, which represents the multiplier required to account for the difference between Customer's load at its meter and the load required at the wholesale level to serve Customer (primarily transmission and distribution line losses), differs from the actual loss factor, then Gexa shall charge or credit Customer, as appropriate, for the difference between the Loss Factor and the actual loss factor (that charge or credit the "**Loss Factor Adjustment**"). Loss Factor Adjustments are calculated and charged or credited on an annual basis. Gexa shall compute and collect or credit them in the manner specified in the Letter Agreement.

**2.2 Additional Pass-Through Charges.** Gexa shall pass through and identify separately on Customer's bill with no mark-up Delivery Charges, Non-Recurring Charges, or Taxes that are not included in the Energy Price(s). All charges are exclusive of Taxes.

**2.3 Tax Exempt Status.** Customer shall provide Gexa with all required exemption certificates if Customer is exempt from paying any Taxes. Gexa shall not recognize an exemption without the exemption certificates and shall not be required to refund or credit previously paid Taxes unless the taxing entity sends the refund to Gexa. Gexa shall, however, assign to Customer any applicable claims for refund.

## **SECTION 3: BILLING AND PAYMENT**

**3.1 Billing and Payment.** Gexa shall invoice Customer's accounts on a monthly basis and shall bill Customer on a consolidated basis for all ESI IDs upon Customer's request. Gexa shall provide a summary bill for all accounts and detailed information for each account. Customer shall remit payment within 30 days of receiving the invoice. Gexa shall base the invoice amount on actual data provided by ERCOT and the TDSP. If ERCOT or the TDSP does not provide actual data in a timely manner, Gexa shall use estimated data to calculate the invoice and, upon receipt of actual data, reconcile the charges and adjust them as needed in subsequent invoices.

**3.2 Late Penalties, Interest on Overdue Payments, Invoice Disputes.** If Customer fails to remit all undisputed amounts on or before the due date, interest will accrue on any due and unpaid amounts from the due date at a rate of one percent per month, or the highest rate permitted by law, whichever is less. If Customer disputes a portion of an invoice it shall provide Gexa a written explanation specifying the amount in dispute and the reason for the dispute within 20 days of the invoice date. If Customer does not provide timely notice, Customer shall owe all amounts by the due

date. Notwithstanding the above, if Customer notifies Gexa of a disputed invoice, regardless of whether Customer has already paid the invoice, Gexa shall make records in its possession that are reasonably necessary for Customer to determine the accuracy of the invoice available to Customer during normal business hours; provided, however that neither party may request an adjustment or correction of an invoice unless written notice of such dispute is given within twelve months after the due date of such invoice; provided further, that such twelve month limit does not apply in the case of TDSP meter tampering charges first billed to Gexa that prevent Gexa from reasonably adjusting invoices prior to the twelve month period. In all cases, Gexa and Customer shall use good faith efforts to resolve disputes. In the event the Parties are unable to resolve a dispute within ten days of the notice date, either Party may begin legal proceedings to seek resolution. Any amounts determined owed shall be paid within three days after a decision.

**3.3 Aggregator Fees.** Pursuant to the REP Services Agreement between Gexa and TCAP, Gexa is obligated to pay TCAP an amount determined by multiplying a TCAP Aggregation Fee by the volume consumed in association with the ESI IDs (the "**Aggregator Fee**"). Customer shall pay the Aggregator Fee. The initial Aggregator Fee is \$ [REDACTED] per kWh, however, it may be changed by the TCAP Board of Directors at any time. Gexa shall state the Aggregator Fee as a separate line item on the Customer's bill.

**3.4 Billing Guarantee.** Gexa shall issue an invoice based on actual or estimated usage to Customer for every ESI ID at least one time per month. If, for reasons other than Force Majeure, Gexa fails to invoice an ESI ID within 120 days of any scheduled meter read, Gexa irrevocably waives its right to invoice Customer for any energy consumed at that ESI ID for the meter read cycle that should have been invoiced, unless not less than 10 days prior to the expiration of such 120 day period, Gexa provides Customer with a written explanation of the circumstances that prevent Gexa from issuing that invoice and the expected time by which an invoice can be issued. In such event, Customer and Gexa shall determine a reasonable extension period, not to exceed 30 days, within which an invoice will be issued. Gexa shall adjust or true-up each invoice no more than twice and Gexa shall issue such adjustments within 210 days of the initial issue date. Notwithstanding the foregoing, Gexa may issue an invoice or partial invoice arising from meter tampering charges without limitation and within a reasonable time after first billed to Gexa by the TDSP.

#### **SECTION 4: CUSTOMER INFORMATION, CREDIT AND DEPOSITS**

**4.1 Customer Information.** By entering into this Agreement and appointing Gexa as Customer's agent for electricity service, Customer authorizes Gexa to obtain certain information that Gexa may need to provide Customer's electric service, including Customer's address, telephone number, account numbers, historical usage information, and historical payment information from Customer's TDSP, and Customer further authorizes its TDSP to release that information to Gexa.

**4.2 Deposits and Other Security.** A Party (the "**Requesting Party**") may require the other Party (the "**Providing Party**") to provide a deposit (or additional deposit if an initial deposit was also required), letter of credit, or other form of credit assurance reasonably acceptable to the Requesting Party (collectively, "**Performance Assurance**") during the Term of this Agreement if: (i) the Requesting Party determines in its reasonable discretion that there has been a material adverse change in the Providing Party's or its guarantor's (if applicable) credit status or financial condition (which, if applicable, will mean that its credit or bond rating has dropped lower than BBB- by Standard & Poor's Rating Group or Baa3 by Moody's Investor Services or ceases to be rated by either of these agencies); or (ii) Customer has been delinquent in paying the electric bill more than twice during the past twelve months. Any Performance Assurance, less any outstanding balance owed by Providing Party to the Requesting Party, will be returned to the Providing Party once the Providing Party's or its guarantor's (if applicable) credit or financial condition becomes satisfactory or, if applicable, to a credit or bond rating of BBB- or Baa3 or higher, whichever occurs earlier; or, if the Performance Assurance relates to delinquent payments, the Providing Party has paid all outstanding balances and has made all payments within the dates set forth in this Agreement for a period of six consecutive months.

#### **SECTION 5: EARLY TERMINATION; DAMAGES**

**5.1 Cancellation by Customer for Insufficient Appropriations.** If, during Customer's annual appropriations determination, the applicable governmental authorities do not allocate sufficient funds to allow Customer to continue to perform its obligations under this Agreement (an "**Appropriations Failure**"), then Customer or Gexa shall have the right to terminate this Agreement in full or as to any affected ESI ID upon 30 days advance written notice effective at the end of the period for which appropriations are made; provided, that if appropriations are subsequently allocated for electricity for the ESI IDs covered by this Agreement, then the termination may be revoked at Gexa's option and those appropriations shall continue to apply to this Agreement and shall not be used for an electricity supply agreement with another REP. Upon a termination of this Agreement for Appropriations Failure, in full or as to any ESI ID(s), Customer shall pay all amounts due Gexa under this Agreement, including the Customer Early Termination Damages.

**5.2 Customer Early Termination Damages.** Except in connection with the closure of a facility associated with an ESI ID pursuant to Section 1.4, in connection with a Force Majeure Event, or as otherwise provided or excused in this Agreement if Customer cancels this Agreement before the end of the Term and refuses to accept electric supply delivery from Gexa for any ESI ID(s), Gexa may charge Customer early termination damages equal to the amount determined as follows: the result of (a) the Expected Usage for each ESI ID subject to Customer's cancellation or refusal of electric supply delivery ("**Customer Terminated Usage**") times the REP Services Fee specified in the REP

Services Agreement; plus (or minus, as applicable) (b) the Wholesale Transaction Termination Payment, as defined below (the result of the entire preceding calculation the "**Customer Early Termination Damages**"). If the Customer Early Termination Damages are charged due to an Event of Default by Customer, then the Customer Early Termination Damages will also include Gexa's reasonable costs relating to the determination and collection of Customer Early Termination Damages, including attorney and consultant fees incurred. The provisions in Section 3 related to Billing and Payment apply to the billing, due date, and collection of Customer Early Termination Damages. Customer agrees that Customer Early Termination Damages are a reasonable estimate of the damages due Gexa for failure to accept electric supply, and are not punitive in nature.

**5.3 Termination for Wholesale Supply Failure.** If, during the Term, the Wholesale Transaction is terminated as a result of a default by PMI ("**Wholesale Supply Failure**"), then this Agreement will also terminate effective on the date the Wholesale Agreement terminates. In the event of a termination for Wholesale Supply Failure, Gexa shall pay Customer a Wholesale Transaction Termination Payment if required by Section 5.5.

**5.4 Gexa Early Termination Damages.** Except for a Wholesale Supply Failure, a Force Majeure Event, or as otherwise provided or excused in this Agreement if Gexa cancels this Agreement and refuses to provide electric supply delivery to Customer for any or all ESI ID(s), Customer shall have the right to charge Gexa an early termination penalty equal to the amount determined as follows: the result of the Expected Usage for each ESI ID subject to Gexa's cancellation or refusal of electric supply delivery ("**Gexa Terminated Usage**") times the REP Services Fee specified in the REP Services Agreement (that result the "**Gexa Early Termination Damages**"). If the Gexa Early Termination Damages are charged due to an Event of Default by Gexa, then the Gexa Early Termination Damages will also include Customer's reasonable costs relating to the determination and collection of Gexa Early Termination Damages, including attorney and consultant fees incurred. Gexa agrees the Gexa Early Termination Damages are a reasonable estimate of the damages due Customer for failure to deliver electric supply, and are not punitive in nature.

