

## Appendix D

### NON-DISCLOSURE AND CONFIDENTIALITY AGREEMENT

This Non-Disclosure Agreement (“NDA”), effective as of this \_\_\_ day of \_\_\_\_\_, 2024, by and between the NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY (“NYSERDA”), a New York public benefit corporation having its principal office and place of business at 17 Columbia Circle, Albany, New York 12203-6399 and \_\_\_\_\_ (“Applicant”), a limited liability company / business corporation having its principal office and place of business at \_\_\_\_\_ (“the Parties”).

#### WHEREAS:

- A. On October 29, 2024, NYSERDA issued a request for qualifications (“RFQL”) designated as RFQL5897 seeking to pre-qualify port infrastructure for the upcoming Phase II RFP; and
- B. The Applicant is submitting an application in response to RFQL 5897 (“Application”); and
- C. The Parties wish to keep highly confidential (i) the substance of any communications concerning RFQL 5897, and (ii) the contents of the Application.

#### NOW IT IS HEREBY AGREED:

- 1. In the event that Applicant’s Application is ultimately qualified for the Phase II RFP, with advance notice to Applicant, NYSERDA or its designee may announce publicly that such Applicant has been pre-qualified for participation in Phase II RFP (“Public Disclosure”). Until any such Public Disclosure, the Parties will keep the qualification status of Applicant’s Application (“Qualification Information”) strictly confidential, which shall include, without limitation, not disclosing the same, or knowingly permitting the same to be disclosed, to any person other than the affiliates of the Parties and the affiliates’ and Parties’ employees, management, officers, equity holders, current and prospective investors and lenders, advisors, consultants, designated representatives or agents, contractors and subcontractors including those providing goods or services for the “Port Sites” or “Potential Port Site Activities and Upgrades” that are the subject of Applicant’s Application (collectively, the Parties’ “Representatives”), each of whom shall be made aware of and who shall comply with this NDA, and at all times taking reasonable steps to ensure that this obligation is fulfilled. After a permitted Public Disclosure, the restrictions on disclosure of Qualification Information imposed by this paragraph shall no longer apply to information included in such Public Disclosure.
- 2. Other than the disclosure of Qualification Information included in a Public Disclosure, the Parties shall at all times keep the content of any discussions or communications of any sort or type, written or oral; strictly confidential, which shall include, without limitation, not disclosing the same, or knowingly permitting the same, to be disclosed to any person other than the Party’s

Representatives, which for NYSERDA shall include other agencies and authorities of New York State, and at all times taking reasonable steps to ensure that this obligation is fulfilled, both during and following any discussions or communications.

3. Any question or inquiry by Applicant regarding the allowability or appropriateness of any disclosure or communication prior to a Public Disclosure should be addressed to Alexander Stein, NYSERDA Deputy General Counsel and Gregory Lampman, NYSERDA Offshore Wind Director.
4. Nothing contained in Paragraphs 1 through 3 hereof shall in any way restrict or impair either Party's right to use or disclose to others information that: (a) was in the public domain at the time of disclosure; or (b) is published or otherwise becomes part of the public domain, not due to the fault of a Party or its Representatives, in the future.
5. Further, if a Party or any of its Representatives is requested or required (by depositions, interrogatories, requests for information or documents in legal proceedings, subpoena, civil investigative demand, court order or other similar process, or by the rules or regulations of or request by any governmental or regulatory authority having jurisdiction over such Party or any such Representative) to disclose any of the confidential information, the disclosing Party shall, to the extent reasonably practicable and legally permissible, provide the non-disclosing Party with prompt written notice of any such request or requirement so that the non-disclosing Party may seek, at the disclosing Party's expense, a protective order or other remedy and/or waive compliance with the provisions of this NDA, and the disclosing Party shall, to the extent permitted by law, consult with the non-disclosing Party with respect to taking steps to resist or narrow the scope of any such request or requirement. If a Party or any of its Representatives is required to disclose the confidential information to any person pursuant to this section, such disclosing Party or its Representatives may, without liability hereunder, disclose to such person only that portion of the confidential information that it has been advised by its legal counsel must be disclosed.
6. Notwithstanding any other provision of this NDA, Applicant acknowledges that NYSERDA is required to comply with the NYS Freedom of Information Law, Public Officers Law, Article 6. As such, NYSERDA cannot guarantee non-disclosure; however, FOIL does provide exceptions to disclosure, including Section 87(2)(d) which provides for exceptions to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Information submitted to NYSERDA that the Applicant wishes to have treated as proprietary and confidential trade secret information should be identified and labeled "Confidential" or "Proprietary" on each page at the time of disclosure. This information should include a written request to exempt it from disclosure, including a written statement of the reasons why the information should be exempted. See Public Officers Law, Section 89(5) and the procedures set forth in 21 NYCRR Part 501. By so marking such information, the Applicant represents that the information has actual or potential specific commercial or competitive value.

7. This NDA shall be governed and construed in all respects in accordance with New York State Law, without giving effect to the conflict of laws provisions thereof and shall be subject to the exclusive jurisdiction of the New York State Courts.
8. This NDA shall remain in full force in effect until the earlier of it being superseded by a definitive agreement or two (2) years from the date first set forth above. Notwithstanding the foregoing, the receiving Party and its Representatives may retain copies of the confidential information (i) solely as required by law, rule, or regulation or in accordance with their internal compliance procedures, to the extent any such information is relevant to demonstrate compliance by the receiving Party or its Representatives with any legal, regulatory, professional or fiduciary obligation, and (ii) for purposes of preserving documents in connection with any litigation or legal or regulatory proceeding; provided, however, that any confidential information so retained will continue to be held confidential pursuant to the terms of this NDA. In addition, any confidential information stored in any backup device or system shall continue to be held confidential pursuant to the terms of this NDA.
9. This NDA may be signed in counterpart and signatures exchanged electronically shall have the same validity as an original signature.
10. NO PARTY, ENTITY OR PERSON SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES IN RESPECT OF THIS AGREEMENT.
11. All notices hereunder shall be in writing. Any notice shall be deemed duly delivered one business day after it is sent for next-business day delivery via a reputable nationwide overnight courier service, in each case to the address listed above.

NEW YORK STATE ENERGY RESEARCH AND  
DEVELOPMENT AUTHORITY

By \_\_\_\_\_

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

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

[APPLICANT]

By \_\_\_\_\_

Authorized Person