

## **FIRST AMENDMENT TO DEPOSIT AGREEMENT**

This FIRST AMENDMENT TO DEPOSIT AGREEMENT (this "Amendment") is entered into this \_\_\_\_ day of December 2020, by and between Triple H Wind Project, LLC, a Delaware limited liability company corporation (the "Depositor"), and Citibank, N.A. (the "Bank"). The Public Utilities Commission of the State of South Dakota (the "PUC") joins in the execution of this Amendment for the purposes set forth below.

### **WITNESSETH:**

**WHEREAS**, pursuant to SDCL 49-41B-39, all right and title in any financial security required by the PUC for the decommissioning of wind turbines shall be controlled by the PUC in accordance with the terms of the financial security agreement or instrument until the PUC by order releases the financial security; and

**WHEREAS**, Depositor and the Bank entered into that certain Deposit Agreement dated as of October 28, 2020 (the "Agreement"), for the purpose of establishing the Account to ensure the availability of funds to cover estimated decommissioning costs of the Triple H Wind Project (the "Facility") once the Facility has met its expected design life, as required by Section 40 of the Permit Conditions set forth in that certain Final Decision and Order to Permit Construction of Facility; Notice of Entry, dated July 24, 2019, EL19-007 (the "Order"), issued by the PUC; and

**WHEREAS**, the parties hereto desire to enter into this Amendment to reflect their agreement to reflect the joinder of the PUC to the Agreement, and to modify certain terms of the Agreement, all as set forth herein.

**NOW, THEREFORE**, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound hereby, agree as follows:

### **AGREEMENT**

1. Capitalized Terms. All capitalized terms used herein and not otherwise defined herein shall have the meaning ascribed to such terms in the Agreement.

2. Joinder of Party. The PUC, by execution hereof, hereby joins in the Agreement and accepts and agrees to be bound by the terms thereof, as amended hereby, as a party to the Agreement; *provided, however*, that it is expressly agreed by the Depositor and the Bank that the PUC shall have no obligations or liabilities of any nature whatsoever under the Agreement for the payment of any costs and expenses required to be made by the Depositor to the Bank pursuant to the Agreement and the Bank agrees to look solely to Depositor for the payment of any such amounts.

3. Amendment. The following sections of the Agreement are amended as set forth below:

(a) Section 2 of the Agreement is deleted and is replaced in its entirety by the following:

2. **Claims and Payment; Release from Account.** At the time of the performance of the Decommissioning Plan for the Facility, the Depositor shall have the right, upon delivery of a certificate to the PUC, signed by an officer of the Depositor (a "Request for Reimbursement"), requesting reimbursement from the Account in order to pay the costs and expenses to be incurred in connection with Depositor's performance of the decommissioning activities for the Facility, which Request for Reimbursement shall include a proposed draft Withdrawal Certificate (as hereinafter defined) and substantiating documentation for such costs and expenses.

Upon approval of a Request for Reimbursement from Depositor, the PUC shall then submit a Withdrawal Certificate, substantially in the form set forth in Exhibit A attached hereto (each, a "Withdrawal Certificate"), to the Bank. The Withdrawal Certificate shall be signed by an Authorized Person (as defined below) of the PUC. The PUC shall also provide a copy of such Withdrawal Certificate to Depositor. Such withdrawals shall be payable in accordance with the directions included in such Withdrawal Certificates. Upon receipt of a duly executed and completed Withdrawal Certificate, the Bank shall transfer from the Account to the Depositor, pursuant to Account instructions to be delivered as part of such Withdrawal Certificate, the amount set forth in such Withdrawal Certificate, provided that the PUC may, in any Withdrawal Certificate, direct the Bank to make disbursements from the Account directly to those Facility landowners who own the land on which associated Facility components are located to the extent that such landowners are required to incur and pay such decommissioning costs directly. Upon the receipt of a final Withdrawal Certificate by the Bank from an Authorized Person of the PUC, the Bank shall pay any amounts remaining in the Account in accordance with the instructions of said final Withdrawal Certificate. Notwithstanding Section 4(d) hereof, in no event shall the Bank make any withdrawals or disbursements from the Account without the express approval of the PUC, as reflected by the PUC's execution of any Withdrawal Certificate submitted to the Bank. The Bank may conclusively rely (and shall be fully justified and shall incur no liability in acting upon) on any duly executed Withdrawal Certificate and shall not be responsible in any manner for the truth or accuracy of, or be required to independently evaluate or verify, any information or calculation contained therein (including any attachments or schedules attached thereto).

(b) Section 12 of the Agreement is amended by adding the following to the end of the first paragraph thereof: All notices to be provided by or to Depositor hereunder shall also be provided to the PUC, expressly including but not limited to any notices sent pursuant to Sections 2, 7, and 9 of the Agreement, as follows, and the PUC agrees upon execution of this Amendment to provide a certificate of incumbency to the Bank, in a form satisfactory to the Bank, providing the names and signatures of the Authorized Persons of the PUC to give any notices and instructions pursuant to the Agreement:

<u>To the PUC:</u>	500 E. Capitol Ave.
	Pierre SD 57501
	Attn: Executive Director
	Phone: 605-773-3201
	E-Mail: PUC@state.sd.us

4. Section 4(d) is hereby amended to read as follows:

(d) Should the Bank become liable for the payment of taxes, including withholding taxes relating to any funds, including interest and penalties thereon, held by it pursuant to this Agreement or any payment made hereunder, the Bank shall satisfy such liability to the extent possible from the Property. The Depositor agrees to indemnify and hold the Bank harmless pursuant to Section 6(b) hereof from any liability or obligation on account of taxes, assessments, interest, penalties, expenses, and other governmental charges that may be assessed or asserted against the Bank.

5. The following section is added as Section 18 to the Agreement:

18. Unencumbered Funds. Depositor warrants that:

a. Depositor will not use the Property as security for any transaction, nor will it pledge the Escrow Funds or list the Account as an asset on any application to obtain credit or to obtain real or personal property;

b. The parties hereto acknowledge and agree that any rights that Depositor or any other party has to the Property and any associated revenue are contingent rights and receipt of any of the Property or associated revenue is subject to the satisfaction or waiver of such contingencies; and

c. The parties hereto acknowledge and understand that, in the event of a bankruptcy filing or other insolvency proceeding commenced by or against Depositor prior to the satisfaction or waiver of such contingencies, the Property will not constitute property of the bankruptcy estate or otherwise be reachable by Depositor's creditors.

5. Except as expressly amended hereby, the Agreement shall remain in full force and effect as originally written. This Amendment and all matters arising hereunder or in connection herewith shall be governed by, interpreted under, construed and enforced in accordance with the laws of the State of South Dakota, without regard to conflicts of law principles. This Amendment may be executed by the parties in one or more counterparts, all of which taken together, shall constitute one and the same instrument. The facsimile or .pdf signatures of the parties shall be deemed to constitute original signatures, and facsimile or .pdf copies hereof shall be deemed to constitute duplicate originals.

IN WITNESS WHEREOF, each of the parties has caused this Amendment to be executed by a duly authorized representative as of the day and year first written above.

**BANK:**

**CITIBANK, N.A.**

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

Name:

Title:

Date:

**DEPOSITOR:**

**TRIPLE H WIND PROJECT, LLC**

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

Name:

Title:

Date:

**JOINDER OF PUC:**

**South Dakota Public Utilities Commission**

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

**Name:** Patricia VanGerpen

**Title:** Executive Director

**Date:**