

**AGREEMENT FOR PAYMENT IN LIEU OF TAXES UNDER M.G.L. c. 59 § 38H(b)**

THIS AGREEMENT FOR PAYMENT IN LIEU OF TAXES UNDER M.G.L. (“G.L.”) c. 59 § 38H(b) (this “Agreement”) is made and entered into as of \_\_\_\_\_, 2016 by and between UPTON SOLAR, LLC (“Developer”), the TOWN OF UPTON, a municipal corporation duly established by law and located in Worcester County, Commonwealth of Massachusetts (the “Town”). Developer and the Town may also be referred to collectively as the “Parties,” and individually as a “Party.”

**WHEREAS**, Developer plans to build, own and operate a solar photovoltaic facility, anticipated to have an estimated nameplate capacity of approximately 2.6 megawatts (“MW”), direct current (“DC”), and 2.0 MW, alternating current (“AC”), (such facility, as further defined below, the “Project”), on an approximately 18 acre parcel of land located at Mass. Route 140 in Upton, Massachusetts, owned by HJT Realty Trust (“Property Owner”), as further described on Exhibit A (the “Property”);

**WHEREAS**, it is the intention of the Parties that Developer make annual payments to the Town for the term of this Agreement in lieu of real and personal property taxes for the Project in accordance with G.L. c.59, §38H(b), and any and all applicable regulations promulgated pursuant thereto; and

**WHEREAS**, except as provided herein, the Parties intend that, during the term of the Agreement, Developer will not be assessed for real and personal property taxes for the Project, and this Agreement will provide for the exclusive payments in lieu of such taxes during the term hereof; provided, however, that this Agreement does not include and shall not affect any other taxes or fees that may be owed now or in the future by Developer and Property Owner, including, but not limited to, real property taxes for the Property (including buildings (other than a single equipment shed which may be included in the Project, subject to approval of the Town) and, excluding the Project, fixtures and improvements located thereon), and taxes for personal property other than the Project, which taxes, if any, shall continue to be assessed by the Town in accordance with applicable laws and regulations.

**NOW THEREFORE**, in exchange for the mutual commitments and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. Payment in Lieu of Real and Personal Property Taxes. Developer agrees to make annual payments to the Town in lieu of real and personal property taxes attributable to the Project for a period of twenty (20) consecutive years as set forth below in this Section 1. Each annual payment will be in the amount of \$12,500 per MW (DC), escalating at 2.0% for the first ten years and at 2.5% for the following ten years. Assuming a Project nameplate capacity of 2.6 MW (DC) and 2.0 MW (AC), annual payments shall be as set forth in Exhibit B (each, an “Annual Payment”), which are subject to adjustment under Paragraph 2 for changes in such capacity. Each Annual Payment will be paid on a fiscal year basis in four (4) equal (or, in the Town’s reasonable discretion in order to conform payments to the Board of Assessor’s valuation of the

Project, slightly unequal) quarterly installments, each of which shall be due on or before August 1, November 1, February 1, and May 1 (each a “Quarterly Payment Date”) of each fiscal year (as adjusted for partial fiscal years at the beginning and end of the term of the Agreement, if applicable). Each quarterly payment amount and due date will be noted on a tax bill to be issued by the Town to the Developer, provided that any failure of the Town to issue such a bill shall not relieve Developer of its obligation to make timely payments hereunder, and provided further that if no bill is issued, Developer shall be in compliance with its payment obligations if it makes all quarterly installments (for which no bill has been issued by the Town) in equal installments by the dates aforesaid.

Annual Payments shall commence with the first quarterly installment due on the first Quarterly Payment Date (February 1, May 1, August 1, or November 1) that falls on or after the earlier of (i) the Commercial Operations Date (as defined below) for the Project or (ii) August 1, 2017 (the earlier of such dates, the “Commencement Date”); and shall end with the last quarterly installment due on the Quarterly Payment Date that is on or immediately follows the expiration of the twentieth (20<sup>th</sup>) year after the Commencement Date. Developer shall provide the Town a copy of the notice it receives from the local electric utility regarding Commercial Operations Date referred to in Section 2.a below; failure to provide such notice shall constitute a material breach of this Agreement.

