

*Each Solar PV project is unique. The sample PGA provided here is intended to be a starting point for developing a PGA; this document is not intended to be a template. The requirements should be modified as appropriate to fit the specific opportunity. Please work with campus counsel when developing a PGA for a Solar PV project.*

### Performance Guarantee Agreement (PGA)

This Performance Guarantee Agreement (this “**Agreement**”) is entered into by the parties listed below (each a “**Party**” and collectively the “**Parties**”) as of the date signed by Provider below (the “**Effective Date**”

<b>Purchaser:</b>		<b>Provider:</b>	
Name and Address		Name and Address	
Phone		Phone	
Fax		Fax	
		E-mail	
<b>System description:</b>	Size: Location:		

This Agreement sets forth the terms and conditions of a performance guarantee provided by Provider in conjunction with that certain Solar Power Purchase Agreement (“**PPA**” or **Insert Campus and Contract Number**) by and between Provider and Purchaser dated of even date herewith. All capitalized terms used hereunder shall have the meanings given such terms in the PPA. The term of this Agreement shall be concurrent with the term of the PPA.

1. **Warranty.** Provider guarantees that during the term of the PPA the System will generate the guaranteed kilowatt-hours (kWh) (“**Guaranteed kWh**”) of energy to Purchaser set forth as follows:
  - A. Commencing on the fifth anniversary of the Commercial Operation Date, if at the end of each successive sixty (60) month anniversary thereof, the cumulative Actual kWh (defined below) generated by the System is *less* than the Guaranteed kWh, then Provider will send Purchaser a refund check equal to the difference between the Guaranteed kWh and the cumulative Actual kWh multiplied by the Guaranteed Energy Price per kWh (defined below). Provider will make that payment within thirty (30) days after the end of the relevant calendar year.
  - B. Commencing on the fifth anniversary of the Commercial Operation Date, if at the end of each successive sixty (60) month anniversary thereof the Actual kWh is *greater* than the Guaranteed kWh during any sixty (60) month period, this surplus will be

carried over and will be used to offset any deficits that may occur in the next true up period.

C. **“Guaranteed kWh”**:

True Up Term Years	Guaranteed kWh
Years 1-5	
Years 6-10	
Years 11-15	
Years 16 -20	
Years 21 -25	

D. **“Actual kWh”** means the AC electricity produced by the System in kilowatt-hours measured and recorded by Provider during each successive sixty (60) month anniversary of the Commercial Operation Date. To measure the Actual kWh the parties shall use [the SolarGuard™ Monitoring Service] or to the extent such services are not available, Provider will estimate the Actual kWh by using reasonable commercial methods.

E. **“Guaranteed Energy Price per kWh”** means the dollar value per kWh as calculated in the table below:

True Up Term	Utility/ kWh	PPA/kWh	<b>Guaranteed Energy Price per kWh (Utility minus PPA)</b>
Years 1-5	\$	\$	\$
Years 6-10	\$	\$	\$
Years 11-15	\$	\$	\$
Years 16 - 29	\$	\$	\$

F. **Effective Date:** The term of the Agreement shall commence on the Effective Date and shall continue for twenty (20) years from the Commercial Operation Date (the “Term”), unless and until the earlier termination of the PPA. If the Parties to the PPA elect to renew the PPA at the end of its term as provided for therein, Purchaser may request that this Agreement be-renewed in conjunction with the PPA. Provider shall promptly respond to such request with the terms under which Provider will renew this Agreement.

2. **Exclusions.** The Warranty does not apply to any repair, replacement or correction required due to the following:
- A. someone other than Provider or its approved service providers installs, removes, re-installs or repairs the System;
  - B. Destruction or damage to the System or its ability to safely produce energy not caused by Provider or its approved service providers while servicing the System (e.g., a tree falls on the System);
  - C. Purchaser's failure to perform, or breach of, Purchaser's obligations under the PPA to the extent such failure or breach impacts System production (such as if Purchaser modifies or alters the System);
  - D. Purchaser's breach of this Agreement including being unavailable to provide access or assistance to Provider in diagnosing or repairing a problem or failing to maintain the System as stated in the Solar Operation and Maintenance Guide;
  - E. any Force Majeure Event (as defined below);
  - F. a power or voltage surge caused by Purchaser or any party or event not within Provider's control, including a grid supply voltage outside of the standard range specified by the Utility;
  - G. Any System failure not caused by a Provider breach under the PPA (e.g., such as making roof repairs); or
  - H. Theft of the System.

Nothing in this Agreement shall be construed as a warranty or guarantee by Provider that the Purchaser (or any beneficiary of this Agreement) will realize saving as a result of this Agreement or the PPA. Provider's guarantee hereunder is a guarantee of electrical production from the System and not of any savings resulting from such electrical production.

3. **Force Majeure.** If Provider is unable to perform all or some of its obligations under this Agreement because of a Force Majeure Event, Provider will be excused from whatever performance is affected by the Force Majeure Event, provided that:
- A. Provider, as soon as is reasonably practical, gives Purchaser notice describing the Force Majeure Event;
  - B. Provider's suspension of its obligations is of no greater scope and of no longer duration than is required by the Force Majeure Event; and
  - C. No Provider obligation that arose before the Force Majeure Event that could and should have been fully performed before such Force Majeure Event is excused as a result of such Force Majeure Event.

