

Fill in this information to identify the case:Debtor Powin, LLCUnited States Bankruptcy Court for the: _____ District of New Jersey
(State)Case number 25-16137**Modified Official Form 410
Proof of Claim****04/25**

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Do not use this form to make a request for payment of an administrative expense. Make such a request according to 11 U.S.C. § 503.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed. That date is on the notice of bankruptcy (Form 309) that you received.

Part 1: Identify the Claim

1. Who is the current creditor?	<u>Ameresco, Inc.</u> Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor _____	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom? _____	
3. Where should notices and payments to the creditor be sent? Federal Rule of Bankruptcy Procedure (FRBP) 2002(g)	Where should notices to the creditor be sent? <u>Ameresco, Inc.</u> <u>Attn Rebecca McIntyre</u> <u>111 Speen Street, Suite 410</u> <u>Framingham, MA 01701, United States</u> Contact phone <u>508-661-2241</u> Contact email <u>rmcintyre@ameresco.com</u> (see summary page for notice party information) Uniform claim identifier (if you use one): _____	Where should payments to the creditor be sent? (if different) Contact phone _____ Contact email _____
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) _____ Filed on _____ MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing? _____	



Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: __ __ __ __
7. How much is the claim?	\$ <u>10,173,942.13</u> Does this amount include interest or other charges? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).
8. What is the basis of the claim?	Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card. Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c). Limit disclosing information that is entitled to privacy, such as health care information. <u>Services performed - see attached addendum</u>
9. Is all or part of the claim secured?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. The claim is secured by a lien on property. Nature or property: <input type="checkbox"/> Real estate: If the claim is secured by the debtor's principle residence, file a <i>Mortgage Proof of Claim Attachment</i> (Official Form 410-A) with this <i>Proof of Claim</i> . <input type="checkbox"/> Motor vehicle <input type="checkbox"/> Other. Describe: _____ Basis for perfection: _____ Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.) Value of property: \$ _____ Amount of the claim that is secured: \$ _____ Amount of the claim that is unsecured: \$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.) Amount necessary to cure any default as of the date of the petition: \$ _____ Annual Interest Rate (when case was filed) _____ % <input type="checkbox"/> Fixed <input type="checkbox"/> Variable
10. Is this claim based on a lease?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Amount necessary to cure any default as of the date of the petition. \$ _____
11. Is this claim subject to a right of setoff?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Identify the property: _____



12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No

☐ Yes. Check all that apply:

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Amount entitled to priority

\$ _____

☐ Up to \$3,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$17,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

\$ _____

☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

\$ _____

☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/28 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim entitled to administrative priority pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(3) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date 09/29/2025
MM / DD / YYYY

/s/Rebecca McIntyre
Signature

Print the name of the person who is completing and signing this claim:

Name Rebecca McIntyre
First name Middle name Last name

Title Deputy General Counsel

Company Ameresco, inc.
Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

Contact phone _____ Email _____



Verita (KCC) ePOC Electronic Claim Filing Summary

For phone assistance: Domestic (866) 507-8031 | International 001-310-823-9000

Debtor: 25-16137 - Powin, LLC District: District of New Jersey, Trenton Division				
Creditor: Ameresco, Inc. Attn Rebecca McIntyre 111 Speen Street, Suite 410 Framingham, MA, 01701 United States Phone: 508-661-2241 Phone 2: Fax: Email: rmcintyre@ameresco.com	Has Supporting Documentation: Yes, supporting documentation successfully uploaded Related Document Statement:			
	Has Related Claim: No Related Claim Filed By:			
	Filing Party: Authorized agent			
Disbursement/Notice Parties: <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> Troutman Pepper Locke LLP Attn Tori L. Remington Hercules Plaza Suite 1000 1313 N. Market Street PO Box 1709 Wilmington , DE, 19801 United States Phone: 302-777-6512 Phone 2: Fax: E-mail: tori.remington@troutman.com </td> <td style="width: 50%; vertical-align: top;"> Troutman Pepper Locke LLP c/o David M. Fournier Hercules Plaza Suite 1000 1313 N. Market Street PO Box 1709 Wilmington, DE, 19801 United States Phone: 302-777-6565 Phone 2: Fax: E-mail: david.fournier@troutman.com </td> </tr> </table>			Troutman Pepper Locke LLP Attn Tori L. Remington Hercules Plaza Suite 1000 1313 N. Market Street PO Box 1709 Wilmington , DE, 19801 United States Phone: 302-777-6512 Phone 2: Fax: E-mail: tori.remington@troutman.com	Troutman Pepper Locke LLP c/o David M. Fournier Hercules Plaza Suite 1000 1313 N. Market Street PO Box 1709 Wilmington, DE, 19801 United States Phone: 302-777-6565 Phone 2: Fax: E-mail: david.fournier@troutman.com
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Other Names Used with Debtor:		Amends Claim: No Acquired Claim: No		
Basis of Claim: Services performed - see attached addendum	Last 4 Digits: No	Uniform Claim Identifier:		
Total Amount of Claim: 10,173,942.13	Includes Interest or Charges: No			
Has Priority Claim: No		Priority Under:		
Has Secured Claim: No Amount of 503(b)(9): No Based on Lease: No Subject to Right of Setoff: No		Nature of Secured Amount: Value of Property: Annual Interest Rate: Arrearage Amount: Basis for Perfection: Amount Unsecured:		
Submitted By: Rebecca McIntyre on 29-Sep-2025 1:20:35 p.m. Pacific Time Title: Deputy General Counsel Company: Ameresco, inc.				

United States Bankruptcy Court for the District of New Jersey

Indicate Debtor against which you assert a claim by checking the appropriate box below. **(Check only one Debtor per claim form.)**

- | | | |
|--|---|---|
| <input type="checkbox"/> Powin Project LLC (Case No. 25-16136) | <input type="checkbox"/> Charger Holdings, LLC (Case No. 25-16140) | <input type="checkbox"/> PEOS Holdings, LLC (Case No. 25-16144) |
| <input checked="" type="checkbox"/> Powin, LLC (Case No. 25-16137) | <input type="checkbox"/> Powin Energy Ontario Storage, LLC (Case No. 25-16141) | <input type="checkbox"/> Powin Energy Storage 2, Inc. (Case No. 25-16558) |
| <input type="checkbox"/> Powin China Holdings 1, LLC (Case No. 25-16138) | <input type="checkbox"/> Powin Energy Operating Holdings, LLC (Case No. 25-16142) | <input type="checkbox"/> Powin Energy Ontario Storage II LP (Case No. 25-16559) |
| <input type="checkbox"/> Powin China Holdings 2, LLC (Case No. 25-16139) | <input type="checkbox"/> Powin Energy Operating, LLC (Case No. 25-16143) | <input type="checkbox"/> Powin Canada B.C. Ltd (Case No. 25-16560) |

Modified Official Form 410

Proof of Claim

04/25

Read the instructions before filling out this form. This form is for making a claim for payment in a bankruptcy case. Other than a claim under 11 U.S.C. § 503(b)(9), this form should not be used to make a claim for an administrative expense arising after the commencement of the case.

Filers must leave out or redact information that is entitled to privacy on this form or on any attached documents. Attach redacted copies or any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. **Do not send original documents;** they may be destroyed after scanning. If the documents are not available, explain in an attachment.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Fill in all the information about the claim as of the date the case was filed.

Part 1: Identify the Claim

1. Who is the current creditor?	Ameresco, Inc. Name of the current creditor (the person or entity to be paid for this claim) Other names the creditor used with the debtor	
2. Has this claim been acquired from someone else?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. From whom?	
3. Where should notices and payments to the creditor be sent?	Where should notices to the creditor be sent? Rebecca McIntyre Name 111 Speen Street, Suite 410 Number Street Framingham MA 01701 City State ZIP Code United States Country Contact phone (508) 661-2241 Contact email rmcIntyre@ameresco.com Uniform claim identifier (if you use one):	Where should payments to the creditor be sent? (if different) Name Number Street City State ZIP Code Country Contact phone Contact email
4. Does this claim amend one already filed?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Claim number on court claims registry (if known) Filed on MM / DD / YYYY	
5. Do you know if anyone else has filed a proof of claim for this claim?	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes. Who made the earlier filing?	

Part 2: Give Information About the Claim as of the Date the Case Was Filed

6. Do you have any number you use to identify the debtor?



No



Yes. Last 4 digits of the debtor's account or any number you use to identify the debtor: ____

7. How much is the claim?

\$ \$10,173,942.13

Does this amount include interest or other charges?



No



Yes. Attach statement itemizing interest, fees, expenses, or other charges required by Bankruptcy Rule 3001(c)(2)(A).

8. What is the basis of the claim?

Examples: Goods sold, money loaned, lease, services performed, personal injury or wrongful death, or credit card.

Attach redacted copies of any documents supporting the claim required by Bankruptcy Rule 3001(c).

Limit disclosing information that is entitled to privacy, such as health care information.

Services performed - see attached addendum

9. Is all or part of the claim secured?



No



Yes. The claim is secured by a lien on property.

Nature of property:



Real estate: If the claim is secured by the debtor's principal residence, file a *Mortgage Proof of Claim Attachment* (Official Form 410-A) with this *Proof of Claim*.



Motor vehicle



Other. Describe: _____

Basis for perfection: _____

Attach redacted copies of documents, if any, that show evidence of perfection of a security interest (for example, a mortgage, lien, certificate of title, financing statement, or other document that shows the lien has been filed or recorded.)

Value of property:

\$ _____

Amount of the claim that is secured:

\$ _____

Amount of the claim that is unsecured:

\$ _____ (The sum of the secured and unsecured amount should match the amount in line 7.)

Amount necessary to cure any default as of the date of the petition:

\$ _____

Annual Interest Rate (when case was filed) _____%



Fixed



Variable

10. Is this claim based on a lease?



No



Yes. Amount necessary to cure any default as of the date of the petition.

\$ _____

11. Is this claim subject to a right of setoff?



No



Yes. Identify the property: _____

12. Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)?

A claim may be partly priority and partly nonpriority. For example, in some categories, the law limits the amount entitled to priority.

☒ No

☐ Yes. Check all that apply:

☐ Domestic support obligations (including alimony and child support) under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

Amount entitled to priority

\$ _____

☐ Up to \$3,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use. 11 U.S.C. § 507(a)(7).

\$ _____

☐ Wages, salaries, or commissions (up to \$17,150*) earned within 180 days before the bankruptcy petition is filed or the debtor's business ends, whichever is earlier. 11 U.S.C. § 507(a)(4).

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☐ Taxes or penalties owed to governmental units. 11 U.S.C. § 507(a)(8).

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☐ Contributions to an employee benefit plan. 11 U.S.C. § 507(a)(5).

\$ _____

☐ Other. Specify subsection of 11 U.S.C. § 507(a)() that applies.

\$ _____

* Amounts are subject to adjustment on 4/01/28 and every 3 years after that for cases begun on or after the date of adjustment.

13. Is all or part of the claim entitled to administrative priority pursuant to 11 U.S.C. § 503(b)(9)?

☒ No

☐ Yes. Indicate the amount of your claim arising from the value of any goods received by the debtor within 20 days before the date of commencement of the above case, in which the goods have been sold to the Debtor in the ordinary course of such Debtor's business. Attach documentation supporting such claim.

\$ _____

Part 3: Sign Below

The person completing this proof of claim must sign and date it. FRBP 9011(b).

If you file this claim electronically, FRBP 5005(a)(3) authorizes courts to establish local rules specifying what a signature is.

A person who files a fraudulent claim could be fined up to \$500,000, imprisoned for up to 5 years, or both. 18 U.S.C. §§ 152, 157, and 3571.

Check the appropriate box:

☐ I am the creditor.

☒ I am the creditor's attorney or authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. Bankruptcy Rule 3004.

☐ I am a guarantor, surety, endorser, or other codebtor. Bankruptcy Rule 3005.

I understand that an authorized signature on this *Proof of Claim* serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

I have examined the information in this *Proof of Claim* and have reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on date

09/27/2025
MM / DD / YYYY

Signature

Print the name of the person who is completing and signing this claim:

Name

Rebecca McIntyre

First name

Middle name

Last name

Title

Deputy General Counsel

Company

Ameresco, Inc.

Identify the corporate servicer as the company if the authorized agent is a servicer.

Address

111 Speen Street, Suite 410

Number

Street

Framingham

City

MA

State

01701

ZIP Code

USA

Country

Contact phone

(508) 661-2241

Email

rmcIntyre@ameresco.com

ADDENDUM TO PROOF OF CLAIM

Ameresco, Inc. (“Ameresco”) submits this Addendum to its proof of claim (inclusive of this Addendum, the “Proof of Claim”) against Powin, LLC (the “Debtor”). As set forth herein, the Debtor owes Ameresco in an amount not less than \$10,173,942.13.

BACKGROUND

1. On June 9, 2025, Powin Project LLC, filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et. seq.* (the “Bankruptcy Code”). Thereafter, on June 10, 2025 (the “Petition Date”), the Debtor and certain of its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Certain other affiliates also filed voluntary petitions for relief on June 22, 2025.

2. Ameresco is a leading cleantech integrator and renewable energy asset developer, owner and operator. Its comprehensive portfolio includes energy efficiency, infrastructure upgrades, asset sustainability and renewable energy solutions delivered to clients throughout North America and Europe. Ameresco has successfully completed energy saving, environmentally responsible projects with federal, state and local governments, K12 school districts, college campuses, healthcare institutions, airports, housing authorities, and commercial and industrial customers.

A. The Ameresco Contracts

i. The Long-Term Service Agreement

3. In early 2021, the Debtor and STEM, INC. executed that certain *Long Term Services Agreement*, dated February 28, 2021 (the “LTSA”), under which STEM, INC developed a solar and storage project, and the Debtor provided certain services and products in connection therewith. Thereafter, STEM, INC. assigned its rights and interest in the LTSA to Ameresco

pursuant to that certain *Notice of Assignment*, dated March 30, 2022.¹ Following the assignment, Ameresco and the Debtor performed under the LTSA.