**5.5 Wholesale Transaction Termination Payment.** If the Wholesale Transaction is terminated then Gexa shall calculate the portion of the Termination Payment (as defined in the EEI Master Agreement) paid under the Wholesale Transaction attributable to Customer's load (the "**Wholesale Transaction Termination Payment**"). Customer or Gexa shall pay the Wholesale Transaction Termination Payment to the other, as appropriate, in the manner described below and without regard to who is a defaulting party. If Gexa owes PMI a Termination Payment under the Wholesale Transaction, Customer shall pay Gexa the portion of the Termination Payment attributable to Customer's load. If PMI owes Gexa a Termination Payment under the Wholesale Transaction, Gexa shall pay Customer the portion of such Termination Payment attributable to Customer's load. To the extent a Termination Payment due from Gexa to PMI is adjusted in Gexa's account to reflect the full benefit of TCAP transacting with a replacement REP, Gexa shall make corresponding adjustments to the Wholesale Transaction Termination Payment on a pro-rata basis. Gexa shall remit a Wholesale Transaction Termination Payment due Customer, within 30 days of Gexa receiving the payment from PMI. Customer shall remit a Wholesale Transaction Termination Payment due Gexa within 30 days of Gexa's invoice. Gexa shall use commercially reasonable efforts to collect Termination Payments from PMI that include amounts due Customer.

**SECTION 6: NOTICES AND PAYMENT**

**6.1 General Notice.** Except as otherwise required by Applicable Law, all notices are deemed duly delivered if hand delivered or sent by United States, prepaid first class mail, facsimile, or by overnight delivery service. Notice by facsimile or hand delivery is effective on the day actually received, notice by overnight United States mail or courier is effective on the next business day after it is sent, and notice by U.S. Mail is effective on the second day after it is sent. The Parties shall send notices to the addresses below or any other address one Party provides to the other in writing:

a. If to Customer:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. If to Gexa:  
Gexa Energy, LP  
20455 State Highway 249, Suite 200  
Houston, Texas 77070

**6.2 Payments.** The Parties shall send payments to the addresses below or any other address one Party provides to the other in writing:

a. If to Customer:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 
- b. If to Gexa:  
Gexa Energy, LP  
20455 State Highway 249, Suite 200  
Houston, Texas 77070

## SECTION 7: DEFINITIONS

**7.1 Definitions.** In addition to terms defined elsewhere in this Agreement, when used with initial capitalization, whether singular or plural, capitalized terms have the meanings set forth in this Section 7.1. All other capitalized terms not otherwise defined shall have the meanings given them in the following documents, with any conflicting definitions contained in those documents applied in the following order: PURA, the PUCT Substantive Rules, and the ERCOT Protocols.

1. **"Actual Usage"** means the actual amount of electric energy (in kWh) used at the ESI ID(s) as determined by the TDSP.
2. **"Delivery Charges"** means those charges or credits from the TDSP pursuant to its tariff, including, but not limited to: Transmission and Distribution Charges, System Benefit Fund Charge, Nuclear Decommissioning Charge, Competitive Transition Charge, Standard Customer Metering Charge, Customer Charge, Merger Savings and Rate Reduction Credit, Excess Mitigation Credit and Utility Imposed Reactive Power Charges.
3. **"Effective Date"** means the date of the first meter reading of an ESI ID provided to Gexa by the TDSP after the TDSP and ERCOT shall have timely performed any required enrollment and cancellation procedures necessary to switch Customer's REP to such ESI ID to Gexa.
4. **"Electricity Related Charges"** means, unless noted otherwise: Ancillary Services Charge, Congestion, ERCOT Administrative Fee, Delivery Loss Charge, Transmission Loss Charge, Renewable Energy Credit Charge, Residential Energy Credit Charge, Unaccounted For Energy Charge, Qualified Scheduling Entity Charge, Imbalance Settlement Charge.
5. **"Energy Price(s)"** means the rates per unit of measure specified in Section 2.1 and includes all Electricity Related Charges.
6. **"ERCOT"** means the Electric Reliability Council of Texas.
7. **"ERCOT Protocols"** means the document adopted, published, and amended from time to time by ERCOT, and initially approved by the PUCT, to govern electric transactions in the ERCOT Region, including any attachments or exhibits referenced in the document, that contains the scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, procedures, standards, and criteria of ERCOT, or any successor document thereto.
8. **"ESI ID(s)"** means the Electric Service Identifiers for the property service addresses identified on Attachment B to this Agreement or if Customer is an existing Gexa customer then the list of service addresses currently served by Gexa, as such list may be modified from time to time as provided in Section 1.4.
9. **"Expected Usage"** means either the amount stated in Attachment B calculated for the remaining Term, or if no amounts are stated or Customer is an existing Gexa customer then the average actual monthly Customer energy usage from the comparable month from the previous year (or if an average cannot be computed due to limited service by Gexa or other circumstances, an average monthly usage as is reasonably determined by Gexa) times the number of months remaining in the Term.
10. **"kWh"** means kilowatt hour.
11. **"LMP" or "Locational Marginal Price"** means the price calculated for the applicable trading hub pursuant to the ERCOT Protocols.
12. **"Market Rate"** means 140% of the load-weighted average of the hourly LMPs at the corresponding trading hub, as determined for any delivery period.
13. **"Nodal Market"** means the implementation of wholesale market design by ERCOT with locational marginal pricing for resources.
14. **"Nodal Congestion"** means the positive difference in price between the real-time settlement point price as determined by ERCOT for the trading hub and the real-time settlement point price as determined by ERCOT for the load zone associated with the customer Facilities.
15. **"Non-Recurring Charges"** means any charges imposed by the TDSP or other third parties on a non-recurring basis for services, repairs or additional equipment needed for Customer's electric service.

16. "PUCT" means Public Utility Commission of Texas.

17. "Special Loads" has the meaning given it in the Letter Agreement.

18. "Taxes" means all taxes, assessments, levies, duties, charges, fees and withholdings of any kind levied by a duly-constituted taxing authority and all penalties, fines, and additions to tax, and interest thereon that are directly related to the services provided under this Agreement, but does not include the System Benefit Fund fee and fees and charges imposed by ERCOT. By way of example only, Taxes includes: Sales Tax, Miscellaneous Gross Receipts Tax, PUCT Assessment Fees and Franchise Fees.

19. "TCAP" means Texas Coalition for Affordable Power, an aggregation pool of governmental and other entities organized and administered by TCAP of which Customer is a member for the ESI IDs.

20. "TDSP" or "Transmission and Distribution Service Provider" means an entity regulated by the State of Texas, which transmits or distributes electric energy.

21. "Wholesale Transaction" means the transaction evidenced by the Confirmation whereby Gexa will purchase and PMI will provide full requirements energy and related services necessary to satisfy electricity consumption of TCAP members as served by retail provider Gexa.

**Attachments:**

Attachment A

Attachment B (for new TCAP Customers only)

Terms and Conditions of Service

Offer Sheet (ESI ID list and Expected Start Date)

<b>CUSTOMER:</b> _____	<b>GEXA:</b> <b>Gexa Energy, LP, By its General Partner Gexa Energy GP, LLC</b>
By:	By:
Printed:	Printed:
Title:	Title:
Date:	Date:

## Terms and Conditions of Service Attachment A

These Terms and Conditions of Service form an integral part of the Commercial Electricity Service Agreement between Customer and Gexa. In addition to the terms defined elsewhere in this Agreement, when used with initial capitalization, whether singular or plural, capitalized terms have the meanings set forth in Section 7.1 of this Agreement. Customer should thoroughly review the entire Agreement, including these Terms and Conditions of Service, before executing this Agreement.

### A. REPRESENTATIONS AND WARRANTIES

**A.1 Customer's Representations and Warranties.** As a material inducement to entering into this Agreement, Customer represents and warrants to Gexa as follows: (a) it is a duly organized entity and is in good standing under the laws of Texas; (b) the execution and delivery of the Agreement are within its powers, have been duly authorized by all necessary action, and do not violate the terms or conditions of contracts it is party to or laws applicable to it; (c) performance of this Agreement will be duly authorized by all necessary action and will not violate the terms or conditions of contracts it is party to; (d) as of the date sales of electricity by Gexa to Customer under the Agreement start, Customer will have all regulatory authorizations necessary for it to legally perform its operations and such performance will not violate the terms or conditions of contracts it is party to or laws applicable to it; (e) this Agreement is a legal, valid, and binding obligation of Customer enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization, and other laws affecting creditor's rights generally, and with regard to equitable remedies, subject to the discretion of the court before which proceedings to obtain the same may be pending; (f) there are no bankruptcy, insolvency, reorganization, receivership, or other similar proceedings pending or being contemplated by it, or to its knowledge threatened against it; (g) there are no suits, proceedings, judgments, rulings, or orders by or before any court or any government authority that could materially adversely affect its ability to perform the Agreement; and (h) as of the Effective Date and throughout the Term, there is no other contract for the purchase of electricity by Customer for the ESI ID(s), or, if such a contract presently exists, that it will terminate prior to delivery under this Agreement. Customer further represents and warrants that it has complied with the requirements of Section 2162, *Texas Government Code* and all applicable contracts (including, but not limited to, Contract 050110-CCG-EM) awarded by the Council on Competitive Government regarding the bidding or awarding of this Agreement.