“Force Majeure Event” means any event, condition or circumstance beyond the control of and not caused by Provider’s or Purchaser’s fault or negligence. It shall include, without limitation, failure or interruption of the production, delivery or acceptance of electricity due to: an act of god; war (declared or undeclared); sabotage; riot; insurrection; civil unrest or disturbance; military or guerilla action; terrorism; economic sanction or embargo; civil strike, work stoppage, slow-down, or lock-out; explosion; fire; earthquake; abnormal weather condition or actions of the elements; hurricane; flood; lightning; wind; drought; the binding order of any governmental authority (provided that such order has been resisted in good faith by all reasonable legal means) the failure to act on the part of any governmental authority (provided that such action has been timely requested and diligently pursued); unavailability of electricity from the utility grid, equipment, supplies or products; and failure of equipment not utilized by Provider or under its control.

4. **Notices.**

Provider: <b>COMPANY</b> <b>ADDRESS</b> <b>CITY STATE ZIP CODE</b> <b>PHONE</b> <b>FAX</b> <b>EMAIL</b>	Purchaser: <b>CAMPUS</b> <b>ADDRESS</b> <b>CITY STATE ZIP CODE</b> <b>PHONE</b> <b>FAX</b> <b>EMAIL</b>
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All notices under this Agreement shall be in writing and shall be by personal delivery, facsimile transmission, overnight courier, or regular, certified, or registered mail, return receipt requested, and shall be deemed received upon personal delivery, acknowledgment of receipt of electronic transmission, the promised delivery date after deposit with overnight courier, or five (5) days after deposit in the mail. Notices shall be sent to the party identified in this Agreement at the address set forth above or such other address as either party may specify in writing. Each party shall deem a document faxed or sent by electronic mail to it as an original document.

5. **Applicable Law.** All disputes arising out of the performance or non-performance under this Agreement shall be construed in accordance with the laws of the State of New York, without regard to principles of conflicts of law other than New York General Obligations Law § 5-1401. The Parties agree that any dispute hereunder will be litigated in a court of competent jurisdiction in New York.

6. **Entire Agreement, Changes.** This Agreement, including State University of New York Standard Terms and Conditions, Exhibit A contains the parties’ entire agreement regarding the matters set forth herein. Provider’s obligations under this Agreement are separate and distinct from the obligations of the Provider or its assigns under the PPA. In the event of a conflict between this Agreement and SUNY Exhibit A, SUNY Exhibit A will control.

No breach of this Agreement shall affect either Party's obligations under the PPA.

Any change to this Agreement must be in writing and signed by both Parties and approved by the New York State Office of the Attorney General and the Office of the State Comptroller.

If any provision of this Agreement, or portion thereof, is held by a court of competent jurisdiction to be contrary to law or otherwise unenforceable, the provision will be modified by the court and interpreted so as best to accomplish the objectives of the original provision to the fullest extent permitted by law, and the remaining provisions of this Agreement will remain in full force and effect.

**[SIGNATURE PAGE FOLLOWS]**

State University of New York  
On behalf **Insert Campus**

**Insert Company**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

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

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

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

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

Date: \_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM  
ATTORNEY GENERAL

APPROVED AND FILED  
STATE COMPTROLLER

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

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

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**ACKNOWLEDGMENT BY NOTARY PUBLIC**

STATE OF \_\_\_\_\_ }  
: SS.:  
COUNTY OF \_\_\_\_\_ }

On the \_\_\_\_ day of \_\_\_\_\_ in the year 20\_\_ , before me personally appeared:  
\_\_\_\_\_, known to me to be the person who executed  
the foregoing instrument, who, being duly sworn by me did depose and say that \_he resides at

\_\_\_\_\_,  
Town of \_\_\_\_\_,  
County of \_\_\_\_\_, State \_\_\_\_\_ of  
\_\_\_\_\_ ; and further that:

**[Check One]**

**If an individual):** \_he executed the foregoing instrument in his/her name and on his/her own behalf.

**If a corporation):** \_he is the \_\_\_\_\_ of \_\_\_\_\_, the corporation described in said instrument; that, by authority of the Board of Directors of said corporation, \_he is authorized to execute the foregoing instrument on behalf of the corporation for purposes set forth therein; and that, pursuant to that authority, \_he executed the foregoing instrument in the name of and on behalf of said corporation as the act and deed of said corporation.

**If an unincorporated association):** \_he is the \_\_\_\_\_ of \_\_\_\_\_, the firm described in said instrument; that, \_he is authorized to execute the foregoing instrument on behalf of the firm for the purposes set forth therein; and that, pursuant to that authority, \_he executed the foregoing instrument in the name and on behalf of said firm as the act and deed of said firm.

**If a partnership):** \_he is the \_\_\_\_\_ of \_\_\_\_\_, the partnership described in said instrument; that, by the terms of said partnership, \_he is authorized to execute the foregoing instrument on behalf of the partnership for the purposes set forth therein; and that, pursuant to that authority, \_he executed the foregoing instrument in the name and on behalf of said partnership as the act and deed of said partnership.

\_\_\_\_\_  
**Notary Public**

**Exhibit A**

[Document to follow this introductory page.]

Insert Exhibit A ([link](#))



**Exhibit A-1**

[Document to follow this introductory page.]

Insert Exhibit A-1 ([link](#))