4. Ameresco hereby asserts a general unliquidated claim against the Debtor for any amounts or obligations owed by the Debtor under the LTSA. Ameresco is reconciling its records and reserves all rights to supplement or amend this Proof of Claim as necessary to reflect amounts owed by the Debtor under the LTSA.

ii. *Energy Supply Agreement*

5. In 2022, Ameresco began developing a solar energy storage project in Osceola County, Florida. In connection with that project, the Debtor and Ameresco entered into that certain *Energy Supply Agreement*, effective as of November 18, 2022 (along with all amendments and change orders, the “2022 Energy Agreement”),² under which Ameresco would purchase from the Debtor an energy storage system for the Florida project. Ameresco’s payments to the Debtor under the 2022 Energy Agreement were to be made in accordance with a milestone payment schedule.

6. Ameresco hereby asserts a general unliquidated claim against the Debtor on account of the Debtor’s warranty and indemnity obligations under the 2022 Energy Agreement. Ameresco reserves all rights of setoff and recoupment with respect to the 2022 Energy Agreement.

iii. *The Master Services Agreement*

7. The Debtor and Ameresco are also party to that certain *Master Agreement—Approved Service Provider*, dated as of September 2, 2022 (the “MSA”), under which Ameresco

¹ The LTSA and Notice of Assignment are not attached to this Proof of Claim to protect their confidentiality. As a party, the Debtor should have a copy of them, but in all events a copy will be provided upon request.

² The 2022 Energy Agreement is not attached to this Proof of Claim as it is voluminous. As a party, the Debtor should have a copy of it, but in all events a copy will be provided upon request.

provided certain mechanical, electrical and/or HVAC services to certain of the Debtor's facilities. The Debtor periodically issued purchase orders to Ameresco, specifying the services needed for a particular facility or site, and Ameresco would subsequently submit an invoice to the Debtor for completing such services in accordance with the MSA. Prior to the Petition Date, Ameresco completed certain services for the Debtor under the MSA totaling \$173,942.13, for which the Debtor failed to remit payment.

8. Ameresco hereby asserts a general unsecured claim against the Debtor in the amount of \$173,942.13, which reflects the outstanding prepetition amounts owed by the Debtor under the MSA.³ A copy of the MSA is attached hereto as **Exhibit A**. Ameresco further asserts a general unliquidated claim on account of any liability or loss by Ameresco for which the Debtor is obligated to indemnify Ameresco under the MSA.

iv. *The Framework Term Agreement*

9. In addition to the foregoing agreements, Ameresco and the Debtor had been in discussions in 2022 to establish a comprehensive, long-term relationship. These discussions culminated in that certain *Framework Agreement Term Sheet*, dated April 29, 2022 (the "Framework Term Sheet"),⁴ under which Ameresco and the Debtor anticipated entering into an agreement where Ameresco would purchase from the Debtor over several years certain battery energy storage equipment. The Framework Term Sheet included numerous terms that would govern the parties' relationship, including the pricing for the sale of equipment under any definitive

³ The invoices or purchase orders reflecting the outstanding amount owed by the Debtor under the MSA are not attached to this claim. Critically, the Debtor acknowledged that \$173,942.13 was due and owing by the Debtor under the MSA in its *Notice of Potentially Assumed Executory Contracts and Unexpired Leases* [D.I. 446]. Copies will also be provided upon request.

⁴ The Framework Term Sheet is not attached to this Proof of Claim to protect its confidentiality. As a party to the Framework Term Sheet, the Debtor should have a copy of the Framework Term Sheet, but in all events a copy will be provided upon request.

agreement. To guarantee the delivery times outlined in the Framework Term Sheet, Ameresco agreed to and did provide a deposit of \$10,000,000.00 (the “Framework Deposit”), which was to be used to offset any amounts owed pursuant to any supply agreements executed pursuant to the contemplated framework agreement.

10. The Debtor failed to perform its obligations under the Framework Term Sheet, including without limitation failing to develop the required pricing tool and standard configurations for supply agreements for certain equipment. Due to the Debtor’s failure to comply with the Framework Term Sheet, the parties never executed a definitive framework agreement. Ameresco demanded return of the Framework Deposit, which was required to be returned under the Framework Term Sheet, but the Debtor failed to do so.

11. To enforce its right to a return of the Framework Deposit, Ameresco and its affiliate Kupon Solar, LLC commenced an action in the Superior Court of the State of Delaware against the Debtor on June 3, 2024, styled as *Ameresco, Inc. and Kupon Solar, LLC v. Powin, LLC*, C.A. No. N24C-04-012 VLM (the “Delaware Action”). The Delaware Action was stayed as of the Petition Date in accordance with 11 U.S.C. § 362. The public complaint filed by Ameresco and Kupon Solar, LLC in the Delaware Action is attached hereto as **Exhibit B** (without exhibits) and incorporated herein by reference.

12. Ameresco hereby asserts an unliquidated claim against the Debtor in the amount of \$10,000,000.00 on account of the Framework Deposit, which the Debtor was required to return following its failure to perform under the Framework Term Sheet.

PROOF OF CLAIM

13. As set forth herein, Ameresco asserts a general unsecured claim against the Debtor in the amount of not less than \$10,173,942.13, consisting of the following amounts:

- a. A general unsecured unliquidated claim against the Debtor for any amounts or obligations owed by the Debtor under the LTSA;
- b. A general unsecured unliquidated claim on account of the Debtor's warranty and indemnity obligations under the 2022 Energy Agreement;
- c. A general unsecured claim in the amount of \$173,942.13, which reflects the amounts owed by the Debtor under the MSA;
- d. A general unsecured unliquidated claim on account of any liability or loss by Ameresco for which the Debtor is obligated to indemnify Ameresco under the MSA; and
- e. A general unsecured claim in the amount of \$10,000,000.00 on account of the Framework Deposit.

14. Ameresco further reserves all rights of setoff and recoupment under any agreement described herein or otherwise.

RESERVATION OF RIGHTS

15. Ameresco reserves all rights, including, but not limited to, the right to (i) amend, supplement or otherwise revise this Proof of Claim or Addendum at any time in any respect, (ii) file additional proofs of claim, including any administrative expense claims, (iii) seek to recover attorneys' fees in accordance with applicable law, and (iv) exercise setoff and recoupment rights. Ameresco does not waive any claims against the Debtor (or any Debtor affiliates) that may arise post-petition, post-confirmation or after any conversion of this case to a case under any other chapter of the Bankruptcy Code.

16. The filing of the Proof of Claim is not intended and should not be construed as an election of remedies, waiver of any past, present or future defaults or events of default, or a waiver or limitation of any rights, remedies, claims, or interests of Ameresco.

NO CONSENT TO JURISDICTION

17. By filing this Proof of Claim, Ameresco does not submit to the jurisdiction of this Court for any purpose other than with respect to the claims asserted in this Proof of Claim, and Ameresco does not waive, and specifically preserves, all of its procedural and substantive defenses (including, without limitation, any rights of setoff and recoupment) to any claim that may be asserted against Ameresco by the Debtor, debtor affiliates, or any other party.

Exhibit A



MASTER AGREEMENT—APPROVED SERVICE PROVIDER

This **Master Agreement—Approved Service Provider** (this "**Agreement**"), dated as of September 2, 2022 (the "**Effective Date**"), is by and between **Powin, LLC**, a Delaware limited liability company ("**Powin**"), and Ameresco, Inc., a [Delaware Corporation] ("**Contractor**"). Powin and Contractor are sometimes referred to in this Agreement individually as a "**Party**" and collectively as the "**Parties**." Capitalized terms not otherwise defined have the meanings given in Section 24 of this Agreement.

Background

- A. Powin is a leading producer of safe and reliable high-capacity, modular battery energy storage systems that it sells to customers and installs at customer facilities and sites. As with any power equipment, Powin Equipment requires maintenance on a scheduled basis and from time to time on an unscheduled non-emergency or emergency basis. Powin's customers either contract with Powin to provide required maintenance services or contract directly with third party service providers approved by Powin ("**ASPs**") to provide that maintenance.
- B. Contractor provides certain mechanical, electrical, and/or HVAC services and has the capability and resources to service Powin Equipment at designated Facilities and Sites. Contractor is willing to obtain the necessary training and certification required by Powin to be a designated ASP.
- C. Powin and Contractor wish to establish the terms under which Powin may engage Contractor to provide Scheduled, Unscheduled Non-Emergency, and Emergency Services for Powin Equipment, as further described in this Agreement and detailed in purchase orders issued from time to time under this Agreement ("**POs**").

Terms

The Parties therefore agree as follows:

1. Engagement of Contractor. During the Term of this Agreement, Powin will engage Contractor, and Contractor accepts such engagement, as an ASP to provide Scheduled Maintenance and Unscheduled Maintenance on Powin Equipment at designated Facilities and Sites. Powin shall engage Contractor for selected Services related to all Facilities and Sites owned by Contractor or its Affiliates. Services will be provided in accordance with Section 2 and the other terms and conditions of this Agreement. This Agreement applies to all Services provided by Contractor to Powin.

2. Services Generally. Contractor shall perform the Services described in Exhibit A.1, in accordance with the terms and conditions provided in Exhibit A.1 for the Term described in



Exhibit A.2. Upon completion of Services, Contractor will issue to Powin an Invoice and service report as described in Section 3(c). Throughout the Term, Powin shall ensure that Contractor and its authorized agents, employees or subcontractors of any tier, and suppliers (i) have sufficient and adequate access to the Powin Equipment and to any of the electrical panels or electrical interconnection infrastructure as may be necessary to provide all Services, and (ii) have sufficient and adequate rights of ingress and egress to and from the Site and Powin Equipment for Contractor to perform the Services. Powin shall be responsible for the security of the Powin Equipment.

3. Pricing and Deliverables.

(a) **Pricing.** Contractor will provide Services at the rates listed in Exhibit A.1

(b) **Issued Purchase Orders.** Powin will issue to Contractor one or more POs in an amount to be determined by Powin. Powin will specify in each PO that it issues to Contractor the Facilities and/or Sites to receive Services, Powin Equipment requiring Services, and amounts allocated for Services Contractor will be requested to perform from time to time under this Agreement. Contractor will not perform any Services under this Agreement without first being issued a PO by Powin. If Contractor expends the full amount authorized under one or more Services listed in the PO, Contractor will promptly notify Powin and request an amendment to the PO or issuance of a new PO to authorize future Services, and will not provide additional Scheduled Maintenance except as authorized under the amended or new PO. Contractor may provide and complete at Powin's request Unscheduled Non-Emergency or Emergency Maintenance in excess of remaining authorization under issued POs, provided that promptly after completion of the Services Contractor notifies Powin of the overage and requests an amended or new PO covering the excess.

(c) **Service Reports and Invoices.** Contractor must submit an invoice, and enter their work hours to Powin's secure web-based service database, within five calendar days of Services being completed. If Contractor fails to submit either document, Powin may withhold payment for the Services performed, without liability or interest, until both documents are submitted. The invoice must refer to the applicable PO, state the amount being charged to Powin for Services, list separate line items for each Service performed and the category of maintenance performed (i.e., Scheduled, Unscheduled Non-Emergency, or Emergency Maintenance), and contain such additional detail as may be reasonably requested in writing by Powin by notice to Contractor. A service report must also be submitted to Powin via email and describe at a minimum the follow: (i) the Services performed, (ii) the category of maintenance, (iii) the type and amount of parts used, (iv) the amount of labor (including timesheets), (v) the Personnel who performed the Services, (vi) the Facility and/or Site where the Services were performed, (vii) any approval or work authorization provided by Powin, (viii) a description of any incidents or "near misses" described in Exhibit A.1; and (ix) any other information required to be included by the terms and conditions of the PO.

4. Payment Terms. Powin shall pay Contractor for Services performed under this Agreement in accordance with the terms and conditions provided in this Section 4 (the "**Payment**



Terms”). In the event a conflict exists between the Payment Terms and a term or condition in a PO, the PO will control. Any additional, consistent payment terms in a PO will supplement these Payment Terms.

(a) Timing of Payment. Powin will pay Contractor within 45 days after Services are completed under this Agreement (the “**Payment Period**”). The Payment Period will begin on the date that Powin receives both the invoice and service report required under Section 3(c). Amounts unpaid by the end of the Payment Period will bear interest at a rate of two percent above the prime rate as reported by the Federal Reserve Bank of New York on the date the payment was due or the maximum rate permitted by Applicable Law, whichever is lower.

(b) Application of Payment. Payments made by Powin will be applied as designated by Powin. If Powin does not designate how a payment is to be applied, payment will be applied first to any interest owed to Contractor and then to the oldest unpaid invoice(s).

(c) Amount Invoiced. Powin reserves the right to dispute any amount invoiced by Contractor and to request additional supporting documentation from Contractor to evidence any disputed amount. For invoices disputed in part, Powin will promptly pay the amount not in dispute, and any disputed amount which is ultimately determined to have been payable will be promptly paid when determined or by the end of the Payment Period if not yet expired. The Payment Period will be suspended while an amount is in dispute and will resume when the dispute is resolved.

(d) United States Currency. All amounts invoiced and payable under this Agreement shall be stated and paid in United States dollars.

(e) Taxes; Other Payments. The fees and any other amounts payable under this Agreement do not include any applicable taxes, which are the sole responsibility of and will be borne by Contractor. Such taxes for which Contractor is responsible include federal, provincial, state, county or local, sales, use, value added, or other similar taxes, whether characterized as such and whether United States or foreign. Contractor may, however, separately itemize and bill Powin for sales, use, value added, and similar taxes, which Powin will pay to the extent it is able to collect such taxes from the applicable customer.

5. Expenses; Mobilization.

(a) Generally. Powin is engaging Contractor with the understanding that Contractor currently has or can readily assemble and deploy all resources and skills needed to provide the Services. Contractor is responsible for establishing and maintaining its ability to provide the Services, at its expense. Contractor will not charge Powin for time or costs incurred by Contractor in procuring equipment, personnel, training, or certifications needed to provide the Services, except as expressly provided in this Agreement or the applicable PO.

(b) Expenses. Except as provided otherwise in this Agreement or the applicable PO, Contractor will be responsible for payment of all expenses Contractor incurs in the course of



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providing Services. Without limitation, Contractor is responsible for costs of training and certification required under Section 7, equipment required under Section 8, and Personnel as provided in Section 9.

(c) Nonbillable Time. Contractor will not charge Powin for time spent on procurement, training, or mobilization, or other activities that do not constitute servicing Powin Equipment, except as may be expressly provided under the applicable PO. Contractor will not be entitled to any compensation or benefits other than the compensation specified in Section 3(a).