Other than as provided in Paragraph 2, Developer agrees that the Annual Payments will not be reduced for any reason (including without limitation on account of a depreciation factor, revaluation or reduction in the Town’s tax rate, or legislative action fixing or otherwise setting taxes or payments in lieu thereof for photovoltaic solar facilities), and the Town agrees that the Annual Payments will not be increased (including on account of an inflation factor, revaluation or increase in the Town’s tax rate or assessment percentage beyond that anticipated by the Parties). Developer hereby waives, during the term of this Agreement, any rights it may have otherwise had in the absence of this Agreement to seek, for any reason and in any forum, an abatement or reduction of taxes assessed for the Project, and therefore, hereby waives any such rights with respect to any payments in lieu of taxes assessed in accordance with the provisions of this Agreement.

2. Adjustments to Annual Payments. Adjustments to Annual Payments shall be made, if at all, only in accordance with this Paragraph 2.

- a. DC Nameplate Capacity Changes. If, as of the date Developer receives from the local electric utility written authorization to interconnect and commence operations of the Project (the “Commercial Operations Date”), the installed DC nameplate capacity of the Project (the “DC Capacity”) is more or less than the DC Capacity set forth above, the Annual Payments reflected in Exhibit B shall be increased (if more) or decreased (if less) by the unit price of \$12.50/KW (DC) for each KW change in DC Capacity, which unit price shall escalate at 2.0% for the first ten years and at 2.5% for the following ten years. If after the Commercial Operations Date, as a result of the addition, replacement, enhancement or removal of Project equipment, improvements or other property, the DC Capacity is increased or decreased, the Annual Payments

shall be adjusted for each KW change in DC Capacity at the same unit price, provided that, in the event of a removal resulting in a decrease in Annual Payments, such decrease shall not be effective unless and until the Project equipment, improvements or other property have been removed from both the Project and the Property.

- b. AC Nameplate Capacity Changes. If after the Commercial Operations Date, as a result of the addition, replacement, or enhancement of Project equipment, improvements or other property the installed AC nameplate capacity of the Project (“AC Capacity”) increases, the Annual Payments reflected in Exhibit B shall be increased by a unit price of \$16.25/KW (AC) for each KW change in AC Capacity, which unit price shall escalate at 2.0% for the first ten years and at 2.5% for the following ten years. In the event that both the AC Capacity and DC Capacity increase as a result of the addition, replacement or enhancement of the same Project equipment, improvements or other property, the unit price (DC or AC) resulting in the largest increase in Annual Payments shall apply. For the avoidance of doubt, for an equipment change resulting in a payment adjustment pursuant to Paragraph 2.a and Paragraph 2.b, only the largest of the payment adjustments pursuant to Paragraph 2.a or 2.b shall apply, not both.
- c. Notice of Commercial Operations Date and Changes in Capacity. Within fourteen (14) days following the Commercial Operations Date, Developer shall provide written notice to the Town certifying that date and the DC Capacity and AC Capacity of the Project as installed as of that date. Within fourteen (14) days of the addition, replacement, removal, or enhancement of Project equipment, improvements or other property resulting in a change in AC/DC Capacity, Developer shall provide written notice to the Town describing, in reasonable detail, the equipment, improvements or other property added, replaced, removed, or enhanced; the resulting change in AC/DC Capacity; and a proposed adjustment to Annual Payments in accordance with Paragraph 2.

3. Inventory; Exclusion of Property, Improvements and Fixtures. Attached to this Agreement as Exhibit C is a preliminary, itemized inventory prepared by Developer (the “Inventory”) of the improvements, equipment and other property anticipated to be incorporated in the Project. Only property necessary or incidental to the production of electricity shall be included in the Project. Notwithstanding anything to the contrary in this Agreement, the Project, and thus the Annual Payments hereunder, shall not include (i) buildings (except for a single equipment storage shed for use in the Project, subject to advance approval of the Town) and, (ii) excluding the Project, fixtures, and improvements constituting “Real Property,” as defined in M.G.L. c. 59, § 2A(a).