**A.2 Gexa's Representations and Warranties.** As a material inducement to entering into this Agreement, Gexa represents and warrants to Customer as follows: (a) it is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in those jurisdictions necessary to perform the Agreement; (b) the execution and delivery of the Agreement are within its powers, have been duly authorized by all necessary action, and do not violate the terms or conditions of its governing documents or contracts it is party to or any laws applicable to it; (c) performance of the Agreement will be duly authorized by all necessary action and will not violate the terms or conditions of its governing documents or contracts it is party to; (d) as of the date sales of electricity by Gexa to Customer under the Agreement start, Gexa will have all regulatory authorizations necessary for it to legally perform its operations and such performance will not violate the terms or conditions of its governing documents, contracts it is party to, or laws applicable to it; and (e) the Agreement constitutes a legal, valid, and binding obligation of Gexa enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization, and other laws affecting creditor's rights generally, and with regard to equitable remedies, subject to the discretion of the court before which proceedings to obtain the same may be pending.

**A.3 Forward Contract.** (i) This Agreement constitutes a forward contract within the meaning of the United States Bankruptcy Code ("Code"); (ii) Gexa is a forward contract merchant; and (iii) either Party is entitled to the rights under, and protections afforded by, the Code.

### B. DISCLAIMERS OF WARRANTIES; LIMITATION OF LIABILITIES

**B.1 LIMITATIONS OF LIABILITY.** LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR AS OTHERWISE PROVIDED, ARE LIMITED TO DIRECT ACTUAL DAMAGES. GEXA IS NOT LIABLE TO CUSTOMER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES OR LOSS OF REVENUES OR PROFIT. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE. EXCEPT FOR (a) THE GEXA EARLY TERMINATION DAMAGES DUE IF GEXA DEFAULTS, (b) THE CUSTOMER EARLY TERMINATION DAMAGES DUE IF CUSTOMER DEFAULTS, AND (c) THE WHOLESALE TRANSACTION TERMINATION PAYMENT, THE LIABILITY OF EITHER PARTY TO THE OTHER FOR ANY OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE AGGREGATE AMOUNT OF ALL DOLLARS PAID BY CUSTOMER TO GEXA (IF CUSTOMER) OR RECEIVED BY GEXA (IF GEXA) PURSUANT TO THIS AGREEMENT. THERE ARE NO THIRD PARTY BENEFICIARIES TO THIS AGREEMENT.

**B.2 Duty to Mitigate.** Each Party shall mitigate damages and use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance.

**B.3 WAIVER OF CUSTOMER PROTECTION RULES AND CONSUMER RIGHTS.** THE PARTIES FURTHER ACKNOWLEDGE THAT THE CUSTOMER PROTECTION RULES ADOPTED BY THE PUBLIC UTILITY COMMISSION (AS CONTAINED IN ITS SUBSTANTIVE RULES 25.471 ET SEQ.) ("CUSTOMER PROTECTION RULES") DO NOT APPLY TO THIS AGREEMENT EXCEPT FOR THE FOLLOWING RULES: 25.481, 25.485 (b),(d), AND (e), AND 25.495. EXCEPT AS SET FORTH IN THIS SECTION, CUSTOMER EXPRESSLY WAIVES THE CUSTOMER PROTECTION RULES TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW. ~~CUSTOMER FURTHER WAIVES ITS RIGHTS UNDER THE DECEPTIVE TRADE PRACTICES CONSUMER PROTECTION ACT, SECTION 17.41, ET. SEQ., BUSINESS & COMMERCE CODE, A LAW THAT GIVES CONSUMERS SPECIAL RIGHTS AND PROTECTIONS. CUSTOMER REPRESENTS AND WARRANTS TO GEXA THAT: (a) CUSTOMER IS NOT IN A SIGNIFICANTLY DISPARATE BARGAINING POSITION IN RELATION TO GEXA; (b) CUSTOMER IS REPRESENTED BY LEGAL COUNSEL THAT~~

~~WAS NEITHER DIRECTLY NOR INDIRECTLY IDENTIFIED, SUGGESTED OR SELECTED BY GEXA; AND (c) CUSTOMER VOLUNTARILY CONSENTS TO THIS WAIVER AFTER CONSULTATION WITH ITS LEGAL COUNSEL.~~

**B.4 UCC/Disclaimer of Warranties.** The electricity delivered is a "good" as that term is understood in the Texas B&CC (UCC §2.105). The Parties waive the UCC to the fullest extent allowed by law and the UCC requirements do not apply to this Agreement, unless otherwise provided. If there is a conflict between the UCC and this Agreement, this Agreement controls. Neither Party controls nor physically takes possession of the electric energy prior to delivery to Customer's ESI ID(s). Therefore, neither Party is responsible to the other for any damages associated with failure to deliver the electric energy, nor for damages it may cause prior to delivery to Customer's ESI ID(s). Once the electric energy is delivered to Customer's ESI ID(s) it is deemed in possession and control of Customer. ELECTRICITY SOLD UNDER THIS AGREEMENT WILL MEET THE QUALITY STANDARDS OF THE APPLICABLE LOCAL DISTRIBUTION UTILITY AND WILL BE SUPPLIED FROM A VARIETY OF SOURCES. GEXA MAKES NO REPRESENTATIONS OR WARRANTIES OTHER THAN THOSE EXPRESSLY SET FORTH IN THIS AGREEMENT, AND GEXA EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. GEXA EXPRESSLY NEGATES ALL OTHER REPRESENTATIONS OR WARRANTIES, WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING ANY REPRESENTATION OF WARRANTY WITH RESPECT TO CONFORMITY, TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.

**B.5 Force Majeure.** Gexa shall make commercially reasonable efforts to provide electric service, but does not guarantee a continuous supply of electricity. Gexa does not generate electricity nor does it transmit or distribute electricity. Causes and events out of the control of Gexa and Customer ("**Force Majeure Event(s)**") may result in interruptions in service or the ability to accept electricity. If either Party is unable to perform its obligations, in whole or in part, due to a Force Majeure Event, then the obligations of the affected Party (other than the obligation to pay any amounts owed to Gexa that relate to periods prior to the Force Majeure Event) are suspended to the extent made necessary by such Force Majeure Event. Therefore, neither Party is liable to the other Party for damages caused by Force Majeure Events, including acts of God, acts of, or the failure to act by, any governmental authority (including the PUCT or ERCOT and specifically including failure by ERCOT to make Customer meter read data available), accidents, strikes, labor troubles, required maintenance work, events of "force majeure" or "uncontrollable force" or a similar term as defined under the applicable transmission provider's tariff, inability to access the local distribution utility system, non-performance by the supplier or the local distribution utility, changes in laws, rules, or regulations of any governmental authority (including the PUCT or ERCOT) that would prevent the physical delivery of energy to Customer's facilities, or any cause beyond such Party's control. The Parties agree that Appropriations Failures and Scheduling Failures are not Force Majeure Events.

## C. CONFIDENTIALITY AGREEMENT

**C.1 Confidentiality.** Customer is a governmental body subject to public information laws, including Chapter 552 of the Texas Government Code ~~and this Agreement, and any records obtained or maintained by Customer in connection therewith, may be subject to public disclosure. [These laws may require disclosure of information, and upon the written request of a Party (that party, the "Disclosing Party"), the other Party (that party, the "Receiving Party") shall keep confidential and not disclose any Confidential Information which is disclosed to the Receiving Party by the Disclosing Party except for disclosures to Authorized Parties or as required by law.[RGM]]~~ "**Confidential Information**" means the terms of this Agreement and any other information in written or other tangible form which is marked as "Confidential" when it is disclosed to the Receiving Party, except that Confidential Information shall not include information which (i) is available to the public, (ii) becomes available to the public other than as a result of a breach by the Receiving Party of its obligations hereunder, (iii) was known to the Receiving Party prior to its disclosure by the Disclosing Party, or (iv) becomes known to the Receiving Party thereafter other than by disclosure by the Disclosing Party. The provisions of this Section apply regardless of fault and survive termination, cancellation, suspension, completion or expiration of this Agreement for a period of two (2) years. Customer authorizes Gexa to provide TCAP with all information requested by TCAP about Customer's account and billings. "**Authorized Parties**" means those officers, directors, employees, agents, representatives and professional consultants of the Parties, and of the Parties' affiliates, that have a need to know the Confidential Information for the purpose of evaluating and performing this Agreement.

## D. DEFAULT AND REMEDIES

**D.1 Events of Default.** An event of default ("**Event of Default**") means: (a) the failure of Customer to make, when due, any payment required under this Agreement for any undisputed amount if that payment is not made within fifteen (15) business days after receipt of written notice (facsimile or electronic mail are valid forms of notice for this paragraph) from Gexa; or (b) any representation or warranty made by a Party proves to be false or misleading in any material respect; (c) except as provided in clause (a) above or otherwise in this section D.1, the failure of any Party to perform its obligations under this Agreement and that failure is not excused by Force Majeure and remains uncured following 20 business days written notice of the failure; (d) the defaulting Party (i) makes an assignment or any general arrangement for the benefit of creditors; or (ii) files a petition or otherwise commences, authorizes or acquiesces to a bankruptcy proceeding or similar proceeding for the protection of creditors, or has such a petition filed against it and that petition is not withdrawn or dismissed within 20 business days after filing; or (iii) otherwise becomes insolvent; or (iv) is unable to pay its debts when due; or (v) fails to establish, maintain or extend Credit in form and in an amount acceptable to Gexa when required; or (e) the Wholesale Transaction is terminated due to a default by Gexa under CESAs with other TCAP members or due to a default by PMI under the Wholesale Transaction. If an Event of Default listed in subsection (d) occurs, it is deemed to have automatically occurred prior to such event.