6. Non-Binding Forecast. Powin may periodically give Contractor forecasts which include projected service requests and timeframes when Powin Equipment will be offline for Scheduled Maintenance. Forecasts are for planning purposes only and are non-binding.

7. Powin Programs.

(a) Certification Training. At contractor expense and at the reduced training rate, Contractor Personnel must successfully complete the Powin training and certification program if determined there is a greater than 6 months gap of time since the specific Contractor Personnel last logged any time in the Powin Field Service database. Contractor Personnel must successfully complete the certification training program then being used by Powin to train, educate, or certify third parties to maintain and service Powin Equipment ("**Certification Training**"). Powin may provide Certification Training either virtually, in person, or in a combination of virtual and in person formats. Contractor may bill Powin for on-the-job training hours related to Certification Training at the reduced training rate listed in Exhibit A.1. Contractor Personnel will be required to enter their hours in the Powin Field Service database as this will be used to track certification hours compliance. Powin's training and certification requirements are attached as Exhibit H.

(b) Safety Program. While performing Services on Powin Equipment under this Agreement, Contractor will abide by all safety protocols used by Powin, including all environmental, health, and safety ("**EHS**") protocols. Contractor will report to Powin any OSHA hours and incident reports that Contractor files with OSHA in relation to any Facility, Site, or Powin Equipment.

(c) Quality Program. To ensure ongoing quality and efficiency of Services provided under this Agreement, Powin and Contractor will establish the following practices, which collectively will be referred to as the "**Quality Assurance Program**":

(i) Quarterly Management Review. Powin and Contractor will remotely meet on a quarterly basis to review Contractor's workload and any issues Contractor has discovered or anticipates with Powin Equipment, Facilities, or Sites. Quarterly meetings will be held at dates and times established by Powin and reasonably acceptable to Contractor. Contractor will prepare and present at such meetings any relevant metrics and data that Powin requests in advance.



(ii) Powin Work Procedures. Contractor will abide by any applicable Powin work procedures provided by Powin when performing Services at each Facility or Site and when performing Services on Powin Equipment.

(iii) Tooling and Vehicle Cost Plan. To ensure that Contractor's vehicles and equipment are properly maintained in order to timely meet any requests by Powin for Scheduled Maintenance or Unscheduled Maintenance, Contractor will submit to Powin a written plan for maintaining the vehicles and equipment that are needed to reach each Facility or Site and perform work on Powin Equipment. Powin will have the right to request reasonable revisions to each submitted plan, but will not unreasonably withhold approval of the plan. Powin may request that the plan be updated from time to time, but no more than once per year.

(iv) Calibration. If Contractor uses voltage meters or similar equipment in performance of Services, Contractor will establish and provide Powin with documentation of a calibration program within 30 days of the Effective Date. Such calibration program will require that Contractor calibrate any such equipment in accordance with Prudent Industry Practices and any specific requirements provided by Powin. Powin may request that the program and the documentation provided to Powin be updated from time to time, but no more than once per year.

8. Equipment and Special Tooling. Powin will not be obligated to reimburse Contractor for the cost of any equipment or tooling unless specifically provided for in this Agreement. Any equipment or tools furnished by Powin to Contractor will remain the property of Powin. All such tools and equipment will be used by Contractor exclusively for performance of Services on Powin Equipment under this Agreement. Contractor will maintain its tools and equipment in first-class condition and will make replacements when necessary. Contractor will be responsible for all loss or damage to such tools and equipment while in Contractor's possession. Upon completion or earlier termination of this Agreement, tools and equipment provided to Contractor by Powin will be returned to Powin or disposed at Powin's direction.

9. Personnel.

(a) Control of Personnel. Contractor will have complete charge and responsibility for its employees and Subcontractors (collectively "**Personnel**"). Powin reserves the right to instruct Contractor to immediately remove any of its Personnel who are in violation of this Agreement or whose services are otherwise unsatisfactory. If Powin requests that Contractor remove one or more of its Personnel, then Contractor will use reasonable efforts to replace such Personnel with one or more appropriately skilled persons, provided such request does not violate Applicable Law. Removal of Contractor Personnel will not affect Contractor's obligation to provide Services under this Agreement.

(b) Certification Training. No Contractor Personnel may perform Services under this Agreement unless such Personnel have successfully completed Powin's Certification Training described in Section 7(a), and have a currently effective certification.



(c) Employment Qualifications and Records. All Contractor Personnel are to be either United States citizens, lawful permanent residents of the United States, or otherwise authorized to work in the United States. All of Contractor's (i) employment practices, including without limitation those relating to the hiring, payment, retention, and discharge of workers, and (ii) employment records, including without limitation its Employment Eligibility Verification Forms (Form I-9) and payment records and all related recordkeeping and retention practices, must be in compliance with Applicable Laws.

10. Audit.

(a) Books and Records. Contractor will maintain accurate books and records of Services performed under this Agreement in sufficient detail in order to confirm Contractor's compliance with the terms of this Agreement ("**Service Records**"). Contractor will retain the Service Records for at least three years following the end of the Calendar Year to which the Service Records pertain.

(b) Audit. Within 20 Business Days after Powin's written request, Contractor will permit an independent certified public accountant selected by Powin and reasonably acceptable to Contractor to conduct an inspection of Contractor's Service Records for the purpose of verifying Contractor's compliance with this Agreement. The accountant will be permitted, during normal business hours, to inspect Contractor's Service Records and to meet with and interview Personnel familiar with Contractor's practices. If the accountant determines that any overcharge or other event entitling Powin to a refund has occurred, then: (i) Contractor will pay Powin such overcharge or refund promptly, together with interest at the rate of eight percent per annum, or if lower, the highest rate permitted by law, from the date of the overcharge or other event; (ii) Contractor will bear the cost of the accountant's inspection; and (iii) Powin may have additional inspections conducted semiannually during the next two years. Otherwise, Powin will bear the cost of each inspection and may conduct inspections no more often than once during a Calendar Year.

(c) Effect of Delay. If Contractor fails to make Service Records and appropriate Personnel available for an inspection, then Powin may upon 30 days written notice withhold payment from Contractor for Services performed, without interest or liability, and/or may terminate this Agreement immediately upon notice to Contractor. Powin will release any withheld payments upon Contractor's compliance with Section 10(a).

11. Representations and Warranties.

(a) By Contractor. Contractor makes the following representations and warranties to Powin:

(i) Service Warranty. All Services and all parts, if provided by Contractor, used in Contractor's performance of Services with respect to specific Powin Equipment will be free from defects in material and workmanship for a period of 365 days from the date of last Service by Contractor for that item of Powin Equipment ("**Service Warranty**").



(ii) Good and Marketable Title. Contractor has and will pass to Powin upon completion of Services good and marketable title to products used for maintenance on Powin Equipment in the course of performing the Services, free and clear of all liens, claims, options, charges, security interests, encumbrances and restrictions of any kind.

(iii) Bona Fide Employee. Each individual providing Services under this Agreement is a bona fide employee or Subcontractor of Contractor. Each such employee or Subcontractor is in compliance with all federal, state, and local laws relating to employment of such person, including without limitation all laws relating to immigration, withholding and payment of taxes, and provision of workers' compensation or industrial insurance. Contractor has not received any written notices of violation or potential violation of any such laws and there are no known conditions or circumstances which might lead to Contractor receiving any such notice of violation or potential violation.

(iv) Skilled Personnel. All Contractor Personnel providing Services have skills and experience adequate to timely perform the Services they provide under this Agreement.

(v) Third Party Trade Rights. Services provided by Contractor and products it uses or supplies under this Agreement do not and will not violate or infringe on the trade rights of any third party.

(b) Survival. All warranties provided under this Agreement will survive inspection, testing, acceptance, and payment.

(c) Third Party Warranties. Contractor extends to Powin all warranties made by third parties that supply Contractor with components and/or parts used by Contractor in performance of Services. Contractor will execute any and all assignments to Powin of third party warranties or make the benefit of the warranties available to Powin if such warranties are not assignable.

(d) No Implied Warranties. THE EXPRESS WARRANTIES BY CONTRACTOR IN THIS AGREEMENT ARE IN LIEU OF ANY OTHER WARRANTIES BY CONTRACTOR, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

12. Remedies.

(a) Breach of Service Warranty. In case of any breach of the Service Warranty, Contractor will, at Powin's option, promptly re-perform any defective Services and replace any defective product, or provide Powin with a full refund for the defective Services or product. Contractor will bear all costs associated with re-performance or replacement. Contractor will re-perform the defective Services and replace any defective product at times designated by Powin.

(b) Failure to Re-Perform. If Powin does not initially elect a refund and Contractor fails to re-perform defective the Services or replace a defective product, or if Contractor's attempted re-performance of Services or product replacement fails to remedy the defect



identified by Powin, then Contractor will provide Powin with a full refund for the defective Services or product and Powin may elect to contract with a different ASP to perform the Services.

(c) Exclusive Remedy; Limited Liability. With respect to any breach of the Service Warranty, POWIN'S SOLE AND EXCLUSIVE REMEDY, AND THE LIMIT OF CONTRACTOR'S LIABILITY, SHALL BE A REFUND OR RE-PERFORMANCE AND REPLACEMENT, AS STATED IN THIS SECTION 12. IN NO EVENT SHALL CONTRACTOR BE HELD LIABLE FOR PUNITIVE, EXEMPLARY, SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES, HOWEVER CAUSED, EXCEPT AS REQUIRED TO BE PAID UNDER SECTION 13.

13. Indemnification.

(a) Indemnification by Contractor. Contractor shall protect, defend, indemnify, and hold harmless Powin, its affiliates, subsidiaries, co-owners, Subcontractors, successors and assigns and its and their directors, officers, employees, agents and insurers (the "**Powin Group**") against any loss, liability or damage incident to claims, demands or causes of action of every kind and character whatsoever related to or arising in connection with bodily injury, illness, death, damage to or loss of property of Contractor, Contractor's employees, Contractor's Subcontractors or their employees, and Contractor's invitees arising out of or resulting from the performance of (or the failure to perform under) this Agreement. This, and all other, indemnity provisions contained herein shall have no application in the event that the event giving rise to any claim, demand, cause of action, or liability arises from the sole or gross negligence of Powin.

(b) Indemnification by Powin. Powin shall protect, defend, indemnify, and hold harmless Contractor, its affiliates, subsidiaries, co-owners, Subcontractors, successors and assigns and its and their directors, officers, employees, agents and insurers (the "**Contractor Group**") against any loss, liability or damage incident to claims, demands or causes of action of every kind and character whatsoever related to or arising in connection with bodily injury, illness, death, damage to or loss of property of Powin, Powin's employees, Powin's Subcontractors or their employees, and Powin's invitees arising out of or resulting from the performance of (or the failure to perform under) this Agreement. This, and all other, indemnity provisions contained herein shall have no application in the event that the event giving rise to any claim, demand, cause of action, or liability arises from the sole or gross negligence of Contractor.

(c) Third Parties. To the fullest extent enforceable under applicable law, Contractor shall protect, defend, indemnify, and hold harmless the Powin Group against any loss, liability or damage suffered by a third party arising out of or resulting from the negligence (whether such negligence be active, passive, sole, joint, concurrent, comparative, contributing or gross), strict liability or willful or wanton misconduct of any of the Contractor Group, or Contractor's invitees.

(d) Process for Indemnification. The Party seeking indemnification under this Agreement ("**Indemnified Party**") will: (i) provide the indemnifying Party reasonable notice of each Loss for which it seeks indemnification; and (ii) at the indemnifying Party's expense, reasonably cooperate in the defense of each Claim. If requested by the Indemnified Party, the indemnifying Party shall use counsel reasonably satisfactory to the Indemnified Party to defend



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each Claim. The Indemnified Party may also participate in the defense using its own counsel at its own expense. If at any time the Indemnified Party reasonably determines that any Claim might result in a conflict of interest or otherwise adversely affect the Indemnified Party, then without limiting indemnifying Party's obligations under this section, Indemnified Party may take control of the defense of the Claim. The indemnifying Party will not settle any Claim without Indemnified Party's prior written consent, which may not be unreasonably withheld if the settlement requires only the payment of monetary damages that will be paid by the indemnifying Party. The indemnifying Party will ensure that any settlement of any Claim by the indemnifying Party is kept confidential to the extent permitted under Applicable Law. The indemnifying Party's duty to defend upon request is independent of its duty to indemnify.

(e) Attorneys' Fees. Each obligation set forth in this Section 13 shall include reasonable attorneys' fees, court costs, costs of investigation and other legal costs and expenses of any nature whatsoever associated with the loss, liability or damage against which the Indemnified Party has been indemnified, and any and all costs and expenses incurred in the enforcement of the indemnity.

14. Liquidated Damages. Powin and Contractor recognize that time is of the essence in performance of the Services provided under this Agreement and that Powin will suffer financial loss if Contractor fails to fully perform the Services or respond to Powin's service requests within the response times provided in Exhibit D. The Parties also recognize the delays, expense, and difficulties involved in proving at a legal or arbitration hearing, the actual loss suffered by Powin if the Services are not completed or Contractor fails meet the required response time. Accordingly, instead of requiring such proof, Powin and Contractor agree that as liquidated damages for Contractor's non-performance, failure to complete the Services, or failure to timely respond to Powin (but not as a penalty) Contractor will pay Powin the applicable liquidated damage amount set forth in Exhibit D for each day that expires after the Services should have been completed, or the expiration of the response time, until such Services are completed. If the liquidated damages set forth in this Agreement are determined to be invalid or unenforceable for any reason, Powin reserves the right to seek and recover actual, consequential, and special damages which arise or are the result of Contractor's failure to fully perform the Services or respond to Powin within the response time provided in Exhibit D.