Within sixty (60) days after the Commercial Operations Date, Developer shall provide Town with an as-built description of the solar photovoltaic panels and inverters and other equipment in the Project, to the same level of detail as provided on Exhibit C, which shall be considered the “Inventory.” Within thirty (30) days after the Town’s receipt of such notification, the Parties will agree on an updated Inventory; in the event the Town does not respond during

such period, it shall be deemed to have accepted the Inventory as provided by the Developer. In the event the Parties are unable so to agree in such 30-day period, the Town shall, at its sole election, reasonably determine the updated Inventory, or assess taxes for such portions of the Project that are not included in the Inventory in Exhibit C as if this Agreement did not exist. Developer will update the Inventory annually as of January 1 of each year, and an updated written Inventory, referred to as an Annual Inventory Update, will be provided to the Town on or before February 1 of each year. The Town, its officers, employees, consultants, agents and attorneys will have the right periodically, during normal business hours and upon reasonable advance notice to Developer, to inspect the Project and review documents in possession of Developer that relate to the Project and the Inventory to verify the Inventory and Developer's compliance with this Agreement.

In addition, the Developer shall, upon signing this Agreement, provide the Town with a copy of Developer's interconnection application filed with the local electric utility (or if such application has not been filed, within fourteen (14) days after it is filed), and a copy of its interconnection agreement with such utility within fourteen (14) days after it has been signed by the utility and Developer. Developer shall also provide the Town any future amendments to such application or interconnection agreement within fourteen (14) days after the amendments to the application are filed by the Developer and the amendments to the interconnection agreement are signed by the utility and Developer.

4. Payment Collection. In addition to such rights and remedies available in this Agreement, all statutory rights and remedies available to the Town for the collection of taxes shall also be available to the Town for the collection of Annual Payments hereunder, including, but not limited to, the rights and remedies provided in G.L. c. 59 and G.L. c. 60, and all such rights and remedies are hereby reserved notwithstanding anything to the contrary herein. Accordingly, for example, if and to the extent deemed necessary by the Town for assessment or collection of Annual Payments, the Project may, at the Town's election, be deemed personal property unintentionally omitted from annual assessment under G.L. c. 59, § 75, or "Real Property," as defined in G.L. c. 59, § 2A(a). All late payments shall accrue interest at 14 percent per annum. Furthermore, if Developer breaches its payment obligations under this Agreement, Developer shall pay the reasonable attorneys' fees, court and other costs incurred by the Town in the collection of the unpaid amounts.

5. Tax Status. The Town agrees that during the term of this Agreement, the Town will not assess Developer for any real and personal property taxes for the Project, and the Town agrees that this Agreement will exclusively govern the payments of such taxes (and payments in lieu of such taxes) that Developer will be obligated to make to the Town with respect to the Project, provided, however, that this Agreement will not affect any other taxes owed by the Developer or Property Owner, including, but not limited to, real property taxes for the Property (including any buildings and, excluding the Project, fixtures and improvements located thereon), and taxes for personal property not incorporated into the Project, which taxes, if any, shall be assessed in accordance with applicable laws and regulations. Notwithstanding the foregoing or anything to the contrary in this Agreement, upon the expiration or earlier termination of this Agreement, the Town shall not be bound by any valuation/payment amount, schedule or formula

set forth in this Agreement in the assessment of future taxes for the Project after the date of such expiration or termination.

6. Assignment. Developer shall not assign this Agreement in whole or in part without the advance written consent of the Town, which shall not be unreasonably withheld, conditioned, or delayed, except that Developer may (i) collaterally assign the Agreement to an entity providing financing for construction, operation or maintenance of the Project with advance written notice to the Town, provided that Developer shall not be relieved of its obligations hereunder; or (ii) with advance written notice to the Town, assign the Agreement to an entity no less creditworthy than Developer to whom Developer has sold or transferred all its interests in the Project, provided that, upon an assignment under clause (ii), Developer shall be deemed as having represented and warranted to the Town that the assignee has the financial ability to comply with all obligations of Developer hereunder.