**D.2 Remedies upon an Event of Default.** If an Event of Default occurs and is continuing, upon written notice to the defaulting Party, the non-defaulting Party may (a) commence an action to require the defaulting Party to remedy such default and specifically perform its duties and obligations in accordance with the Agreement; (b) exercise any other rights and remedies it has at equity or at law, subject to the Agreement's Limitations of Liabilities; and/or (c) suspend performance; provided, however, that suspension shall not continue for

longer than ten (10) Business Days unless the non-defaulting Party has declared an early termination with proper notice. If Customer is responsible for an Event of Default and fails to cure within ten (10) days of written notice (such additional cure period does not apply to default for non-payment), in addition to its other remedies, Gexa may (i) terminate this Agreement; and (ii) charge Customer the Customer Early Termination Penalty pursuant to Section 5 of this Agreement. Notwithstanding the above, Gexa shall not disconnect or order disconnection of service to Customer unless the following events have all occurred: (1) Customer has an Event of Default for nonpayment under Section D.1(a) above, (2) Gexa gives Customer a ten (10) day written disconnection notice; and (3) Customer does not pay all undisputed outstanding payments owed by the end of the ten (10) day notice period. .

#### **E. MISCELLANEOUS PROVISIONS**

**E.1 Disclaimer.** This Agreement does not constitute, create, or otherwise recognize the existence of a joint venture, association, partnership, or other formal business entity of any kind among the Parties and the rights and obligations of the Parties are limited to those set forth in this Agreement.

**E.2 Headings.** The descriptive headings of the Articles and Sections of this Agreement are inserted for convenience only and are not intended to affect the meaning, interpretation or construction of this Agreement.

**E.3 Waiver.** Except as otherwise provided, failure of a Party to comply with an obligation, covenant, agreement, or condition may be waived by the other Party only in a writing signed by the Party granting the waiver, but that waiver does not constitute a waiver of, or estoppel with respect to a subsequent failure of the first Party to comply with that obligation, covenant, agreement, or condition.

**E.4 Assignment.** Except as provided in the Letter Agreement, Customer shall not assign this Agreement, in whole or in part, or any of its rights or obligations pursuant to the Agreement without Gexa's prior written consent, which shall not be unreasonably withheld. Gexa may withhold consent if a proposed assignee fails to be at least as creditworthy as Customer as of the Effective Date. Gexa may: (a) transfer, sell, pledge, encumber or assign the revenues or proceeds of this Agreement in connection with any financing or other financial arrangement; (b) transfer or assign this Agreement to a Gexa affiliate with operating capability and financial condition substantially similar to Gexa; (c) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets of Gexa with an operating capability and financial condition substantially similar to Gexa as of the execution date of this Agreement; and/or (d) transfer or assign this Agreement to a certified REP with an operating capability and financial condition substantially similar to Gexa as of the execution date of this Agreement. In the case of (b), (c), or (d), any such assignee shall agree in writing to be bound by these Terms and Conditions of Service, and upon assignment, Gexa shall have no further obligations under this Agreement. Gexa shall not assign the Agreement to a non-affiliated entity (including its guarantor) that has a credit rating lower than BBB- without the prior written consent of TCAP, which shall not be unreasonably withheld.

**E.5 No Third-Party Beneficiaries.** This Agreement does not confer any rights or remedies on any person or party other than the Parties, their successors and permitted assigns; except that the Parties recognize that TCAP is entitled to receive the Aggregator Fee .

**E.6 Severability.** If a provision of this Agreement is held to be unenforceable or invalid by a court or regulatory authority of competent jurisdiction, the validity and enforceability of the remaining provisions are unaffected by that holding, and the Parties shall, to the extent possible, negotiate an equitable adjustment to the provisions of this Agreement in order to preserve the original intent and purpose of this Agreement.

**E.7 Entire Agreement; Amendments.** This Agreement constitutes the entire understanding between the Parties, and supersedes any and all previous understandings, oral or written, with respect to the subjects it covers. This Agreement may be amended only upon the mutually signed, written agreement of the Parties.

**E.8 Further Assurances.** The Parties shall promptly execute and deliver, at the expense of the Party requesting such action, any and all other and further instruments and documents which are reasonably requested in order to effectuate the transactions contemplated in this Agreement.

**E.9 Emergency, Outage and Wire Service.** In the event of an emergency, outage or service need, Customer shall call the TDSP for the service area of the ESI ID experiencing the emergency, outage or service need.

**E.10 Customer Care.** Customer may contact Gexa Customer Care if Customer has specific comments, questions, disputes, or complaints toll free at 1-866-961-9399, Monday to Friday 7:00 a.m. – 8:00 p.m. CST and Saturday from 8:00 a.m. – 2:00 p.m.. Gexa shall assist and cooperate with Customer regarding communications with a TDSP relating to service to any ESI ID served by Gexa under this Agreement.

#### **E.11 Governing Law.**

a. This Agreement is governed by and construed and enforced in accordance with the laws of the State of Texas applicable to contracts made and performed in the State of Texas, without regard to the State of Texas conflict of laws provisions.

b. All disputes between the Parties under this Agreement which are not otherwise settled will be decided by a court of competent jurisdiction in ~~Harris-Ellis~~ County, Texas, and the Parties submit to the jurisdiction of the courts of the State of Texas ~~and the Federal District Courts in Houston, HarrisEllis~~ County, Texas. All disputes are governed under the laws of the State of Texas.

c. Subject to the provisions of E.11.a. above, this Agreement is subject to, and in the performance of their respective obligations under this Agreement the Parties shall comply with, all applicable federal, state and local laws, regulations and requirements (including the rules, regulations and requirements of quasigovernmental and regulatory authorities with jurisdiction over the Parties, including ERCOT) (collectively, "*Applicable Law*").

**E.12 No Presumption Against Drafting.** Both Parties contributed to the drafting of this Agreement. The rule of construction that any ambiguity is construed against the party who drafted this Agreement does not apply to this Agreement. [RGM2]

**E.13 Counterparts; Facsimile Copies.** This Agreement may be executed in counterparts, all of which constitute one and the same Agreement and each is deemed an original. A facsimile copy of either Party's signature is considered an original for all purposes, and each Party shall provide its original signature upon request.

**E.15 Offer for Electric Service; Refusal of Service.** This Agreement, including these Terms and Conditions of Service, constitute

an offer for electric service, and is expressly conditioned on acceptance of this Agreement by Gexa. Gexa may refuse to provide electric service to Customer subject to the requirements of Applicable Law.

**Original / Presented Version**

# COMMERCIAL ELECTRICITY SERVICE AGREEMENT

(Fixed Price Around the Clock)

This Commercial Electricity Service Agreement, including all of the Attachments, Schedules, and Exhibits, which are attached and incorporated (collectively, the "**Agreement**"), is entered into between Gexa Energy, LP ("**Gexa**"), a Texas limited partnership, and \_\_\_\_\_ ("**Customer**"). Gexa and Customer may be referred to individually as a "**Party**" or collectively as the "**Parties**".

## SECTION 1: RETAIL ELECTRIC SALES AND SERVICES

**1.1 Appointment and Scope.** Customer appoints Gexa as its Retail Electric Provider ("**REP**") for the ESI ID(s) served under this Agreement. Customer authorizes Gexa to: (i) act as Customer's REP for all purposes; and (ii) provide the services required of a REP including, without limitation, the procurement, scheduling and delivery of electricity throughout the Term to each of the ESI ID(s). Customer's appointment imposes no other duties on Gexa other than those specified in this Agreement and the REP Services Agreement.

**1.2 Agreement to Purchase.** Customer shall purchase its electricity requirements from Gexa throughout the Term for each of the ESI ID(s) except as otherwise provided. The electricity and services Customer receives from Gexa is for Customer's exclusive proprietary use. Customer alone shall pay for electricity and services provided and for electricity and services Customer fails to take pursuant to its contractual obligations. If Gexa fails to deliver sufficient quantities of electricity to the TDSP for delivery to Customer or fails to schedule the delivery of sufficient quantities of electricity (collectively, a "**Scheduling Failure**") the TDSP is obligated by law and by its tariff to deliver sufficient electricity to satisfy Customer's needs. If a Scheduling Failure occurs, Gexa shall financially settle, at no additional cost or expense to Customer, with its Qualified Scheduling Entity (as defined by ERCOT) for the purchase of electricity necessary to cover the Scheduling Failure.

### 1.3 Term.

**(a) Effective Date.** Gexa shall provide retail electric service under this Agreement to each ESI ID beginning on the Effective Date, which will occur either on or after the Expected Start Date stated in Attachment B for any new customer or if Customer is an existing customer then the Expected Start Date is the meter read date following the expiration of the Customer's prior Agreement with Gexa, until December 31, 2022 (that period, the "**Term**"). The end of the Term for each respective ESI ID is the meter read date occurring in December 2022. As a result of variations in the timing of the Effective Date described in this Section 1.3 the Term may include a partial calendar month in addition to the number of months set forth in Attachment B, if any.