15. Restrictive Covenants.

(a) Non-Solicitation of Powin and Contractor's Employees. During the Term of this Agreement and for a period of two years after the completion or earlier termination of this Agreement, Contractor and Powin (Parties) agree and covenants the Parties will not, directly or indirectly, in any manner (whether as an owner, officer, director, partner, manager, member, employee, independent contractor, consultant or otherwise) solicit the other Party's employee for employment as an employee of such Party, an Affiliate of such Party, or as a consultant for Party or one of its Affiliates. Party also agrees and covenants to not recommend to third parties that they solicit or engage a Party's employee for employment as an employee, as a consultant, or otherwise; , except (i) with the prior written consent of the other Party, (ii) in so far that such



employee responds to a bona fide public job advertisement made by such Party (whether posted on a public site on the internet or in a newspaper, magazine or other publication of general circulation), or (iii) if such employee initiates contact regarding employment with such Party on his or her own volition.

(b) Non-Solicitation of Customers. During the Term of this Agreement and for a period of two years after the completion or earlier termination of this Agreement, Contractor will not, directly or indirectly, (i) contact, solicit, approach, seek business from or with, or accept an offer from, a Powin customer (other than a Contractor Affiliate) to provide services for Powin Equipment Agreement directly to such customer, unless Powin consents, in writing, which consent Powin will not unreasonably withhold, to Contractor's providing services to the customer and Contractor continues to successfully complete Certification Training on a bi-annual basis as described in Section 7(a); or (ii) induce or attempt to induce any customer or other business relation of Powin to cease doing business with or renegotiate their relationships with Powin, or in any way adversely interfere with the relationship between any such customer or other business counterparty and Powin.

16. Confidentiality.

(a) Contractor will keep confidential any nonpublic information about Powin's existing or proposed business, products, or services ("**Confidential Information**"). Confidential Information may be written, oral, observed while at Sites or Facilities, embodied in Powin Equipment, or in other forms and may or may not be patentable. All information in Powin's possession, including information from third parties, is presumed to be Confidential Information unless Powin states otherwise in writing.

(b) Contractor will protect Confidential Information from disclosure by using reasonable care and at least the same care Contractor uses to protect its own confidential information. Contractor will notify Powin immediately of any disclosure of Confidential Information not permitted by this Agreement, and will cooperate fully with Powin to recover it and limit its dissemination.

(c) Contractor may disclose Confidential Information to its Personnel who need to know Confidential Information in order to provide Services to Powin and who are required by Contractor to comply with the restrictions imposed on Contractor under this Section 16. Contractor is responsible for any breach of this agreement by its Personnel.

(d) Contractor will not use Confidential Information, except to provide Services to Powin.

(e) At Powin's request, Contractor will return all materials furnished by Powin that contain Confidential Information and will destroy or deliver to Powin any other materials containing Confidential Information, including materials prepared by Contractor. Upon request, Contractor will state in writing under oath whether it has complied with this Section 16(e).



(f) If Contractor makes or proposes any improvements or other modifications to Confidential Information, either alone or jointly with others, Powin will own all rights in the improvements or other modifications, and Contractor will execute any documents Powin requests to confirm that the improvements or other modifications belong to Powin. Contractor will promptly disclose any such improvements or modifications to Powin, and they will be considered Confidential Information of Powin.

(g) The obligations of this Section 16 will survive the end of the Term and will remain in effect as long as Contractor knows or possesses Confidential Information, but will not apply to information: (a) available to the public through no fault of Contractor; or (b) received in good faith by Contractor without restriction on use or disclosure from others having no obligation of confidentiality to Powin; or (c) independently developed by Contractor, as evidenced by Contractor's written records.

(h) The fact that portions of Confidential Information may be publicly available or otherwise not subject to this Section 16 will not affect Contractor's obligations with respect to the remaining portion or with respect to the particular formulation or compilation disclosed by Powin.

(i) If a court or governmental agency requires Contractor to disclose Confidential Information, Contractor will promptly notify Powin and allow Powin a reasonable time to oppose disclosure. If disclosure is nonetheless required, Contractor will use its best efforts to limit the dissemination of Confidential Information that is disclosed.

(j) Contractor will not provide Powin with any confidential information belonging to Contractor or any other party unless Powin first agrees in writing to receive the information and acknowledges its confidential nature.

17. Compliance with Law. Contractor and its Affiliates will at all times comply with any Applicable Laws and regulations. In the United States, these laws may include without limitation the Fair Labor Standards Act, and Department of Labor, Department of Commerce, Environmental Protection Agency, and Department of Transportation regulations. Contractor will comply with Executive Order 11246, implementing Equal Employment Opportunity regulations, and the Immigration Act of 1987, unless exempted or inapplicable.

18. Hazardous Materials.

(a) Appropriate Use. If Contractor's performance of Services includes the use of Hazardous Materials, Contractor will ensure that its Personnel understand the nature and hazards associated with such Hazardous Materials, including their proper handling, transportation, use, and disposition. Within 30 days of executing this Agreement, Contractor shall deliver to Powin a Safety Data Sheet ("**SDS**") for any Hazardous Materials that Contractor knows it will or could bring to any Site or Facility in its performance of Services. If at any time after Contractor delivers to Powin an SDS, Contractor becomes aware of one or more Hazardous Materials that it will or could bring to any Site or Facility in its performance of Services, Contractor



will notify Powin and deliver to Powin an SDS for the additional Hazardous Material(s) prior to transporting them or using them at any Facility or Site. In addition to an SDS, Contractor will supply Powin with all other documentation necessary for compliance with Applicable Laws. Contractor may not use any Hazardous Materials at any Facility or Site without prior approval by Powin.

(b) Alternate Materials. When Contractor becomes aware of an alternative product that is less hazardous in terms of human and environmental endangerment than a product used in the performance of Services under this Agreement, Contractor will submit a written proposal for Powin's review suggesting the use of such alternate product.

(c) Ozone Depletion. Contractor certifies that parts and products used in performance of Services under this Agreement do not contain and are not manufactured with any ozone depleting substances as defined in any Applicable Law, except as disclosed to and approved in advance by Powin.

(d) Contractor shall have no liability for and Powin agrees to indemnify, defend and hold Contractor harmless against and from, any and all damages, losses, liabilities, claims, litigation, demands, proceedings, judgments, or suits of any kind or of any nature whatsoever (including reasonable legal, consultant, expert fees incurred in investigating, defending against, settlement or prosecuting any claim, litigation or proceeding) which may at any time be imposed upon, incurred by or asserted or awarded against Contractor or its employees or contractor arising out of or relating to the presence of any Hazardous Materials which are (i) present on the Site prior to or after the commencement of Contractor's work, or (ii) improperly handled or disposed of by Powin or parties under Powin's supervision (other than Contractor) or (iii) brought on to the Site or produced thereon by parties other than Contractor, its subcontractor or parties under Contractor's supervision.

19. Contractor Insurance. Within 30 days of the Effective Date and upon any renewal or extension of this Agreement thereafter, Contractor will deliver to Powin certificates of insurance evidencing the policies described in Exhibit E. The insurance policies referenced in Exhibit E will be endorsed to be primary and non-contributory to any other insurance Powin may procure. Contractor shall waive all rights of subrogation against Powin for any occurrence arising out of Services performed under this Agreement.

20. Termination and Default.

(a) Contractor Default. The following events will constitute a default by Contractor (each a "**Contractor Default**"):

- (i) Contractor fails to complete the request Services;
- (ii) Contractor fails to comply with the requirements of one or more of the Powin programs described in Section 7, including without limitation the Certification Training



program, safety program, and Quality Assurance Program and such failure remains uncured after 30 days written notice from Powin;

(iii) A representation or warranty made by Contractor is materially false or misleading as of the Effective Date of this Agreement, and Contractor fails to cure such false or misleading representation or warranty within 30 days of Powin providing Contractor notice of the false or misleading representation or warranty;

(iv) Contractor violates any restrictive covenant provided in Sections 15 or 16;

(v) Contractor becomes bankrupt or insolvent, goes into liquidation, files a petition seeking reorganization or similar relief, has a receiving or administration order made against it, makes an assignment for the benefit of its creditors, or has any involuntary petition or proceeding under bankruptcy or insolvency laws instated against Contractor that is not stayed, enjoined, or discharged within 90 days; or

(vi) Contractor fails to cure a material default in the performance of any of its obligations under this Agreement within 30 days after receipt of written notice from Powin.

(b) Powin Default. The following events will constitute a default by Powin (each a “**Powin Default**”):

(i) If Powin becomes bankrupt or insolvent, goes into liquidation, files a petition seeking reorganization or similar relief, has a receiving or administration order made against it, makes an assignment for the benefit of its creditors, or has any involuntary petition or proceeding under bankruptcy or insolvency laws instated against Contractor that is not stayed, enjoined or discharged within 90 days;

(ii) Powin fails to pay or cause to be paid any amount that is due and payable to Contractor pursuant to this Agreement with respect to which there does not exist a bona fide dispute and fails to cure such default within 30 days following receipt of written notice from Contractor; or

(iii) Powin fails to cure a material default in the performance of its obligations under this Agreement within 30 days after receipt of written notice from Contractor.

(c) Termination for Default. Upon the occurrence of a Powin Default or Contractor Default, the non-defaulting Party may, upon giving notice to the defaulting Party, terminate this Agreement without prejudice to any other right or remedy the non-defaulting Party may have under this Agreement or at law or in equity, and no such remedy will be exclusive of any other remedy.

21. Independent Contractor. Contractor's relationship with Powin will be that of an independent contractor. Contractor will be solely responsible for determining the means and methods for performing Services under this Agreement. Contractor's Personnel will not be considered employees of Powin. Contractor is solely responsible for compensating its Personnel



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and must maintain all necessary records regarding the employment and engagement of its Personnel. Powin will not withhold any amount that would normally be required to be withheld from an employee's pay. Contractor will be solely responsible for all payroll taxes and insurance premiums required under federal, state, or local law with respect to compensation of its Personnel. Contractor will comply with all reporting, payment, and withholding obligations arising from the payment of such compensation. Contractor's Personnel will not be entitled to participate in any employee benefits, of any nature, that Powin provides to its employees. Powin will not provide Contractor or its Personnel with any insurance coverage. Contractor will be responsible for furnishing all equipment and materials needed to perform the Services under this Agreement, unless this Agreement provides otherwise. Nothing in this Agreement will be construed to create a partnership, joint venture, or agency relationship between the Parties. Neither Contractor nor any of its Personnel are authorized to take any action on behalf of Powin, and will avoid any taking any action that could lead one or more third parties to believe otherwise.

22. Force Majeure. No liability will result from delay in performance or non-performance, in whole or in part, by either Party to the extent that such delay or non-performance is caused by an event of Force Majeure. "**Force Majeure**" means an event that is beyond the non-performing Party's reasonable control, including without limitation, acts of God, strikes, lock-outs or other industrial/labor disputes, war, riot, civil commotion, governmental acts or restrictions, quarantine, epidemic/pandemic, terrorist act, malicious damage, fire, flood, storm, or natural disaster. The COVID-19 pandemic is not to be considered an event of Force Majeure to the extent of its impact known as of the date of this Agreement. The Force Majeure Party will, within five days of the occurrence of the Force Majeure event, give written notice to the other Party stating the nature of the Force Majeure event, its anticipated duration and any action being taken to avoid or minimize its effect. Any suspension of performance will be of no greater scope and of no longer duration than is reasonably required and the Force Majeure Party will use best endeavors without being obligated to incur any material expenditure to remedy its inability to perform; provided, however, if the suspension of performance continues for 15 days after the date of the occurrence and such failure to perform would constitute a material breach of this Agreement in the absence of such event of Force Majeure, the Parties will meet and discuss in good faith any amendments to this Agreement to permit the other Party to exercise its rights under this Agreement. If the Parties are not able to agree on such amendments within seven days and if suspension of performance continues, such other Party may terminate this Agreement immediately by written notice to the Force Majeure Party, in which case neither Party will have any liability to the other except for those rights and liabilities that accrued prior to the date of termination.

23. Notices. Notices must be in writing and will be deemed given upon the earliest of: (i) actual receipt, (ii) the first business day after being sent by nationally recognized overnight courier for next business day delivery, (iii) five business days after being mailed, postage prepaid, by certified mail, return receipt requested, or (iv) except for notices of breach or termination ("**Legal Notices**"), when sent by e-mail, or the following business day if sent by e-mail after the close of the recipient's business day. Legal Notices may be given only in person or by the methods



specified in clauses (ii) or (iii). Notices are to be addressed to the Party's address for notices on the signature page, which that Party may change by notice given under this section.

24. Definitions.

(a) **"Affiliate"** means, with respect to any entity, another entity or a person which controls, is controlled by, or is under common control with the first entity. For purposes of this definition "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any entity, means the possession, directly or indirectly through one or more intermediaries, of any of the following with respect to another entity: (i) the legal or beneficial ownership of more than 50 percent of the economic interest in such entity, (ii) the power to elect more than 50 percent of the directors, managers, or other voting members of the governing body of such entity, (iii) more than 50 percent of the voting securities (or equivalent voting interests) in such entity, or (iv) the power to direct or cause the direction of the management and policies of such entity (by contract or otherwise).

(b) **"Applicable Laws"** means (i) all laws, statutes, orders, ordinances, codes, rules, decrees, injunctions, licenses, Permits, approvals, agreements and regulations of any Governmental Authority having or asserting jurisdiction over the matter in question which are applicable to or which affect the operation and maintenance of the Facility and or Site, the Parties, this Agreement or Contractor's provision of the Services, including the operation and maintenance of each Facility or Site, (ii) any condition, specified standards or objective criteria contained in any applicable Permit, approval, decision, determination or ruling of any Governmental Authority, or (iii) any other legislative, administrative or judicial action, final decree, judgment or order of any Governmental Authority; in each of the foregoing cases as in effect from time to time.

(c) **"Business Day"** means any day other than a Saturday, Sunday or any other day on which banking institutions in New York City or Portland, Oregon are not open for the transaction of normal banking business.

(d) **"Calendar Year"** means the period of time beginning on January 1 and ending December 31, except for the first year which will begin on the Effective Date and end on December 31.

(e) **"Consumables"** means those items that are installed, added to or otherwise used by, or on behalf of, Contractor in the process of performing the Services.

(f) **"Facility"** means, the facility or facilities described in Exhibit B.

(g) **"Governmental Authority"** means any federal, provincial, state, local, municipal, regional, territorial, aboriginal, or other government, governmental or public department, branch, ministry, or court, domestic or foreign, including any district, agency, commission, board, arbitration panel or authority exercising or entitled to exercise any administrative, executive, judicial, ministerial, prerogative, legislative, regulatory or taxing authority or power of any nature



as well as any quasi-governmental or private body exercising any regulatory, expropriation or taxing authority under or for the account of any of them, and any subdivision of any of them having or asserting jurisdiction over the performance of the Services, the Facility, the Site, operations, or otherwise over any Party.