7. Invalidity. The Parties understand and agree that this Agreement shall be void and unenforceable if (a) this Agreement, or any material portion of this Agreement, is determined or declared by a court or agency of competent jurisdiction to be illegal, void, or unenforceable; (b) Developer is determined or declared by a court or agency of competent jurisdiction to not be a “generation company” or “wholesale generation company” as those terms are used and/or defined in G.L. c. 59 § 38H(b), and G.L. c. 164 § 1; and/or (c) this Agreement has not been approved by Town Meeting. In the event this Agreement is declared void in accordance with this Paragraph 7, any payments due and/or made to the Town before the date of such declaration shall be and remain property of the Town, and to the extent permitted by law, shall be deemed full satisfaction of the taxes in lieu of which they were made.

8. Notices. All notices, consents, requests, or other communications provided for or permitted to be given hereunder by a Party must be in writing and will be deemed to have been properly given or served upon the personal delivery thereof, via courier delivery service, or by mail in a manner of delivery that results in a confirmation of receipt, such as certified mail or federal express. Such notices shall be addressed or delivered to the Parties at their respective addresses shown below.

To: Developer

Upton Solar, LLC  
c/o Nexamp, Inc.  
4 Liberty Square, 3<sup>rd</sup> Floor  
Boston, MA 02109  
Attn: Chris Clark  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To: Town of Upton  
Board of Selectmen

1 Main Street, Box 1  
Upton, MA 01568

Any such addresses for the giving of notices may be changed by either Party by giving written notice as provided above to the other Party. Notice given by counsel to a Party shall be effective as notice from such Party.

9. Applicable Law. This Agreement will be made and interpreted in accordance with the laws of the Commonwealth of Massachusetts without regard to the law of “conflicts of laws.” The Parties each consent to the jurisdiction of the Massachusetts courts or other applicable agencies of the Commonwealth of Massachusetts regarding any and all matters, including interpretation or enforcement of this Agreement or any of its provisions. Venue for all court actions brought hereunder shall be (solely) the state courts located in Suffolk County, Massachusetts, or if different, the county in which the Town is located. Developer agrees to accept service of process, including civil complaints, by certified mail at the address indicated in Paragraph 8 (Notices).

10. Force Majeure. As used herein, an event of Force Majeure is an event beyond the reasonable control of the Parties, and includes, without limitation, the following events:

- a. Acts of god including floods, winds, storms, earthquake, fire or other natural calamity;
- b. Acts of War or other civil insurrection or terrorism; or
- c. Taking by eminent domain by any governmental entity of all or a portion of the Property or the Project.

In the event that a Force Majeure occurs during the term of this Agreement that renders the Project wholly or substantially unable to produce electricity for a period of more than sixty (60) days, Developer may, at its election, terminate the Agreement following expiration of such 60-day period by written notice to the Town, provided that such termination shall be effective no earlier than the end (June 30) of the fiscal year in which said notice is received by the Town, and provided further that the Project will thereafter be assessed and taxed as if this Agreement does not exist.

Notwithstanding the foregoing or any Force Majeure event, Developer shall continue to make Annual Payments without abatement or reduction until this Agreement is terminated, if at all, in accordance with this Paragraph 10.

11. Certification of Tax Compliance. Pursuant to G.L. c. 62C, § 49A, Developer by its duly authorized representative, certifies that it has complied with all laws of the commonwealth relating to taxes, reporting of employees and contractors, and withholding and remitting of child support.