**(b) Delayed Effective Date.** Gexa shall use commercially reasonable efforts to cause the Effective Date for each ESI ID to occur on the Expected Start Date. If the Effective Date for an ESI ID occurs more than 20 days after the Expected Start Date, Customer may provide Gexa with evidence of the amount of electricity purchased by Customer from its current REP in connection with that ESI ID during the period on and after the 21st day after the Expected Start Date until the Effective Date (the "**Delayed Effective Date Period**"), and the total amount paid by Customer to its current REP for the electricity it purchased during the Delayed Effective Date Period (the "**Delayed Effective Date Electricity Amount**"). Upon receipt of evidence from Customer Gexa shall calculate and provide Customer a credit against future purchases under this Agreement equal to the positive amount resulting from the following calculation: (a) the Delayed Effective Date Electricity Amount minus (b) the amount that Customer would have paid to Gexa pursuant to this Agreement during the Delayed Effective Date Period for the same amount of electricity purchased by Customer from its current REP during that period in connection with the affected ESI ID(s); provided, that any credit is subject to the aggregate limit for all TCAP customers stated in Exhibit A to the First Amendment of the REP Services Agreement between Gexa and TCAP, and that Gexa shall not be required to provide a credit with respect to any period during a Delayed Effective Date Period where the delay was caused by an event outside of Gexa's control.

**(c) Service After Term.** If service continues beyond the Term, it will be on a month-to-month basis, and the Agreement will continue in effect for the ESI ID(s) except that the Energy Price will be the greater of: (i) the Energy Price as set forth in Section 2.1 below, or (ii) the aggregate weighted average of the Market Rate (as defined herein) as determined for all of the ESI ID(s), for as long as service continues. If Customer has not switched from Gexa to another supplier at the expiration of the Term, Gexa shall serve Customer at the rate set forth in this Section for a minimum of 60 days. After those 60 days, Gexa may continue to serve Customer or terminate the Agreement and disconnect Customer.

**1.4 Modifications to ESI IDs.** Gexa shall work with Customer in good faith during the Term to reasonably accommodate and assist Customer with the management of its electricity needs. If at any time during the Term, Customer wants to i) add or delete one or more ESI IDs, ii) otherwise modify the ESI ID information as a result of a decision by Customer to open, close or sell a facility owned or leased by Customer, iii) expand an existing facility, or iv) increase an existing facility's metered load, then Customer shall provide written notice to Gexa of such change. If, in

Gexa's reasonable judgment, i) the addition is a separately metered load having (a) a peak demand expected to be less than 0.25 MW at all times during the first twelve months following commercial operation or (b) an annual average expected to be less than 0.125 MW during the first twelve months following commercial operation; or ii) does not result in a net increase of (a) 0.25 MW in peak demand or (b) 0.125 MW in average usage for an existing facility, Gexa shall use commercially reasonable efforts to promptly implement such changes, including providing required notices to ERCOT. If the addition is a separately metered load having (a) a peak demand expected to be in excess of 0.25 MW at any time during the first twelve months following commercial operation, (b) an annual average expected to be in excess of 0.125 MW during the first twelve months following commercial operation, or (c) results in a net increase of 0.25 MW in peak usage or 0.125 MW of average annual usage after consideration of any contemporaneous offsetting load decreases, as per the Letter Agreement (defined below), Gexa shall provide service to that account in accordance with the terms and conditions for Special Loads as stated in the April 27, 2011 Letter Agreement, as amended [REDACTED], 2016 (and via a Special Load Addendum thereto), among NEPM II, LLC, as assignee of NextEra Energy Power Marketing, LLC, ("PMI"), and Texas Coalition for Affordable Power ("TCAP") and Gexa (the "Letter Agreement"), and the April 27, 2011 Master Power Purchase and Sale Agreement Confirmation between PMI and Gexa, as amended [REDACTED], 2016 (the "Confirmation"). Gexa shall make periodic reports regarding changes to the billing status of any ESI ID(s) available to Customer and TCAP. Amendments that add or remove ESI ID(s) as a result of changes made pursuant to this section are incorporated into this Agreement, and are effective on the Effective Date for each ESI ID(s) added to this Agreement or the date that retail electric service for any removed ESI ID(s) ceases or is transferred to another REP.

## SECTION 2: RETAIL ELECTRIC ENERGY SERVICE CHARGES

### 2.1 Energy Price.

(a) The Energy Price for the period commencing January 1, 2018 and ending December 31, 2022 is equal to \$ [REDACTED] /MWh. For the purposes of Section 3 the Energy Price shall be converted to dollars per kWh.

(b) The Energy Price shall include a charge intended to reflect (i) the anticipated Ancillary Services charges and (ii) the anticipated difference between the Load Zone price for the applicable load zone(s) in which the load is located and the appropriate trading hub price for those zone(s) (that charge the "Ancillary Services and Nodal Basis Rate"). Gexa shall charge or credit Customer, as appropriate, for the difference between the Ancillary and Nodal Basis Rate and the actual costs for each item incurred to serve TCAP customers (that charge or credit the "Ancillary Services and Nodal Basis Adjustment"). Ancillary Services and Nodal Basis Adjustments are calculated and charged or credited on a quarterly basis. Gexa shall collect or credit them in the manner specified in the Letter Agreement.

(c) If, during the Term, the aggregate TCAP load within an ERCOT defined load zone is greater than the Excess Load Amount under Schedule I of the Letter Agreement or less than the Shortfall Load Amount under Schedule I of the Letter Agreement, the Customer may be subject to its pro-rata share of the TCAP Aggregate Load Threshold Adjustment. Load Threshold Adjustments are calculated on a monthly basis and charged or credited on a quarterly basis and Gexa shall collect or credit them in the manner specified in the Letter Agreement.

(d) If, during the Term, the Loss Factor as provided in the Letter Agreement, which represents the multiplier required to account for the difference between Customer's load at its meter and the load required at the wholesale level to serve Customer (primarily transmission and distribution line losses), differs from the actual loss factor, then Gexa shall charge or credit Customer, as appropriate, for the difference between the Loss Factor and the actual loss factor (that charge or credit the "Loss Factor Adjustment"). Loss Factor Adjustments are calculated and charged or credited on an annual basis. Gexa shall compute and collect or credit them in the manner specified in the Letter Agreement.

**2.2 Additional Pass-Through Charges.** Gexa shall pass through and identify separately on Customer's bill with no mark-up Delivery Charges, Non-Recurring Charges, or Taxes that are not included in the Energy Price(s). All charges are exclusive of Taxes.

**2.3 Tax Exempt Status.** Customer shall provide Gexa with all required exemption certificates if Customer is exempt from paying any Taxes. Gexa shall not recognize an exemption without the exemption certificates and shall not be required to refund or credit previously paid Taxes unless the taxing entity sends the refund to Gexa. Gexa shall, however, assign to Customer any applicable claims for refund.

## SECTION 3: BILLING AND PAYMENT

**3.1 Billing and Payment.** Gexa shall invoice Customer's accounts on a monthly basis and shall bill Customer on a consolidated basis for all ESI IDs upon Customer's request. Gexa shall provide a summary bill for all accounts and detailed information for each account. Customer shall remit payment within 30 days of receiving the invoice. Gexa shall base the invoice amount on actual data provided by ERCOT and the TDSP. If ERCOT or the TDSP does not provide actual data in a timely manner, Gexa shall use estimated data to calculate the invoice and, upon receipt of actual data, reconcile the charges and adjust them as needed in subsequent invoices.

**3.2 Late Penalties, Interest on Overdue Payments, Invoice Disputes.** If Customer fails to remit all undisputed amounts on or before the due date, interest will accrue on any due and unpaid amounts from the due date at a rate of one percent per month, or the highest rate permitted by law, whichever is less. If Customer disputes a portion of an invoice it shall provide Gexa a written explanation specifying the amount in dispute and the reason for the dispute within 20 days of the invoice date. If Customer does not provide timely notice, Customer shall owe all amounts by the due

date. Notwithstanding the above, if Customer notifies Gexa of a disputed invoice, regardless of whether Customer has already paid the invoice, Gexa shall make records in its possession that are reasonably necessary for Customer to determine the accuracy of the invoice available to Customer during normal business hours; provided, however that neither party may request an adjustment or correction of an invoice unless written notice of such dispute is given within twelve months after the due date of such invoice; provided further, that such twelve month limit does not apply in the case of TDSP meter tampering charges first billed to Gexa that prevent Gexa from reasonably adjusting invoices prior to the twelve month period. In all cases, Gexa and Customer shall use good faith efforts to resolve disputes. In the event the Parties are unable to resolve a dispute within ten days of the notice date, either Party may begin legal proceedings to seek resolution. Any amounts determined owed shall be paid within three days after a decision.

**3.3 Aggregator Fees.** Pursuant to the REP Services Agreement between Gexa and TCAP, Gexa is obligated to pay TCAP an amount determined by multiplying a TCAP Aggregation Fee by the volume consumed in association with the ESI IDs (the "**Aggregator Fee**"). Customer shall pay the Aggregator Fee. The initial Aggregator Fee is \$ [REDACTED] per kWh, however, it may be changed by the TCAP Board of Directors at any time. Gexa shall state the Aggregator Fee as a separate line item on the Customer's bill.

**3.4 Billing Guarantee.** Gexa shall issue an invoice based on actual or estimated usage to Customer for every ESI ID at least one time per month. If, for reasons other than Force Majeure, Gexa fails to invoice an ESI ID within 120 days of any scheduled meter read, Gexa irrevocably waives its right to invoice Customer for any energy consumed at that ESI ID for the meter read cycle that should have been invoiced, unless not less than 10 days prior to the expiration of such 120 day period, Gexa provides Customer with a written explanation of the circumstances that prevent Gexa from issuing that invoice and the expected time by which an invoice can be issued. In such event, Customer and Gexa shall determine a reasonable extension period, not to exceed 30 days, within which an invoice will be issued. Gexa shall adjust or true-up each invoice no more than twice and Gexa shall issue such adjustments within 210 days of the initial issue date. Notwithstanding the foregoing, Gexa may issue an invoice or partial invoice arising from meter tampering charges without limitation and within a reasonable time after first billed to Gexa by the TDSP.