(h) **"Hazardous Materials"** means any chemical, substance or material regulated or governed by any Permit or Applicable Law, or any substance, emission or material now or hereafter deemed by any Governmental Authority to be a "regulated substance," "hazardous material," "hazardous waste," "hazardous constituent," "hazardous substance," "toxic substance," "radioactive substance," or "pesticide."

(i) **"Permit"** means any waiver, exemption, variance, franchise, certification, approval, permit, registration, extension, filing, notification, certificate, exemption, authorization, license, consent, or similar order of or from any Governmental Authority having or asserting jurisdiction over the matter in question.

(j) **"Powin Equipment"** means all of the equipment, materials, apparatus, structures, supplies and other goods that will be serviced per the terms of this Agreement as described further in Exhibit A.

(k) **"Prudent Industry Practice"** means the practices, methods and acts (including without limitation the operating and safety practices generally followed by the electrical energy storage industry) engaged in or approved by a significant portion of the electrical energy storage industry in the United States that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with Applicable Laws, regulations, codes, standards, equipment manufacturer's written recommendations, reliability, safety, environmental protection, economy and expedition. "Prudent Industry Practice" does not necessarily mean the highest standard in industry practice, method, or standard of care, skill, safety and diligence in all cases, but is instead intended to encompass a range of acceptable practices, methods, and standards.

(l) **"Release"** means any releasing, spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, disposing, or dumping into soil, surface water, ground water, land surface, subsurface strata, ambient air, wildlife, plants or other natural resources.

(m) **"Scheduled Maintenance"** means, one or more of the Services described in Exhibit A.1 that Powin requests in accordance with the required notice in Exhibit D. Powin may, in its discretion, require that Scheduled Maintenance be performed on a regular time interval, such as on a quarterly, semi-annual, or annual basis.

(n) **"Services"** means, collectively, the services described in Exhibit A.1 and any Unscheduled Maintenance.



(o) **"Site"** means the site of the Facility as described on Exhibit B hereto.

(p) **"Spare Parts"** means all appliances, parts, instruments, appurtenances, accessories, furnishings and other equipment of whatever nature which may be from time to time installed in or attached to any Powin Equipment or any other portion of the Facility or held in inventory, other than Powin Equipment.

(q) **"Subcontractors"** means any subcontractor, of any tier, or supplier of materials, equipment or services to Contractor or any subcontractor, of any tier, of any Person engaged or employed by Powin or any Subcontractor in connection with the performance of the scope of this Agreement, including each agent, representative and employee of the foregoing.

(r) **"Term"** means the Base Term described in Exhibit A.2, including any Renewal Period, and the Extended Term.

(s) **"Unscheduled Emergency Maintenance"** means, Services requested by Powin in response to an event at a Facility, Site, or adjacent property that Powin determines require immediate preventative or remedial action because such event poses actual or imminent risk of serious personal injury or material physical or economic damage to the Facility, Site, or Powin Equipment if no action is taken.

(t) **"Unscheduled Maintenance"** means, Unscheduled Non-Emergency Maintenance and Unscheduled Emergency Maintenance.

(u) **"Unscheduled Non-Emergency Maintenance"** means, Services requested by Powin in response to an event at a Facility, Site, or adjacent property that Powin determines requires Services before the next Scheduled Maintenance (if any), but in Powin's determination, does not rise to the level of requiring Unscheduled Emergency Maintenance.

25. Miscellaneous.

(a) Assignment. This Agreement is personal to Contractor. Contractor may not assign or otherwise transfer its interest without the Powin's prior written approval. Notwithstanding anything herein to the contrary, Powin is permitted on onetime assignment of this Agreement without consent of Contractor consent to its successor entity, Powin, LLC a Delaware limited liability company. Upon assignment pursuant to the preceding clause, Powin will be released from any and all benefit, obligations, liabilities, and responsibilities under this Agreement.

(b) Attorney Fees; Governing Law; and Venue. In any litigation or arbitration relating to this Agreement, the prevailing Party will be entitled to recover all reasonable attorney fees and expenses, including fees on appeal or petition for review. For purposes of this Agreement, "prevailing Party" means the Party that prevails (whether affirmatively or by means of a successful defense) with respect to claims having the greatest value or importance as reasonably determined by the court. This Agreement will be governed by Delaware law without regard to contrary choice-of-law principles. Any claim relating to this Agreement will be brought only in



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state or federal courts in Delaware. Contractor waives any defense that venue in such courts is inconvenient or otherwise improper.

(c) Counterparts. This Agreement may be executed in counterparts, which together will constitute one agreement. Signed copies reproduced or transmitted by electronic or other reliable means will be effective as originals.

(d) Entire Agreement. This Agreement constitutes the entire agreement between the Parties with respect to its subject matter, and supersede all other prior agreements and understandings, both written and oral, between the Parties with respect to its subject matter.

(e) Further Assurances. Each Party will (i) execute and deliver such other documents and (ii) do and perform such other acts and things, as the other Party may reasonably request, to carry out the intent and accomplish the purposes of this Agreement.

(f) Governing Law. This Agreement will be governed by and construed in accordance with [Oregon] law.

(g) Section Headings. The section headings in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

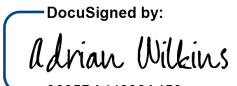
(h) Severability. If any provision of this Agreement is held invalid or unenforceable in any jurisdiction, then, to the fullest extent permitted by law, (i) it is to be deemed modified to the extent necessary to make it enforceable in that jurisdiction, (ii) the affected provision will remain in full force and effect in all other jurisdictions, and (iii) all other provisions will remain in full force and effect.

(i) Time of Essence. Time is of the essence with respect to all dates and time periods in this Agreement.

The Parties have executed this Agreement as of the Effective Date.



POWIN: POWIN, LLC

By: 
[Name] Adrian wilkins

Its: [Title] EVP Global Service

Address for Notices:
Powin, LLC
20550 SW 115th Avenue
Tualatin, Oregon 97062
Attn: Legal Department
Phone: 503-598-6659
Email: Notice@powin.com

CONTRACTOR: AMERESCO, INC

By: 
Brett D. Chapman

Its: Vice President

Address for Notices:
117 Flanders Road, Unit 100
Westborough, MA 01581
Attn: Brett Chapman
Phone: 508-598-3101
E-mail: bchapman@ameresco.com

*Checked box indicates that the term is applicable.
Terms with an unchecked box are inapplicable.*


EXHIBIT A

EQUIPMENT TO BE SERVICED

Powin Equipment to Be Serviced. Under the terms of the Agreement, Powin may request that Contractor perform the Services described in Exhibit A.1 on the pieces of equipment that are produced and installed by Powin at each Facility and/or Site as further described in the applicable PO ("Powin Equipment"):

EXHIBIT A.1**SERVICES**

1. Summary of Services and Cost. Contractor will provide the Services listed in the table below on a scheduled and unscheduled basis at the provided rate for the duration agreed to by the Parties under Exhibit A.2.

Service	Unit	Hourly Rate	Note
Technician	Hourly	\$110.00	Portal to Portal from Technicians home, regular time
Technician	Hourly	\$125.00	Portal to Portal, Overtime 
Training of Techs	First 40 Hours	\$0.00	All costs associated with first 40 hours of training are no charge to Powin
Training, Work of Techs – Local (tech can drive to site)	41 hours to 160 Hours, Portal to Portal	\$80.00	All work, whether training or other work
Training, Travel Rate	41 Hours to 160 Hours, From Hotel room to and from Site	\$95.00	
Monitoring & Reporting	Hourly	\$0.00	As required in contract

- \$200/day expense charge (\$75 per diem + \$125 hotel estimate) for situations where our technicians are spending overnights during the servicing of Powin sites. This would only apply to situations where we would be driving somewhere and staying overnight. In the unlikely event they need us to fly somewhere to service a site, flights costs would be on top of the \$200 daily expense charge.
- 2% Annual Escalator on all pricing in this MSA.
- Materials, Subcontractors, Equipment: Mark-up of 10%
- The above rates/pricing supersede all other rates/pricing detailed in this MSA unless specifically called out in the Purchase Order.

2. Service Requirements. Contractor shall abide by the following requirements:

(a) Prudent Industry Practices. Contractor and its Personnel will perform all Services indicated below in accordance with Prudent Industry Practices, and will exercise reasonable judgment in light of the facts known at the time of Service, acting at all times in accordance with (i) all Applicable Laws; (ii) any equipment manufacturers' recommendations; and (iii) all applicable reliability, safety and environmental protection standards. Without limitation, all Contractor Personnel providing Services must have and properly use Category 4 personal protective equipment ("PPE") as described in Exhibit C.

(b) Availability of Personnel. Contractor will make available necessary Personnel, stage and perform all Scheduled Maintenance and Unscheduled Maintenance when requested by Powin, in accordance with approved operational procedures and in accordance with the terms of the Agreement.

(c) Response Time. Contractor will respond to and remedy (in accordance with approval from Powin) all issues within the response times set forth in Exhibit D, in accordance with the nature and severity of the issue.

(d) Incidents and Near Misses. Powin is constantly looking to improve safety and performance procedures associated with maintenance of Powin Equipment. Contractor will report any incidents or "near misses" on the service report it submits to Powin after completion of Services. A "near miss" means an event that occurs during Contractor's performance of Services, not in accordance with Prudent Industry Practices, that results in a significant risk of harm to the Facility and/or Site, Contractor, its Personnel, Powin, Powin's Personnel, and/or Powin Equipment that Contractor was able to prevent by using preventative or curative actions.

(e) Manufacturer's Requirement. Contractor will conduct Services in accordance with the instructions and recommendations of the manufacturer's and equipment warranty requirements.

(f) Record Keeping. Contractor will prepare and keep records for inspections, maintenance, replacement parts, diagnoses, and other work; all records are to be supplied to Powin and submitted to Powin's secure web-based service database, within five Business Days of completion of each service activity (e.g., site visit, maintenance activity, diagnostic activity, etc.) in accordance with the terms of the Agreement.

(g) Time is of the Essence. Time is of the essence in Contractor's response and provision of Services. Contractor will respond to and as applicable complete each service request issued by Powin within the response times required in Exhibit D.

3. Background Checks. If indicated below, all of Contractor's Personnel are required to have been independently verified and to have passed all Federal Energy Regulatory Commission ("FERC") and/or North American Electric Reliability Corporation ("NERC") background check requirements in order to perform Services on Powin Equipment. If Contractor's personnel are required to be verified and have passed FERC and/or NERC background check requirements, Powin may request that Contractor submit proof that one or more of its Personnel have cleared FERC and/or NERC background checks, but no more than once per year.

☐ Contractor's Personnel are required to have been independently verified and have passed all FERC background check requirements.

☐ Contractor's Personnel are required to have been independently verified and have passed all NERC background check requirements.

☒ Contractor's Personnel are required to have been independently verified and have passed all FERC and NERC background check requirements.

☐ Contractor's Personnel are not required to have been independently verified or have passed FERC or NERC background check requirements.

4. Scheduling. Contractor will work with Powin on scheduling a date and time to perform any Services and will take all reasonable efforts to minimize impact on Powin and Powin customers when scheduling. Reasonable efforts include taking all reasonable steps to ensure that Services are scheduled during times that Powin and Powin's customer have agreed to power down Powin Equipment. Contractor agrees to acknowledge receipt of Powin's service requests for Scheduled Maintenance within five Business Days. Contractor will notify Powin in such acknowledgement of any conflicts that exist as related to the proposed date and time of the Scheduled Maintenance. If a timing conflict exists, Powin and Contractor will in good faith negotiate to establish an alternative time for the Scheduled Maintenance to be performed that is agreeable to both Parties. If no agreement is reached, Powin may contract another ASP to perform the Scheduled Maintenance, and Contractor will pay Powin any increased cost to Powin incurred in contracting the new ASP. For Unscheduled Maintenance, Contractor must respond to Powin's service request within the response time required in Exhibit D. In the event a conflict exists and Contractor cannot perform the Unscheduled Maintenance within the required time, Powin may contract another ASP to perform the Unscheduled Maintenance. In the event a new ASP is contracted to perform Unscheduled Maintenance, Contractor shall pay to Powin any increased costs incurred by Powin in contracting the new ASP.

5. Scheduled Maintenance Services. Contractor will conduct in-person inspections of Powin Equipment on the basis indicated below:

- ☐ Annual basis
- ☐ Semi-annual basis
- ☐ Quarterly basis
- ☐ Monthly basis
- ☐ Other: upon request

6. Monitoring and Reporting Services. Contractor will perform the following monitoring and reporting services if selected:

- ☐ Annual onsite review of the Facility and Site performance and system components. As part of the annual review, Contractor will make recommendations for: any additional maintenance that is needed or anticipated, storage augmentation, optimization of dispatch, and other preventative maintenance and corrective actions.
- ☐ Develop annual maintenance reports describing (i) previous period maintenance activity, comparing Facility and Site performance against appropriate key performance indicators and guarantees, (ii) the costs of maintenance, on-site labor, and Subcontractors used on site, and (iii) recommendations for improving Facility and Site performance and more effective maintenance.
- ☐ Provide an archive of all Facility and Site operation data including overall Facility and Site performance and component operation, including PCS and HVAC data.

EXHIBIT A.2

TERM

The term of the Agreement will commence on the Effective Date and will continue for a period of **Three year(s)** after the Effective Date ("**Base Term**"). If no period of time is entered, the Base Term of this Agreement will be one year. The Base Term of this Agreement may be renewed and/or extended as indicated below:

☐ At the end of the Base Term the Agreement will automatically renew for an additional one-year period under the same terms and conditions (the "**Renewal Period**"), unless (i) this Agreement is extended for an additional period of time as indicated in this Exhibit A.2; (ii) this Agreement is terminated as provided in Section 20 of the Agreement; or (iii) either Party provides notice to the other of its decision to not renew this Agreement at least 90 days prior to the conclusion of the then effective Term. If no box is checked in this Exhibit A.2 the Agreement will automatically renew for an additional one-year period as provided in this Exhibit A.2.