#### **SECTION 4: CUSTOMER INFORMATION, CREDIT AND DEPOSITS**

**4.1 Customer Information.** By entering into this Agreement and appointing Gexa as Customer's agent for electricity service, Customer authorizes Gexa to obtain certain information that Gexa may need to provide Customer's electric service, including Customer's address, telephone number, account numbers, historical usage information, and historical payment information from Customer's TDSP, and Customer further authorizes its TDSP to release that information to Gexa.

**4.2 Deposits and Other Security.** A Party (the "**Requesting Party**") may require the other Party (the "**Providing Party**") to provide a deposit (or additional deposit if an initial deposit was also required), letter of credit, or other form of credit assurance reasonably acceptable to the Requesting Party (collectively, "**Performance Assurance**") during the Term of this Agreement if: (i) the Requesting Party determines in its reasonable discretion that there has been a material adverse change in the Providing Party's or its guarantor's (if applicable) credit status or financial condition (which, if applicable, will mean that its credit or bond rating has dropped lower than BBB- by Standard & Poor's Rating Group or Baa3 by Moody's Investor Services or ceases to be rated by either of these agencies); or (ii) Customer has been delinquent in paying the electric bill more than twice during the past twelve months. Any Performance Assurance, less any outstanding balance owed by Providing Party to the Requesting Party, will be returned to the Providing Party once the Providing Party's or its guarantor's (if applicable) credit or financial condition becomes satisfactory or, if applicable, to a credit or bond rating of BBB- or Baa3 or higher, whichever occurs earlier; or, if the Performance Assurance relates to delinquent payments, the Providing Party has paid all outstanding balances and has made all payments within the dates set forth in this Agreement for a period of six consecutive months.

#### **SECTION 5: EARLY TERMINATION; DAMAGES**

**5.1 Cancellation by Customer for Insufficient Appropriations.** If, during Customer's annual appropriations determination, the applicable governmental authorities do not allocate sufficient funds to allow Customer to continue to perform its obligations under this Agreement (an "**Appropriations Failure**"), then Customer or Gexa shall have the right to terminate this Agreement in full or as to any affected ESI ID upon 30 days advance written notice effective at the end of the period for which appropriations are made; provided, that if appropriations are subsequently allocated for electricity for the ESI IDs covered by this Agreement, then the termination may be revoked at Gexa's option and those appropriations shall continue to apply to this Agreement and shall not be used for an electricity supply agreement with another REP. Upon a termination of this Agreement for Appropriations Failure, in full or as to any ESI ID(s), Customer shall pay all amounts due Gexa under this Agreement, including the Customer Early Termination Damages.

**5.2 Customer Early Termination Damages.** Except in connection with the closure of a facility associated with an ESI ID pursuant to Section 1.4, in connection with a Force Majeure Event, or as otherwise provided or excused in this Agreement if Customer cancels this Agreement before the end of the Term and refuses to accept electric supply delivery from Gexa for any ESI ID(s), Gexa may charge Customer early termination damages equal to the amount determined as follows: the result of (a) the Expected Usage for each ESI ID subject to Customer's cancellation or refusal of electric supply delivery ("**Customer Terminated Usage**") times the REP Services Fee specified in the REP

Services Agreement; plus (or minus, as applicable) (b) the Wholesale Transaction Termination Payment, as defined below (the result of the entire preceding calculation the "**Customer Early Termination Damages**"). If the Customer Early Termination Damages are charged due to an Event of Default by Customer, then the Customer Early Termination Damages will also include Gexa's reasonable costs relating to the determination and collection of Customer Early Termination Damages, including attorney and consultant fees incurred. The provisions in Section 3 related to Billing and Payment apply to the billing, due date, and collection of Customer Early Termination Damages. Customer agrees that Customer Early Termination Damages are a reasonable estimate of the damages due Gexa for failure to accept electric supply, and are not punitive in nature.

**5.3 Termination for Wholesale Supply Failure.** If, during the Term, the Wholesale Transaction is terminated as a result of a default by PMI ("**Wholesale Supply Failure**"), then this Agreement will also terminate effective on the date the Wholesale Agreement terminates. In the event of a termination for Wholesale Supply Failure, Gexa shall pay Customer a Wholesale Transaction Termination Payment if required by Section 5.5.

**5.4 Gexa Early Termination Damages.** Except for a Wholesale Supply Failure, a Force Majeure Event, or as otherwise provided or excused in this Agreement if Gexa cancels this Agreement and refuses to provide electric supply delivery to Customer for any or all ESI ID(s), Customer shall have the right to charge Gexa an early termination penalty equal to the amount determined as follows: the result of the Expected Usage for each ESI ID subject to Gexa's cancellation or refusal of electric supply delivery ("**Gexa Terminated Usage**") times the REP Services Fee specified in the REP Services Agreement (that result the "**Gexa Early Termination Damages**"). If the Gexa Early Termination Damages are charged due to an Event of Default by Gexa, then the Gexa Early Termination Damages will also include Customer's reasonable costs relating to the determination and collection of Gexa Early Termination Damages, including attorney and consultant fees incurred. Gexa agrees the Gexa Early Termination Damages are a reasonable estimate of the damages due Customer for failure to deliver electric supply, and are not punitive in nature.

**5.5 Wholesale Transaction Termination Payment.** If the Wholesale Transaction is terminated then Gexa shall calculate the portion of the Termination Payment (as defined in the EEI Master Agreement) paid under the Wholesale Transaction attributable to Customer's load (the "**Wholesale Transaction Termination Payment**"). Customer or Gexa shall pay the Wholesale Transaction Termination Payment to the other, as appropriate, in the manner described below and without regard to who is a defaulting party. If Gexa owes PMI a Termination Payment under the Wholesale Transaction, Customer shall pay Gexa the portion of the Termination Payment attributable to Customer's load. If PMI owes Gexa a Termination Payment under the Wholesale Transaction, Gexa shall pay Customer the portion of such Termination Payment attributable to Customer's load. To the extent a Termination Payment due from Gexa to PMI is adjusted in Gexa's account to reflect the full benefit of TCAP transacting with a replacement REP, Gexa shall make corresponding adjustments to the Wholesale Transaction Termination Payment on a pro-rata basis. Gexa shall remit a Wholesale Transaction Termination Payment due Customer, within 30 days of Gexa receiving the payment from PMI. Customer shall remit a Wholesale Transaction Termination Payment due Gexa within 30 days of Gexa's invoice. Gexa shall use commercially reasonable efforts to collect Termination Payments from PMI that include amounts due Customer.

**SECTION 6: NOTICES AND PAYMENT**

**6.1 General Notice.** Except as otherwise required by Applicable Law, all notices are deemed duly delivered if hand delivered or sent by United States, prepaid first class mail, facsimile, or by overnight delivery service. Notice by facsimile or hand delivery is effective on the day actually received, notice by overnight United States mail or courier is effective on the next business day after it is sent, and notice by U.S. Mail is effective on the second day after it is sent. The Parties shall send notices to the addresses below or any other address one Party provides to the other in writing:

a. If to Customer:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

b. If to Gexa:  
Gexa Energy, LP  
20455 State Highway 249, Suite 200  
Houston, Texas 77070

**6.2 Payments.** The Parties shall send payments to the addresses below or any other address one Party provides to the other in writing:

a. If to Customer:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 
- b. If to Gexa:  
Gexa Energy, LP  
20455 State Highway 249, Suite 200  
Houston, Texas 77070

## SECTION 7: DEFINITIONS

**7.1 Definitions.** In addition to terms defined elsewhere in this Agreement, when used with initial capitalization, whether singular or plural, capitalized terms have the meanings set forth in this Section 7.1. All other capitalized terms not otherwise defined shall have the meanings given them in the following documents, with any conflicting definitions contained in those documents applied in the following order: PURA, the PUCT Substantive Rules, and the ERCOT Protocols.

1. **"Actual Usage"** means the actual amount of electric energy (in kWh) used at the ESI ID(s) as determined by the TDSP.
2. **"Delivery Charges"** means those charges or credits from the TDSP pursuant to its tariff, including, but not limited to: Transmission and Distribution Charges, System Benefit Fund Charge, Nuclear Decommissioning Charge, Competitive Transition Charge, Standard Customer Metering Charge, Customer Charge, Merger Savings and Rate Reduction Credit, Excess Mitigation Credit and Utility Imposed Reactive Power Charges.
3. **"Effective Date"** means the date of the first meter reading of an ESI ID provided to Gexa by the TDSP after the TDSP and ERCOT shall have timely performed any required enrollment and cancellation procedures necessary to switch Customer's REP to such ESI ID to Gexa.
4. **"Electricity Related Charges"** means, unless noted otherwise: Ancillary Services Charge, Congestion, ERCOT Administrative Fee, Delivery Loss Charge, Transmission Loss Charge, Renewable Energy Credit Charge, Residential Energy Credit Charge, Unaccounted For Energy Charge, Qualified Scheduling Entity Charge, Imbalance Settlement Charge.
5. **"Energy Price(s)"** means the rates per unit of measure specified in Section 2.1 and includes all Electricity Related Charges.
6. **"ERCOT"** means the Electric Reliability Council of Texas.
7. **"ERCOT Protocols"** means the document adopted, published, and amended from time to time by ERCOT, and initially approved by the PUCT, to govern electric transactions in the ERCOT Region, including any attachments or exhibits referenced in the document, that contains the scheduling, operating, planning, reliability, and settlement policies, rules, guidelines, procedures, standards, and criteria of ERCOT, or any successor document thereto.
8. **"ESI ID(s)"** means the Electric Service Identifiers for the property service addresses identified on Attachment B to this Agreement or if Customer is an existing Gexa customer then the list of service addresses currently served by Gexa, as such list may be modified from time to time as provided in Section 1.4.
9. **"Expected Usage"** means either the amount stated in Attachment B calculated for the remaining Term, or if no amounts are stated or Customer is an existing Gexa customer then the average actual monthly Customer energy usage from the comparable month from the previous year (or if an average cannot be computed due to limited service by Gexa or other circumstances, an average monthly usage as is reasonably determined by Gexa) times the number of months remaining in the Term.
10. **"kWh"** means kilowatt hour.
11. **"LMP" or "Locational Marginal Price"** means the price calculated for the applicable trading hub pursuant to the ERCOT Protocols.
12. **"Market Rate"** means 140% of the load-weighted average of the hourly LMPs at the corresponding trading hub, as determined for any delivery period.
13. **"Nodal Market"** means the implementation of wholesale market design by ERCOT with locational marginal pricing for resources.
14. **"Nodal Congestion"** means the positive difference in price between the real-time settlement point price as determined by ERCOT for the trading hub and the real-time settlement point price as determined by ERCOT for the load zone associated with the customer Facilities.
15. **"Non-Recurring Charges"** means any charges imposed by the TDSP or other third parties on a non-recurring basis for services, repairs or additional equipment needed for Customer's electric service.