☒ Powin may at its discretion extend the Base Term under the same terms and conditions for an additional one **year** period (the "**Extended Term**") by providing written notice to Contractor of its decision to extend the Base Term, given at least 60 days prior to the completion of the Base Term. The Extended Term will begin upon the completion of the Base Term.

☐ The Base Term will not automatically renew or be extended and the Agreement will terminate upon completion of the Base Term, unless earlier terminated as permitted in the Agreement.

EXHIBIT A.3

INVENTORY MAINTENANCE

If indicated below, Contractor, at its own expense, will maintain inventory to Powin's satisfaction. Contractor's Required Inventory Level is determined in part by the amount of Powin Equipment at each assigned Facility or Site, the anticipated level of Services to be performed on such Powin Equipment, and the number of Facilities and/or Sites assigned to Contractor under this Agreement.

☐ Contractor will maintain appropriate levels of inventory, Spare Parts, wear items, and Consumables needed to complete Scheduled Maintenance and any potential Unscheduled Non-Emergency or Emergency Maintenance. Contractor will manage its inventory so that its levels will not will not drop below _____ (the "**Required Inventory Level**").

☐ Contractor will not be required to maintain its inventory, Spare Parts, wear items, and Consumables, such items will be provided by Powin.

At the end of the Contract Term, if Agreement is not renewed, Powin will purchase all inventory from Contractor which Contractor cannot reasonably sale or use for other customers or projects.

EXHIBIT B

SITES AND FACILITIES

Contractor will be responsible for performing Scheduled Maintenance and Unscheduled Maintenance at the Facilities and/or Sites and on the Powin Equipment indicated in POs issued by Powin. If Contractor performs Services at locations outside the United States, Contractor will comply with the additional terms of Exhibit G for such Services.

EXHIBIT C

PERSONAL PROTECTIVE EQUIPMENT REQUIREMENTS

[Insert PPE Document]

EXHIBIT D**SERVICE NOTICE AND RESPONSE TIME REQUIREMENTS**

Type of Maintenance	Lead up Notice Provided In Service Request	Required Response Time by Contractor	Liquidated Damages for Untimely Response or Performance	Liquidated Damages for Failure to Complete Services within Allotted Time
Scheduled Maintenance	No less than 30 days' notice	Within [14] days of Powin Notice	\$500 per day	\$500
Unscheduled Non-Emergency Maintenance	As soon as reasonably known by Powin	Within [two] days of Powin Notice	\$250 per day	\$250
Unscheduled Emergency Maintenance	As soon as reasonably known by Powin	Within [24] hours of Powin Notice	\$250 per day	\$250

EXHIBIT E

INSURANCE

Contractor will maintain insurance coverage of at least the amount and types listed below:

Policy	Amount
General Liability	\$1,000,000
Workers Compensation	\$1,000,000
Employer’s Liability	\$1,000,000
Automobile Liability	\$1,000,000
Umbrella	\$1,000,000
[additional required policies]	



CERTIFICATE OF LIABILITY INSURANCE

DATE (MM/DD/YYYY)

9/8/2022

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an **ADDITIONAL INSURED**, the policy(ies) must have **ADDITIONAL INSURED** provisions or be endorsed. If **SUBROGATION IS WAIVED**, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER Arthur J. Gallagher Risk Management Services, Inc. 470 Atlantic Avenue Boston MA 02210	CONTACT NAME: PHONE (A/C. No. Ext): 617-261-6700 FAX (A/C. No): 617-646-0400 E-MAIL ADDRESS: <table style="width: 100%;"> <tr> <td style="text-align: center;">INSURER(S) AFFORDING COVERAGE</td> <td style="text-align: center;">NAIC #</td> </tr> <tr> <td>INSURER A : Hartford Casualty Insurance Company</td> <td>29424</td> </tr> <tr> <td>INSURER B :</td> <td></td> </tr> <tr> <td>INSURER C :</td> <td></td> </tr> <tr> <td>INSURER D :</td> <td></td> </tr> <tr> <td>INSURER E :</td> <td></td> </tr> <tr> <td>INSURER F :</td> <td></td> </tr> </table>	INSURER(S) AFFORDING COVERAGE	NAIC #	INSURER A : Hartford Casualty Insurance Company	29424	INSURER B :		INSURER C :		INSURER D :		INSURER E :		INSURER F :	
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INSURER D :															
INSURER E :															
INSURER F :															
INSURED Ameresco, Inc. 111 Speen Street Suite 410 Framingham MA 01701															

COVERAGES**CERTIFICATE NUMBER:** 105691545**REVISION NUMBER:**

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	TYPE OF INSURANCE	ADDL INSD	SUBR WVD	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS																						
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E.L. DISEASE - POLICY LIMIT		\$ 1,000,000																											

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

CERTIFICATE HOLDER**CANCELLATION**
 Powin, LLC
 20550 115th Avenue
 Tualatin OR 97062

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE

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EXHIBIT G

ADDITIONAL TERMS FOR SERVICES

PERFORMED OUTSIDE OF THE UNITED STATES

Exhibit B



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

AMERESCO, INC. and KUPONO
SOLAR, LLC,

Plaintiffs,

v.

POWIN, LLC,

Defendant.

C.A. No. N24C-04-012 VLM
[CCLD]

**PUBLIC VERSION FILED
JUNE 3, 2024**

COMPLAINT

Plaintiffs Ameresco, Inc. (“Ameresco”) and Kuponosolar, LLC (“Kupono”
and together with Ameresco, the “Plaintiffs”), bring this action against Defendant
Powin, LLC (“Powin”), and allege as follows:

NATURE OF THE ACTION

1. This action arises out of Powin’s unjust refusal to return over [REDACTED]
[REDACTED] in deposits that the Plaintiffs paid to Powin for projects and transactions that
never materialized due to Powin’s failure to honor its obligations in good faith.

2. Specifically, Kupono seeks the return of a [REDACTED] deposit that
Kupono paid to Powin (the “Kupono Deposit”) in connection with a Limited Notice
to Proceed, dated April 22, 2022, between Kupono and Powin (the “Limited Notice
to Proceed”) and Ameresco seeks the return of a [REDACTED] deposit that it paid to

Powin (the “Ameresco Deposit”) in connection with a Framework Term Sheet, dated April 29, 2022, between Kuponon and Powin (the “Term Sheet”).

3. Under the Limited Notice to Proceed, Kuponon agreed to provide Powin the Kuponon Deposit in consideration for Powin’s agreement to hold the pricing and delivery terms that Powin had previously quoted to Kuponon (the “BESS Supply Quote”) for equipment that was able to meet the technical requirements of a project that Kuponon bid upon in O’ahu, Hawaii (the “Kuponon Solar Project”).

4. After Kuponon paid Powin the Kuponon Deposit, carrying out its end of the bargain, Powin was unable to honor the pricing and delivery terms in the BESS Supply Quote and guaranteed in the Limited Notice to Proceed for equipment that complied with the project’s technical requirements. As a result, Kuponon was forced to choose another supplier for the Kuponon Solar Project.

5. Despite the fact that Powin failed to provide the consideration it agreed to provide for the Kuponon Deposit and despite the fact that Powin did not become the battery energy equipment supplier for the Kuponon Solar Project, Powin has refused to return the Kuponon Deposit to Kuponon. This action seeks to compel Powin to do so.

6. Around the same time that Kuponon and Powin entered into the Limited Notice to Proceed, Ameresco entered into the Term Sheet with Powin. While the Limited Notice to Proceed between Kuponon and Powin was primarily for a specific

project—the Kupon Solar Project—the Term Sheet was intended to establish a broader, longer-term relationship between Ameresco and Powin.

7. At a basic level, the concept, as outlined in the Term Sheet, was that Powin would develop a pricing tool that Ameresco could use to quickly obtain fair and predictable pricing for Powin’s systems. In exchange, Ameresco would agree to purchase, and Powin would agree to supply, a guaranteed amount of Powin’s battery storage equipment over the course of multiple years for multiple projects pursuant to the agreed pricing framework and provide a down payment for that work. The parties were to work out the details of the arrangement and memorialize their mutual understanding into a “Framework Agreement.”

8. After signing the Term Sheet, Ameresco paid Powin the Ameresco Deposit, carrying out its end of the bargain. Powin, however, wholly failed to carry out its end of the deal by failing to develop the Pricing Tool, which was to be the engine of the parties’ entire relationship. As a result, the parties were never able to execute a Framework Agreement. Even though the Framework Agreement never materialized due to Powin’s failure to perform, Powin has refused to return the [REDACTED] Ameresco Deposit. This action seeks to compel Powin to do so.

9. In addition to seeking the return of the Kupon Deposit and the Ameresco Deposit, Plaintiffs seek damages they incurred because Powin’s misconduct forced them to source equipment from different, higher price suppliers.

THE PARTIES AND RELEVANT NON-PARTIES

10. Plaintiff Ameresco is a Delaware corporation with its principal place of business in Framingham, Massachusetts.

11. Plaintiff Kuponon is a Delaware limited liability company, with its principal place of business in Framingham, Massachusetts. Kuponon is a wholly-owned subsidiary of Kuponon Solar Development Company, LLC, a Delaware limited liability company. For simplicity, Kuponon and Kuponon Solar Development Company, LLC are referred to herein, collectively, as “Kuponon.” Ameresco subsequently purchased Bright Canyon’s interest in the joint venture and is now the sole owner of Kuponon.

12. Defendant Powin is a Delaware limited liability company, with its principal place of business in Oregon.

JURISDICTION

13. This Court has personal jurisdiction over Powin pursuant to 6 *Del. C.* § 18-105 because Powin is a Delaware limited liability company.

14. This Court has subject matter jurisdiction over this matter pursuant to *Del. Const. Art. IV § 7* and 10 *Del. C.* § 541.

15. This matter is properly referred to the Court’s Complex Commercial Litigation Division because the amount in controversy exceeds \$1 million.

FACTUAL BACKGROUND

A. Ameresco, Kuponon, and their Business

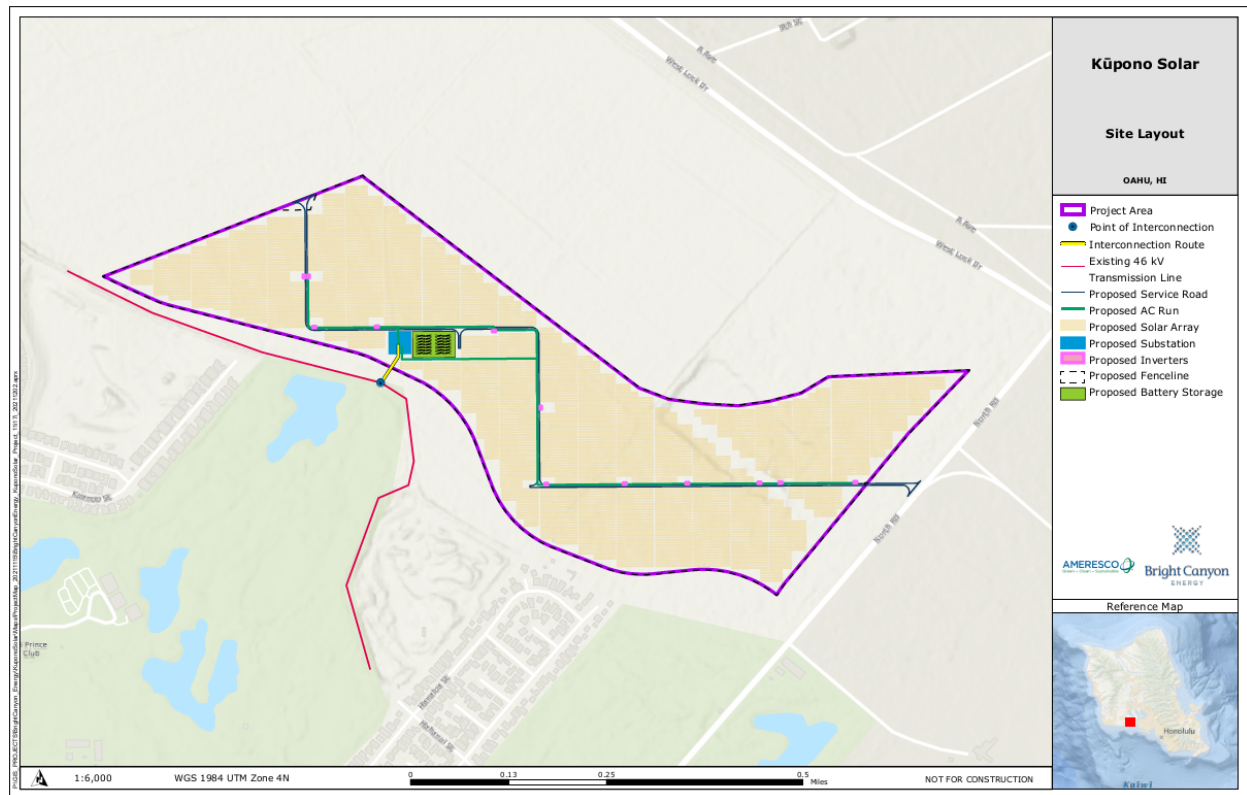
16. Founded in 2000, Ameresco is a leading cleantech integrator and renewable energy asset developer, owner and operator. Its comprehensive portfolio includes energy efficiency, infrastructure upgrades, asset sustainability and renewable energy solutions delivered to clients throughout North America and Europe. Ameresco has successfully completed energy saving, environmentally responsible projects with federal, state and local governments, K12 school districts, college campuses, healthcare institutions, airports, housing authorities, and commercial and industrial customers.

17. Ameresco has been implementing energy solutions in Hawaii for over 15 years. As part of those efforts, Ameresco established Kuponon to deliver clean, renewable energy to the local utility's power grid in O'ahu, Hawaii (i.e., the Kuponon Solar Project). Ameresco subsequently purchased Bright Canyon's interest in the joint venture and is now the sole owner of Kuponon.

18. Kuponon is currently in the process of constructing and will operate a combined solar and battery energy storage system on 131 acres of underutilized lands within the Navy West Loch Annex of Joint Base Pearl Harbor-Hickam.

19. The project involves the construction of over 100,000 photovoltaic solar panels mounted on low-profile fixed mounting systems, a battery energy

storage system designed to house the produced energy, and medium voltage switchgear, transformers and inverters designed to supply that energy to the O‘ahu power grid. The site layout for the plan is depicted below:



20. Ultimately, the project is anticipated to supply clean, renewable power to approximately 10,000 homes and remove more than 50,000 tons of carbon dioxide emissions annually from the Hawaiian environment—the equivalent to offsetting carbon dioxide emissions from 12,000 cars every year. It is also expected that the Kūpono Solar Project will provide, among other benefits, a stable cost of energy for the benefit of O‘ahu utility customers, reduce dependence on fossil fuels, and create project-related jobs for O‘ahu citizens.

B. The Limited Notice to Proceed

21. In connection with the Kuponon Solar Project, Kuponon sought proposals from a number of vendors to supply the equipment necessary to construct the battery energy storage system for the project.

22. Specifically, in November 2021, Kuponon contacted Powin and other vendors to bid on the Kuponon Solar Project. Kuponon provided Powin with the project requirements for the Kuponon Solar Project and requested a proposal. Over the course of the next several months, Kuponon and Powin continued to confer regarding the Kuponon Solar Project, exchanging clarifications and amended requirements.

23. Key selection criteria of the Kuponon Solar Project conveyed to Powin included:

- Country of origin sensitivities necessary to satisfy national security concerns related to the Kuponon Solar Project siting on a Department of Defense leased parcel.
- 42 MW power and 168 MWh of energy available at the point of interconnection to the utility.
- 85.4% round trip efficiency at the point of interconnection to the utility, including any system auxiliary requirements not limited to Supplier-determined loads for controls and thermal management, as well as balance of plant losses.
- System capability to operate in a grid forming mode (GFM).
- Timely provision of technical models of the supplied equipment for use in Power Systems Computer Aided Design (PSCAD) and

Power System Simulation Equipment (PSSE) power system modeling analysis.

24. Each of these requirements was specifically required by the underlying agreement for the project and therefore was a mandatory requirement of procurement. These requirements were provided to Powin as part of Kuponon's request for proposal.

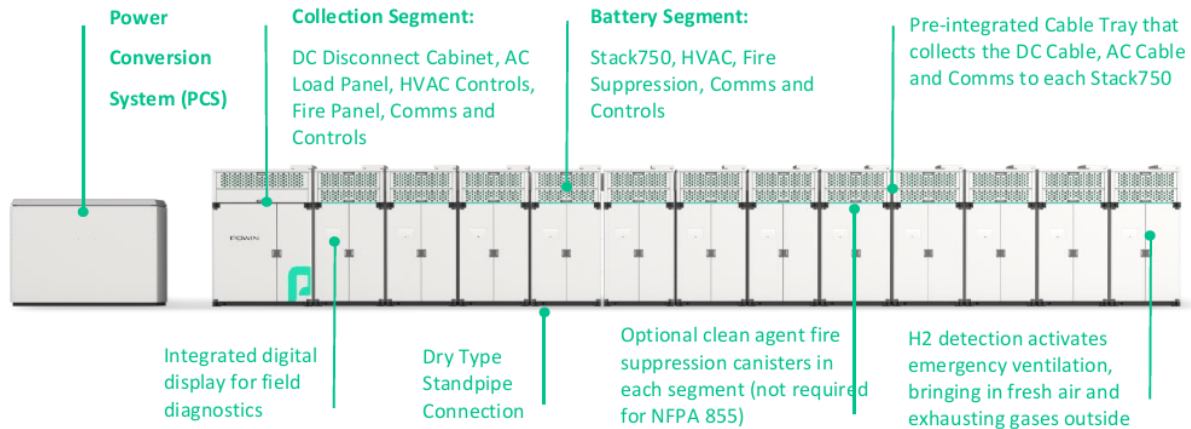
25. Over the course of the next several months, Kuponon continued confer with Powin and other vendors regarding the Kuponon Solar Project, exchanging clarifications and amended requirements.

26. During these discussions, the Kuponon Solar Project team held several meetings with Powin before execution of the Limited Notice to Proceed to assure an electrical model could be delivered to the Utility, Hawaiian Electric. Powin represented that it had had other similar projects in process in Hawaii and would be able to meet the requirements.

27. Ultimately, this process culminated in three vendors submitting proposals and quotes for the project ranging from [REDACTED] to [REDACTED]. One of the proposals was from Powin.

28. Powin submitted the BESS Supply Quote to Kuponon on April 18, 2022 to provide the equipment and related services for the Kuponon Solar Project. Ex. A. Powin proposed supplying its Stack750E battery energy storage equipment and

related products and services for the project. *Id.* at 2-5. A depiction of Powin’s Stack750 system is below:



29. Powin’s BESS Supply Quote quoted a total price of [REDACTED] for the system and related products and services. *Id.* at 5. The quote also provided for the delivery of the equipment within 42-52 weeks after the effective date of the parties’ entrance into a definitive Battery Energy Storage Agreement for the project. *Id.*

30. On April 22, 2022, to secure the pricing and delivery timelines that Powin set forth in the BESS Supply Quote, the parties agreed to enter into the Limited Notice to Proceed. Ex. B. As set forth therein, the purpose of the agreement was to lock in the pricing and delivery timelines of the equipment specified in Powin’s quote in exchange for a deposit from Kuono of [REDACTED] of the equipment price. *Id.* at 1. Indeed, the Limited Notice to Proceed unambiguously provides that:

- Kuono “desires to enter into this Limited Notice to Proceed . . . with Powin in order for Powin [to] hold the Equipment price and to ensure the Equipment is delivered commencing 42 weeks after

the date the Parties execute a definitive Battery Equipment Supply Agreement” for the Kupon Solar Project; and

- the purpose of the Limited Notice to Proceed “is expressly limited to securing the pricing associated with the Equipment as described in the BESS Supply Quote under the Powin provided scope of the proposal.”

Id.

31. In consideration for the guaranteed pricing and delivery timelines, Kupon agreed to provide a deposit equal to [REDACTED] of the overall contract price—*i.e.*, [REDACTED] (*i.e.*, the Kupon Deposit). The Limited Notice to Proceed expressly links the payment of the Kupon Deposit to the guaranteed pricing and delivery timelines, providing that:

In consideration for the [Kupon Deposit] . . . Powin will hold the Equipment Price as set forth in the BESS Supply Quote until the Effective Date of the BESA and Powin shall deliver and Customer shall take delivery of the Equipment no sooner than 42 weeks, or no later than 52 weeks, after the effective date of the BESA.

Id. at 1 (emphasis added).

32. The parties also agreed to “negotiate in good faith to mutually agree upon and execute [a definitive Battery Equipment Supply Agreement] *that is consistent with the BESS Supply Quote.*” *Id.* at 2 (emphasis added). And the parties agreed “to work together to execute [a Battery Equipment Supply Agreement] within 60 days of the execution of [the] Limited Notice to Proceed.” *Id.* at 2.

33. The Limited Notice to Proceed further provided that if “Powin acts in bad faith and the Parties are not able to mutually agree on a [definitive Battery Equipment Supply Agreement], Powin shall refund to [Kupono] the Deposit.” *Id.*

34. The Limited Notice to Proceed is governed by New York law. *Id.*

C. Powin Fails to Perform Under the Limited Notice to Proceed

35. In accordance with the Limited Notice to Proceed, the parties promptly began negotiating a definitive Battery Energy Supply Agreement (“Supply Agreement”) for the Kupono Solar Project.

36. It became apparent, however, that Powin—despite its clear obligations under the Limited Notice to Proceed to “hold” the pricing and delivery terms set forth in the BESS Supply Quote until execution of a definitive Battery Equipment Supply Agreement and to negotiate “in good faith to mutually agree upon and execute [a definitive Battery Equipment Supply Agreement] *that is consistent with the BESS Supply Quote*”—could not honor the pricing, technical, and delivery terms it agreed to in the Limited Notice to Proceed with respect to the Kupono Solar Project.

37. For example, Powin was unable to supply equipment that complied with the electrical modeling/technical requirements specified in the technical documents provided to Powin within the timeframe it represented in the Limited

Notice to Proceed, and that it knew this at the time of signing the Limited Notice to Proceed, but represented otherwise to induce payment of the deposit.

38. Specifically, contrary to Powin's representation in the Limited Notice to Proceed that the BESS equipment would be delivered from their Mexico manufacturing facility, Ex. A at 4, after execution of the Limited Notice to Proceed, delays in the readiness of that facility led Powin to offer procurement instead from China with final completion in Oregon, a sequence of manufacturing that added risk to the national security review process required for execution of the Kuponno Solar site lease.

39. In addition, and contrary to Powin's representation in the Limited Notice to Proceed that the BESS equipment could provide a 42MW / 168 MWh system, Ex. A at 2, Powin changed its tune after Kuponno signed the Limited Notice to Proceed and supplied the deposit, stating that it could only provide such a system under previously undisclosed and optimistic operating conditions, including consistent nominal voltage at the system terminals and temperature conditions that were not consistent with the stated project location. According to Powin, the equipment would therefore need to be "augmented" to provide the necessary capacity for the Kuponno Solar Project, which would increase the cost of the equipment.

40. Further, although Powin represented that it could provide the required round trip efficiency for the project of 85.08%, after receiving Kuponos deposit, it later retreated from that representation, stating that they could only provide round trip efficiency of 83.76% at the beginning of the project, degrading to 82.11% by the twenty-first year of operation. This was not permissible under the underlying Kuponos Solar Power Purchase Agreement for the project.

41. Further, after execution of the Limited Notice to Proceed and Kuponos payment of the Kuponos Deposit, Powin was not able to timely and reliably provide the system capability to operate in a grid forming mode, a required specification of the Kuponos Solar Project. Powin was not able to provide a firm commitment as to this requirement until August 4, 2022, 104 days after the execution of the Limited Notice to Proceed.

42. This delay also prohibited Powin from complying with the project requirement mandating the timely provision of technical models of the supplied equipment for use in Power Systems Computer Aided Design (PSCAD) and Power System Simulation Equipment (PSSE) power system modeling analysis.

43. Finally, despite representing that it had had other similar projects in process in Hawaii and would be able to meet the electrical modeling required for the project, Powin was not able to provide these within the 60 days after the Limited Notice to Proceed was signed. Kuponos repeatedly urged Powin senior management

to provide the required modeling, but Powin was never able to provide it. Even at this time, there is no confidence that the Powin product can meet the electrical grid forming and control requirements that is required by Hawaiian Electric and other Navy microgrid projects.

44. Despite Powin's failure to perform under the Limited Notice to Proceed, including its failure to negotiate the BESA in good faith, over the course of six months (from August 23, 2022 through February 22, 2023), Kuponono sought to resolve the parties' disagreement by working with Powin to reallocate the equipment proposed to be used for the Kuponono Solar Project to other Navy and Air Force projects that Ameresco was handling, as the Limited Notice to Proceed expressly permitted Ameresco to do.

45. After multiple email exchanges and delays caused by Powin, Powin finally disclosed to Ameresco on February 22, 2023 that Powin was unable to provide the pricing and delivery timelines to which the parties agreed in the Limited Notice to Proceed for the proposed project alternatives. Powin instead provided revised terms that were not consistent with the pricing and delivery terms in the Limited Notice to Proceed. Due to the revised terms from Powin, Ameresco communicated to Powin that Ameresco would not be able to utilize the equipment for other proposed projects.

46. Because Powin was unable to provide battery energy storage equipment that meets the required electrical and technical specifications for the Kuponno Solar Project or offer consistent pricing and delivery timelines as agreed under the Limited Notice to Proceed so that Kuponno could reallocate the Kuponno Solar Project-related equipment to alternative projects, Kuponno demanded a return of Kuponno Deposit. Ex. C. Powin wrongfully refused. Ex. D. Kuponno made further attempts to recover the Kuponno Deposit from Powin amicably, which went unanswered. Ex. E.

47. Kuponno was also forced to secure battery storage equipment for the Kuponno Solar Project and the proposed alternative projects at prices that were higher than the guaranteed pricing in the Limited Notice to Proceed, causing Ameresco further harm.

D. The Term Sheet

48. At the same time that Kuponno and Powin entered into the Limited Notice to Proceed, Ameresco and Powin were also discussing a broader, longer-term relationship. The concept was that Powin would develop a Pricing Tool that Ameresco could use to quickly obtain fair and predictable pricing for Powin's systems on a particular project so that Ameresco could respond to requests for proposal from its customers and prospective customers in a timely manner with certain, non-contingent pricing. In exchange for the Pricing Tool, Ameresco would agree to purchase and Powin would agree to supply a guaranteed amount of Powin's

battery storage equipment over multiple years for multiple projects pursuant to the agreed pricing framework and provide the deposit for these future projects.

49. To memorialize the parties' preliminary understanding of their broader relationship, the parties entered into a Term Sheet on April 29, 2022. Ex. F.

50. As set out in the Term Sheet, the parties were to attempt to negotiate a definitive "Framework Agreement" to govern the parties' overall relationship. *Id.* The prospective Framework Agreement was to include the total quantity of battery energy storage equipment that Ameresco would buy from Powin and the pricing at which Ameresco would buy such equipment from Powin via the Pricing Tool to be developed and supplied by Powin. *Id.* Then, after the Framework Agreement was executed, Ameresco and Powin would agree to project-level Supply Agreements to govern the sale of certain equipment for specific energy projects that were consistent with the terms set forth in the Framework Agreement, including the agreed-upon pricing framework set forth in the Pricing Tool. *Id.* As noted above, the Term Sheet and anticipated Framework Agreement described therein were intended to create a relationship between the two companies that would result in ease of use and expedited pricing and contracting.

51. Indeed, the recitals of the Term Sheet state that Ameresco and Powin "anticipate entering into a Framework Agreement for the purchase and sale across several years of Seller's batter energy storage equipment . . . on the terms set forth

herein and to be finalized in a definitive framework agreement (the “Framework Agreement”))” and that Battery Equipment Supply Agreements would be “issued under the Framework Agreement for projects developed by [Ameresco] or its affiliates” *Id.*, Recitals.