16. **"PUCT"** means Public Utility Commission of Texas.

17. **"Special Loads"** has the meaning given it in the Letter Agreement.

18. **"Taxes"** means all taxes, assessments, levies, duties, charges, fees and withholdings of any kind levied by a duly-constituted taxing authority and all penalties, fines, and additions to tax, and interest thereon that are directly related to the services provided under this Agreement, but does not include the System Benefit Fund fee and fees and charges imposed by ERCOT. By way of example only, Taxes includes: Sales Tax, Miscellaneous Gross Receipts Tax, PUCT Assessment Fees and Franchise Fees.

19. **"TCAP"** means Texas Coalition for Affordable Power, an aggregation pool of governmental and other entities organized and administered by TCAP of which Customer is a member for the ESI IDs.

20. **"TDSP"** or **"Transmission and Distribution Service Provider"** means an entity regulated by the State of Texas, which transmits or distributes electric energy.

21. **"Wholesale Transaction"** means the transaction evidenced by the Confirmation whereby Gexa will purchase and PMI will provide full requirements energy and related services necessary to satisfy electricity consumption of TCAP members as served by retail provider Gexa.

**Attachments:**

Attachment A

Attachment B (for new TCAP Customers only)

Terms and Conditions of Service

Offer Sheet (ESI ID list and Expected Start Date)

<b>CUSTOMER:</b> _____	<b>GEXA:</b> Gexa Energy, LP, By its General Partner Gexa Energy GP, LLC
By:	By:
Printed:	Printed:
Title:	Title:
Date:	Date:

## Terms and Conditions of Service Attachment A

These Terms and Conditions of Service form an integral part of the Commercial Electricity Service Agreement between Customer and Gexa. In addition to the terms defined elsewhere in this Agreement, when used with initial capitalization, whether singular or plural, capitalized terms have the meanings set forth in Section 7.1 of this Agreement. Customer should thoroughly review the entire Agreement, including these Terms and Conditions of Service, before executing this Agreement.

### A. REPRESENTATIONS AND WARRANTIES

**A.1 Customer's Representations and Warranties.** As a material inducement to entering into this Agreement, Customer represents and warrants to Gexa as follows: (a) it is a duly organized entity and is in good standing under the laws of Texas; (b) the execution and delivery of the Agreement are within its powers, have been duly authorized by all necessary action, and do not violate the terms or conditions of contracts it is party to or laws applicable to it; (c) performance of this Agreement will be duly authorized by all necessary action and will not violate the terms or conditions of contracts it is party to; (d) as of the date sales of electricity by Gexa to Customer under the Agreement start, Customer will have all regulatory authorizations necessary for it to legally perform its operations and such performance will not violate the terms or conditions of contracts it is party to or laws applicable to it; (e) this Agreement is a legal, valid, and binding obligation of Customer enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization, and other laws affecting creditor's rights generally, and with regard to equitable remedies, subject to the discretion of the court before which proceedings to obtain the same may be pending; (f) there are no bankruptcy, insolvency, reorganization, receivership, or other similar proceedings pending or being contemplated by it, or to its knowledge threatened against it; (g) there are no suits, proceedings, judgments, rulings, or orders by or before any court or any government authority that could materially adversely affect its ability to perform the Agreement; and (h) as of the Effective Date and throughout the Term, there is no other contract for the purchase of electricity by Customer for the ESI ID(s), or, if such a contract presently exists, that it will terminate prior to delivery under this Agreement. Customer further represents and warrants that it has complied with the requirements of Section 2162, *Texas Government Code* and all applicable contracts (including, but not limited to, Contract 050110-CCG-EM) awarded by the Council on Competitive Government regarding the bidding or awarding of this Agreement.

**A.2 Gexa's Representations and Warranties.** As a material inducement to entering into this Agreement, Gexa represents and warrants to Customer as follows: (a) it is duly organized, validly existing, and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in those jurisdictions necessary to perform the Agreement; (b) the execution and delivery of the Agreement are within its powers, have been duly authorized by all necessary action, and do not violate the terms or conditions of its governing documents or contracts it is party to or any laws applicable to it; (c) performance of the Agreement will be duly authorized by all necessary action and will not violate the terms or conditions of its governing documents or contracts it is party to; (d) as of the date sales of electricity by Gexa to Customer under the Agreement start, Gexa will have all regulatory authorizations necessary for it to legally perform its operations and such performance will not violate the terms or conditions of its governing documents, contracts it is party to, or laws applicable to it; and (e) the Agreement constitutes a legal, valid, and binding obligation of Gexa enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization, and other laws affecting creditor's rights generally, and with regard to equitable remedies, subject to the discretion of the court before which proceedings to obtain the same may be pending.

**A.3 Forward Contract.** (i) This Agreement constitutes a forward contract within the meaning of the United States Bankruptcy Code ("Code"); (ii) Gexa is a forward contract merchant; and (iii) either Party is entitled to the rights under, and protections afforded by, the Code.

### B. DISCLAIMERS OF WARRANTIES; LIMITATION OF LIABILITIES

**B.1 LIMITATIONS OF LIABILITY.** LIABILITIES NOT EXCUSED BY REASON OF FORCE MAJEURE OR AS OTHERWISE PROVIDED, ARE LIMITED TO DIRECT ACTUAL DAMAGES. GEXA IS NOT LIABLE TO CUSTOMER FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES OR LOSS OF REVENUES OR PROFIT. THESE LIMITATIONS APPLY WITHOUT REGARD TO THE CAUSE OF ANY LIABILITY OR DAMAGE. EXCEPT FOR (a) THE GEXA EARLY TERMINATION DAMAGES DUE IF GEXA DEFAULTS, (b) THE CUSTOMER EARLY TERMINATION DAMAGES DUE IF CUSTOMER DEFAULTS, AND (c) THE WHOLESALE TRANSACTION TERMINATION PAYMENT, THE LIABILITY OF EITHER PARTY TO THE OTHER FOR ANY OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE AGGREGATE AMOUNT OF ALL DOLLARS PAID BY CUSTOMER TO GEXA (IF CUSTOMER) OR RECEIVED BY GEXA (IF GEXA) PURSUANT TO THIS AGREEMENT. THERE ARE NO THIRD PARTY BENEFICIARIES TO THIS AGREEMENT.

**B.2 Duty to Mitigate.** Each Party shall mitigate damages and use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance.

**B.3 WAIVER OF CUSTOMER PROTECTION RULES AND CONSUMER RIGHTS.** THE PARTIES FURTHER ACKNOWLEDGE THAT THE CUSTOMER PROTECTION RULES ADOPTED BY THE PUBLIC UTILITY COMMISSION (AS CONTAINED IN ITS SUBSTANTIVE RULES 25.471 ET SEQ.) ("CUSTOMER PROTECTION RULES") DO NOT APPLY TO THIS AGREEMENT EXCEPT FOR THE FOLLOWING RULES: 25.481, 25.485 (b),(d), AND (e), AND 25.495. EXCEPT AS SET FORTH IN THIS SECTION, CUSTOMER EXPRESSLY WAIVES THE CUSTOMER PROTECTION RULES TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW. **B.4**

**UCC/Disclaimer of Warranties.** The electricity delivered is a "good" as that term is understood in the Texas B&CC (UCC §2.105). The Parties waive the UCC to the fullest extent allowed by law and the UCC requirements do not apply to this Agreement, unless otherwise provided. If there is a conflict between the UCC and this Agreement, this Agreement controls. Neither Party controls nor physically takes possession of the electric energy prior to delivery to Customer's ESI ID(s). Therefore, neither Party is responsible to

the other for any damages associated with failure to deliver the electric energy, nor for damages it may cause prior to delivery to Customer's ESI ID(s). Once the electric energy is delivered to Customer's ESI ID(s) it is deemed in possession and control of Customer. ELECTRICITY SOLD UNDER THIS AGREEMENT WILL MEET THE QUALITY STANDARDS OF THE APPLICABLE LOCAL DISTRIBUTION UTILITY AND WILL BE SUPPLIED FROM A VARIETY OF SOURCES. GEXA MAKES NO REPRESENTATIONS OR WARRANTIES OTHER THAN THOSE EXPRESSLY SET FORTH IN THIS AGREEMENT, AND GEXA EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. GEXA EXPRESSLY NEGATES ALL OTHER REPRESENTATIONS OR WARRANTIES, WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING ANY REPRESENTATION OF WARRANTY WITH RESPECT TO CONFORMITY, TO MODELS OR SAMPLES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE.