52. The Term Sheet proceeded to outline some of the terms that the parties were to include in the Framework Agreement. For example, the Term Sheet provided that “the term of the Framework Agreement shall be twenty-seven months from the execution date.” *Id.* § 1. It provided that during the term of the to-be executed Framework Agreement, Powin would sell and Ameresco would buy “2500 MWh worth of” energy storage equipment and that such quantity was to be allocated among multiple projects “pursuant to” Supply Agreements. *Id.* §§ 1, 2.

53. Notably, it provided that the pricing for such equipment would be governed by a “Framework Pricing tool” to be developed by Powin (*i.e.*, Pricing Tool), which Ameresco could use to quickly obtain fair and predictable pricing for Powin’s systems on a particular project so that it could respond to requests for proposal from its customers and prospective customers in a timely manner with certain, non-contingent pricing. *Id.* §§ 4, 6. In short, the Term Sheet reflects that the Pricing Tool was intended to expedite the process of obtaining predictable price quotes from Powin and short circuit the contracting process in order to meet Ameresco’s customer needs.

54. The Term Sheet also contemplated that Powin would provide standard configurations for Supply Agreements smaller than 5 MWac for Ameresco to use in engineering projects with Powin equipment. *Id.* § 3.

55. It also set forth the delivery times that Powin was to agree to in connection with each project. Specifically, Powin agreed that the Framework Agreement would provide that delivery would commence within 47 weeks after the effective date of each project-specific Supply Agreement. *Id.* § 7.

56. To guarantee the delivery times set out in Section 5 of the Term Sheet, Ameresco agreed to provide a [REDACTED] deposit. *Id.* § 5. The deposit was to be used to offset amounts due pursuant to Supply Agreements executed pursuant to the contemplated Framework Agreement. *Id.*

57. The Term Sheet also contained a damages disclaimer, liability cap, New York choice-of-law provision, confidentiality clause, and dispute resolution provision, and other miscellaneous provisions. *Id.* §§ 13-18.

58. Finally, the Term Sheet made clear that “the terms contained in this Term Sheet are intended and shall be construed to be *non-binding* and shall not survive termination or expiry of this Term Sheet [other than] Sections 12 through 18 . . .” *Id.* §§ 13-18 (emphasis added).

E. Powin Fails to Perform its Obligation Under the Term Sheet

59. As set forth above, the Term Sheet was an agreement to agree to a Framework Agreement that would govern Ameresco's and Powin's broader business relationship. The core of the proposed relationship was the Pricing Tool that Powin would develop that Ameresco could use to quickly obtain fair and predictable pricing for Powin's systems and, in exchange, Ameresco would provide a deposit and agree to purchase and Powin would agree to supply a guaranteed amount of Powin's battery storage equipment over the course of multiple years for multiple projects pursuant to the agreed pricing framework in the Pricing Tool.

60. The Pricing Tool was at the heart of the parties' anticipated Framework Agreement so that Ameresco could timely respond to request for proposals from its customers and potential customers, rather than waiting for Powin personnel to manually create price quotes in response to Ameresco's requests. *Id.* §§ 4, 6.

61. In addition, and as noted above, the Term Sheet also contemplated that Powin would provide standard configurations for Supply Agreements smaller than 5 MWac for Ameresco to use in engineering projects with Powin equipment. Like the Pricing Tool, this agreement was also to increase the efficiency and speed at which Ameresco could respond to proposals from its customers.

62. Despite multiple requests from Ameresco, Powin never developed the Pricing Tool. Nor has it established standard configurations for Supply Agreements smaller than 5 MWac.

63. Instead, since the Term Sheet was executed, Powin has forced Ameresco and Powin to continue to operate in the same, piecemeal manner in which Ameresco and Powin had dealt with each other before the Term Sheet was signed, despite the extra [REDACTED] in Powin's pocket. That is, Ameresco will receive a proposal from a potential customer, and because no Pricing Tool has been developed, is forced to request a quote from Powin, which Powin must then manually prepare so that Ameresco can respond to the proposal.

64. Subsequent to the execution of the Term Sheet, Ameresco development teams found that dealing with Powin is long and confusing in all aspects of the process. Powin has been slow to respond to requests for quote, fails to honor commitments regarding pricing or timelines set forth in quotes that Powin was able to timely provide, fails to explain their internal processes, and has provided poor and incomplete documentation from an engineering and contracting perspective, all of which has led to delays, the inability to effectively respond to proposals, cost overruns, and the need to bid for projects with a number of contingencies in order to account for multiple unknowns.

65. In addition, and despite the proposed 47-week delivery timeline in the Term Sheet, Powin has provided Ameresco development teams quotes with significantly longer delivery timelines and often have been told that the equipment is not even available. Ameresco has detailed specific examples of these contracting issues in the written correspondence to Powin, which is incorporated herein. Ex. I.

66. Because of Powin's failure to develop the Pricing Tool, failure to develop standard configurations for Supply Agreements smaller than 5 MWac, the resulting project-specific inefficiencies, and Powin's deviation from the delivery timelines that it agreed to provide in the Term Sheet, the parties never executed a definitive Framework Agreement. As a result, Ameresco demanded the return of the [REDACTED] Ameresco Deposit. Ex. G.

67. Despite the fact that the Ameresco Deposit was intended solely as a down payment for Supply Agreements that were to be executed pursuant to a Framework Agreement that never materialized due to Powin's failure to fulfil its end of the bargain under the Term Sheet, Powin has wrongfully refused to return the Ameresco Deposit. Ex. H.

COUNT I
Declaratory Judgment
(Limited Notice to Proceed)

68. Kuponon hereby repeats, realleges, and incorporates each of the foregoing allegations as if set forth fully herein.

69. Pursuant to 10 *Del. C.* §§ 6501, *et. seq.*, this Court has authority to issue a declaratory judgment.

70. There is an active and justiciable controversy regarding whether Powin is able to retain the Kuponon Deposit under the Limited Notice to Proceed. Indeed, Kuponon has demanded repayment of the Kuponon Deposit, but Powin has refused to return it.

71. The controversy involves Kuponon's right to a return of the Kuponon Deposit it paid Powin in connection with the Limited Notice to Proceed. Through this claim, Kuponon is asserting its right to the Kuponon Deposit against Powin, which has an interest in contesting the claim. The controversy is real, adverse, and ripe for judicial determination.

72. For the reasons described herein, the Court should resolve this controversy in Kuponon's favor. Specifically, the Court should declare that the Limited Notice to Proceed is rescinded and void for failure of consideration because Powin refused to honor the pricing and delivery timelines that it guaranteed in the Limited Notice to Proceed, which was the sole reason why Kuponon paid Powin the

Kupono Deposit. Kupono also respectfully requests that the Court declare that it is entitled to a return of the Kupono Deposit that it paid to Powin in connection with the Limited Notice to Proceed.

COUNT II
Breach of Contract
(Limited Notice to Proceed)

73. Kupono hereby repeats, realleges, and incorporates each of the foregoing allegations as if set forth fully herein.

74. This count is pled as an alternative to Count I in the event that the Court finds that the Limited Notice to Proceed is a binding and enforceable contract.

75. If the Limited Notice to Proceed is a binding and enforceable contract, Powin materially breached it by refusing to honor the pricing, equipment supply and delivery timelines that it guaranteed in the Limited Notice to Proceed, which was the sole reason why Kupono paid Powin the Kupono Deposit. Powin also breached its obligation to negotiate the Supply Agreement in good faith and acted in bad faith by delaying negotiations and insisting upon prices and delivery timelines that were not consistent with the prices and timelines set forth in the Limited Notice to Proceed.

76. In addition, given that Powin provided the BESS Supply Quote and signed the Limited Notice to Proceed aware of the technical requirements of the Kupono Solar Project, there was an implied covenant in the Limited Notice to Proceed that Powin could provide equipment at the quoted pricing and delivery times

that complied with the technical requirements of the Kuponno Solar Project. Powin also breached its express obligations and the implied covenant of good faith and fair dealing by failing to provide, at the pricing and delivery timeline set forth in the Limited Notice to Proceed, equipment that met the technical requirements specified in the documentation provided to Powin before it submitted its quote.

77. Kuponno has complied with all of its obligations under the Limited Notice to Proceed.

78. Kuponno has been harmed as a direct result of Powin's breach of the Limited Notice to Proceed in the amount of the Kuponno Deposit as well as damages to be determined at trial.

COUNT III
Unjust Enrichment
(Limited Notice to Proceed)

79. Kuponno hereby repeats, realleges, and incorporates each of the foregoing allegations as if set forth fully herein.

80. Powin has been unjustly enriched because it is wrongfully retaining the Kuponno Deposit.

81. Powin has experienced a gain in the amount of the Kuponno Deposit that Kuponno paid it in connection with the Limited Notice to Proceed.

82. Kuponno has suffered a loss in the amount of the Kuponno Deposit that it paid Powin in connection with the Limited Notice to Proceed.

83. Powin's gain and Kuponon's loss are related.

84. Powin has retained the Kuponon Deposit without justification because the Limited Notice to Proceed is either not a binding and enforceable contract or Powin has materially breached several essential and material terms of the Limited Notice to Proceed such that the contract should be rescinded.

85. For these reasons, Powin has been unjustly enriched and the Kuponon Deposit should be returned to Kuponon.

COUNT IV
Declaratory Judgment
(Term Sheet)

86. Ameresco hereby repeats, realleges, and incorporates each of the foregoing allegations as if set forth fully herein.

87. Pursuant to 10 *Del. C.* §§ 6501, *et. seq.*, this Court has authority to issue a declaratory judgment.

88. There is an active and justiciable controversy regarding whether Powin is able to retain the Ameresco Deposit under the Term Sheet. Indeed, Ameresco has demanded repayment of the Ameresco Deposit, but Powin has refused to return the deposit.

89. The controversy involves Ameresco's right to a return of the Ameresco Deposit it paid Powin in connection with the Term Sheet.

90. Through this claim, Ameresco is asserting its right to the Ameresco Deposit against Powin, which has an interest in contesting the claim.

91. The controversy is real, adverse, and ripe for judicial determination.

92. For the reasons described herein, the Court should resolve this controversy in Ameresco's favor. Specifically, the Court should declare that the Term Sheet was never a binding and enforceable contract because it did not contain sufficiently definite pricing terms, which was a condition of the parties' prospective contractual relationship.

93. In the alternative, the Court should declare that the Term Sheet is rescinded and void for failure of consideration because Powin never developed the Pricing Tool or the standard configurations for Supply Agreements smaller than 5 MWac, each of which were essential and material to the parties' prospective business relationship.

94. In either event, Ameresco also respectfully requests that the Court declare that it is entitled to a return of the [REDACTED] Ameresco Deposit that it paid to Powin pursuant to the Term Sheet.

COUNT V
Breach of Contract
(Term Sheet)

95. Ameresco hereby repeats, realleges, and incorporates each of the foregoing allegations as if set forth fully herein.

96. This count is pled as an alternative to Count IV in the event that the Court finds that the Term Sheet is a binding and enforceable contract.

97. If the Term Sheet is a binding and enforceable contract, Powin materially breached it by failing to develop the Pricing Tool and the standard configurations for Supply Agreements smaller than 5 MWac, as required under the Term Sheet, each of which were essential and material to the parties' prospective business relationship.

98. Ameresco has complied with all of its obligations under the Term Sheet.

99. Ameresco has been harmed as a direct result of Powin's breach of the Term Sheet, at a minimum, in the amount of the Ameresco Deposit.

COUNT VI
Unjust Enrichment
(Term Sheet)

100. Ameresco hereby repeats, realleges, and incorporates each of the foregoing allegations as if set forth fully herein.

101. Powin has been unjustly enriched because it is wrongfully retaining the Ameresco Deposit.

102. Powin has experienced in gain in the amount of the Ameresco Deposit that Ameresco paid it in connection with the Term Sheet.

103. Ameresco has suffered a loss in the amount of the Ameresco Deposit that it paid Powin in connection with the Term Sheet.

104. Powin's gain and Ameresco's loss are related.

105. Powin has retained the Ameresco Deposit without justification because either the Term Sheet is not a binding and enforceable contract or Powin has materially breached a number of essential and material terms of the contract such that the contract must be rescinded.

106. For these reasons, Powin has been unjustly enriched and the Ameresco Deposit should be returned to Ameresco.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully requests that the Court enter an order:

- a. declaring that the Limited Notice to Proceed is not a binding or enforceable contract because of a failure of consideration;
- b. declaring that Powin materially breached the Limited Notice to Proceed because it refused to honor the pricing and delivery timelines that it guaranteed in the Limited Notice to Proceed;
- c. rescinding the Limited Notice to Proceed for failure of consideration or, alternatively, based upon Powin's material breach of the Limited Notice to Proceed;
- d. declaring that Kuponon is entitled to the return of the Kuponon Deposit that it paid to Powin in connection with the Limited Notice to Proceed;
- e. ordering Powin to return the Kuponon Deposit to Kuponon or, alternatively, awarding Kuponon monetary damages in

an amount equal to the Kupon Deposit plus an amount to be determined at trial;

- f. declaring that the Term Sheet is not a binding or enforceable contract because it did not contain sufficiently definite pricing terms, which were an essential and material component of the parties' prospective relationship;
- g. declaring that the Term Sheet is rescinded and void for failure of consideration because Powin never developed the Pricing Tool or the standard configurations for Supply Agreements smaller than 5 MWac, each of which was essential and material to the parties' prospective business relationship;
- h. declaring that Powin materially breached the Term Sheet because Powin never developed the Pricing Tool or the standard configurations for Supply Agreements smaller than 5 MWac, each of which was essential and material to the parties' prospective business relationship;
- i. rescinding the Term Sheet for failure of consideration or, alternatively, based upon Powin's material breach of the Limited Notice to Proceed;
- j. declaring that Ameresco is entitled to the return of the Ameresco Deposit that it paid to Powin in connection with the Term Sheet;
- k. ordering Powin to return the Ameresco Deposit to Ameresco or, alternatively, awarding Ameresco monetary damages in an amount equal to the Ameresco Deposit;
- l. awarding Plaintiffs damages in an amount to be proven at trial;
- m. awarding Plaintiffs pre- and post-judgment interest;
- n. awarding Plaintiffs the costs, expenses, and reasonable attorneys' fees they incurred in bringing and prosecuting this action; and

- o. granting Plaintiffs such other relief that the Court deems just and proper under the circumstances.

Dated: April 1, 2024

TROUTMAN PEPPER HAMILTON
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