**B.5 Force Majeure.** Gexa shall make commercially reasonable efforts to provide electric service, but does not guarantee a continuous supply of electricity. Gexa does not generate electricity nor does it transmit or distribute electricity. Causes and events out of the control of Gexa and Customer ("**Force Majeure Event(s)**") may result in interruptions in service or the ability to accept electricity. If either Party is unable to perform its obligations, in whole or in part, due to a Force Majeure Event, then the obligations of the affected Party (other than the obligation to pay any amounts owed to Gexa that relate to periods prior to the Force Majeure Event) are suspended to the extent made necessary by such Force Majeure Event. Therefore, neither Party is liable to the other Party for damages caused by Force Majeure Events, including acts of God, acts of, or the failure to act by, any governmental authority (including the PUCT or ERCOT and specifically including failure by ERCOT to make Customer meter read data available), accidents, strikes, labor troubles, required maintenance work, events of "force majeure" or "uncontrollable force" or a similar term as defined under the applicable transmission provider's tariff, inability to access the local distribution utility system, non-performance by the supplier or the local distribution utility, changes in laws, rules, or regulations of any governmental authority (including the PUCT or ERCOT) that would prevent the physical delivery of energy to Customer's facilities, or any cause beyond such Party's control. The Parties agree that Appropriations Failures and Scheduling Failures are not Force Majeure Events.

### **C. CONFIDENTIALITY AGREEMENT**

**C.1 Confidentiality.** Customer is a governmental body subject to public information laws, including Chapter 552 of the Texas Government Code and this Agreement, and any records obtained or maintained by Customer in connection therewith, may be subject to public disclosure.

### **D. DEFAULT AND REMEDIES**

**D.1 Events of Default.** An event of default ("**Event of Default**") means: (a) the failure of Customer to make, when due, any payment required under this Agreement for any undisputed amount if that payment is not made within fifteen (15) business days after receipt of written notice (facsimile or electronic mail are valid forms of notice for this paragraph) from Gexa; or (b) any representation or warranty made by a Party proves to be false or misleading in any material respect; (c) except as provided in clause (a) above or otherwise in this section D.1, the failure of any Party to perform its obligations under this Agreement and that failure is not excused by Force Majeure and remains uncured following 20 business days written notice of the failure; (d) the defaulting Party (i) makes an assignment or any general arrangement for the benefit of creditors; or (ii) files a petition or otherwise commences, authorizes or acquiesces to a bankruptcy proceeding or similar proceeding for the protection of creditors, or has such a petition filed against it and that petition is not withdrawn or dismissed within 20 business days after filing; or (iii) otherwise becomes insolvent; or (iv) is unable to pay its debts when due; or (v) fails to establish, maintain or extend Credit in form and in an amount acceptable to Gexa when required; or (e) the Wholesale Transaction is terminated due to a default by Gexa under CESAs with other TCAP members or due to a default by PMI under the Wholesale Transaction. If an Event of Default listed in subsection (d) occurs, it is deemed to have automatically occurred prior to such event.

**D.2 Remedies upon an Event of Default.** If an Event of Default occurs and is continuing, upon written notice to the defaulting Party, the non-defaulting Party may (a) commence an action to require the defaulting Party to remedy such default and specifically perform its duties and obligations in accordance with the Agreement; (b) exercise any other rights and remedies it has at equity or at law, subject to the Agreement's Limitations of Liabilities; and/or (c) suspend performance; provided, however, that suspension shall not continue for longer than ten (10) Business Days unless the non-defaulting Party has declared an early termination with proper notice. If Customer is responsible for an Event of Default and fails to cure within ten (10) days of written notice (such additional cure period does not apply to default for non-payment), in addition to its other remedies, Gexa may (i) terminate this Agreement; and (ii) charge Customer the Customer Early Termination Penalty pursuant to Section 5 of this Agreement. Notwithstanding the above, Gexa shall not disconnect or order disconnection of service to Customer unless the following events have all occurred: (1) Customer has an Event of Default for nonpayment under Section D.1(a) above, (2) Gexa gives Customer a ten (10) day written disconnection notice; and (3) Customer does not pay all undisputed outstanding payments owed by the end of the ten (10) day notice period. .

### **E. MISCELLANEOUS PROVISIONS**

**E.1 Disclaimer.** This Agreement does not constitute, create, or otherwise recognize the existence of a joint venture, association, partnership, or other formal business entity of any kind among the Parties and the rights and obligations of the Parties are limited to those set forth in this Agreement.

**E.2 Headings.** The descriptive headings of the Articles and Sections of this Agreement are inserted for convenience only and are not intended to affect the meaning, interpretation or construction of this Agreement.

**E.3 Waiver.** Except as otherwise provided, failure of a Party to comply with an obligation, covenant, agreement, or condition may be waived by the other Party only in a writing signed by the Party granting the waiver, but that waiver does not constitute a waiver of, or estoppel with respect to a subsequent failure of the first Party to comply with that obligation, covenant, agreement, or condition.

**E.4 Assignment.** Except as provided in the Letter Agreement, Customer shall not assign this Agreement, in whole or in part, or any

of its rights or obligations pursuant to the Agreement without Gexa's prior written consent, which shall not be unreasonably withheld. Gexa may withhold consent if a proposed assignee fails to be at least as creditworthy as Customer as of the Effective Date. Gexa may: (a) transfer, sell, pledge, encumber or assign the revenues or proceeds of this Agreement in connection with any financing or other financial arrangement; (b) transfer or assign this Agreement to a Gexa affiliate with operating capability and financial condition substantially similar to Gexa; (c) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets of Gexa with an operating capability and financial condition substantially similar to Gexa as of the execution date of this Agreement; and/or (d) transfer or assign this Agreement to a certified REP with an operating capability and financial condition substantially similar to Gexa as of the execution date of this Agreement. In the case of (b), (c), or (d), any such assignee shall agree in writing to be bound by these Terms and Conditions of Service, and upon assignment, Gexa shall have no further obligations under this Agreement. Gexa shall not assign the Agreement to a non-affiliated entity (including its guarantor) that has a credit rating lower than BBB- without the prior written consent of TCAP, which shall not be unreasonably withheld.

**E.5 No Third-Party Beneficiaries.** This Agreement does not confer any rights or remedies on any person or party other than the Parties, their successors and permitted assigns; except that the Parties recognize that TCAP is entitled to receive the Aggregator Fee .

**E.6 Severability.** If a provision of this Agreement is held to be unenforceable or invalid by a court or regulatory authority of competent jurisdiction, the validity and enforceability of the remaining provisions are unaffected by that holding, and the Parties shall, to the extent possible, negotiate an equitable adjustment to the provisions of this Agreement in order to preserve the original intent and purpose of this Agreement.

**E.7 Entire Agreement; Amendments.** This Agreement constitutes the entire understanding between the Parties, and supersedes any and all previous understandings, oral or written, with respect to the subjects it covers. This Agreement may be amended only upon the mutually signed, written agreement of the Parties.

**E.8 Further Assurances.** The Parties shall promptly execute and deliver, at the expense of the Party requesting such action, any and all other and further instruments and documents which are reasonably requested in order to effectuate the transactions contemplated in this Agreement.

**E.9 Emergency, Outage and Wire Service.** In the event of an emergency, outage or service need, Customer shall call the TDSP for the service area of the ESI ID experiencing the emergency, outage or service need.

**E.10 Customer Care.** Customer may contact Gexa Customer Care if Customer has specific comments, questions, disputes, or complaints toll free at 1-866-961-9399, Monday to Friday 7:00 a.m. – 8:00 p.m. CST and Saturday from 8:00 a.m. – 2:00 p.m.. Gexa shall assist and cooperate with Customer regarding communications with a TDSP relating to service to any ESI ID served by Gexa under this Agreement.

**E.11 Governing Law.**

a. This Agreement is governed by and construed and enforced in accordance with the laws of the State of Texas applicable to contracts made and performed in the State of Texas, without regard to the State of Texas conflict of laws provisions.

b. All disputes between the Parties under this Agreement which are not otherwise settled will be decided by a court of competent jurisdiction in Ellis County, Texas, and the Parties submit to the jurisdiction of the courts of the State of Texas in Ellis County, Texas. All disputes are governed under the laws of the State of Texas.

c. Subject to the provisions of E.11.a. above, this Agreement is subject to, and in the performance of their respective obligations under this Agreement the Parties shall comply with, all applicable federal, state and local laws, regulations and requirements (including the rules, regulations and requirements of quasigovernmental and regulatory authorities with jurisdiction over the Parties, including ERCOT) (collectively, "*Applicable Law*").

**E.12 No Presumption Against Drafting.** Both Parties contributed to the drafting of this Agreement. The rule of construction that any ambiguity is construed against the party who drafted this Agreement does not apply to this Agreement.

**E.13 Counterparts; Facsimile Copies.** This Agreement may be executed in counterparts, all of which constitute one and the same Agreement and each is deemed an original. A facsimile copy of either Party's signature is considered an original for all purposes, and each Party shall provide its original signature upon request.

**E.15 Offer for Electric Service; Refusal of Service.** This Agreement, including these Terms and Conditions of Service, constitute an offer for electric service, and is expressly conditioned on acceptance of this Agreement by Gexa. Gexa may refuse to provide electric service to Customer subject to the requirements of Applicable Law.