12. Covenants, Representations and Warranties of Developer and Town.

a. During the term of the Agreement, Developer will not do any of the following:

1. convey by sale, lease, assignment or otherwise any interest in the Property or Project to any tax-exempt entity or organization, including without limitation a charitable organization pursuant to G.L. c.59, § 5 (Clause Third);

2. fail to pay the Town all amounts due hereunder when due in accordance with the terms of this Agreement;

3. seek, for any reason, an abatement or reduction of any of the amounts assessed in accordance with the terms of this Agreement, and Developer hereby waives, during the full term of this Agreement, any rights it may have otherwise had to seek such an abatement or reduction; or

4. seek to amend or terminate this Agreement on account of the enactment of any law or regulation or a change in any existing law or regulation the intent or effect of which is to fix or limit in any way the method for calculating payments-in-lieu-of-taxes for renewable energy facilities.

b. Developer represents and warrants:

1. It is a corporation or other business entity duly organized, validly existing and in good standing under the laws of the state in which it was formed, and if a foreign corporation or other business entity, is registered with the Massachusetts Secretary of State, and has full power and authority to carry on its business as it is now being conducted.

2. This Agreement constitutes the legal, valid and binding obligation of Developer enforceable in accordance with its terms, except to the extent that the enforceability may be limited by applicable bankruptcy, insolvency or other laws affecting other enforcement of creditors' rights generally or by general equitable principles.

3. It has taken all necessary action to authorize and approve the execution and delivery of this Agreement.

4. The person executing this Agreement on behalf of Developer has the full power and authority to bind it to each and every provision of this Agreement.

5. Developer is a “generation company” or “wholesale generation company” as those terms are used and defined in G.L. c. 59, § 38H(b) and G.L. c. 164 § 1.

6. Developer does not qualify for a manufacturing classification exemption pursuant to G.L. c. 59, § 5(16)(3).

7. The documents and information furnished by Developer to the Town in connection with this Agreement, including but not limited to the Inventory and any update thereto, is true, accurate and complete in all material respects.

8. The performance of Developer’s obligations under this Agreement will not violate or result in a breach or default of any agreement or instrument to which Developer is a party or to which Developer is otherwise bound.

- c. Town represents and warrants to Developer that it has secured all approvals of appropriate municipal officers, boards and bodies necessary to duly authorize the execution, delivery and performance of this Agreement and its obligations hereunder, including its Board of Selectmen and Town Meeting.

13. Entire Agreement. The Parties agree that this is the entire, fully integrated Agreement between them with respect to payments in lieu of taxes for the Project, and that there are no third party beneficiaries to this Agreement.

14. Termination by Town. Notwithstanding anything to the contrary in this Agreement, the Town may terminate this Agreement on thirty (30) days written notice to Developer if:

- a. The Developer fails to make timely payments required under this Agreement, unless such payment is received by the Town within the 30-day notice period with interest as stated in this Agreement, provided, however, that the Town may nonetheless terminate this Agreement if such failure occurs more than three times in any rolling 365-day period, even if each such failure is cured within the 30-day notice period;
- b. The Developer has filed, or has had filed against it, a petition in Bankruptcy, or is otherwise insolvent;
- c. The Developer otherwise materially breaches this Agreement, unless such breach is cured within the 30-day notice period, including payment to the Town of any

damages arising from such breach, provided, however, that the Town may nonetheless terminate this Agreement if Developer materially breaches this Agreement more than three times in any rolling 365-day period, even if each such breach is cured within the 30-day notice period; and/or

- d. The Developer's representations set forth in Paragraph 12 were untrue, inaccurate, or incomplete in material respects at the time they were made.

15. Payment of Town Costs. Upon execution of this Agreement, the Developer shall pay the Town by bank or certified check, or wire transfer, the lump-sum amount of \$3000, representing payment of costs and expenses, including attorneys' fees, incurred by the Town in the negotiation of this Agreement.

16. Statement of Good Faith. The Parties agree that the payment obligations established by this Agreement were negotiated in good faith in recognition of and with due consideration of the full and fair cash value of the Project, to the extent that such value is reasonably determinable as of the date of this Agreement in accordance with G.L. c.59, §38H. Each Party was represented by counsel in the negotiation and preparation of this Agreement and has entered into this Agreement after full and due consideration and with the advice of its counsel and its independent consultants. The Parties further acknowledge that this Agreement is fair and mutually beneficial to them because it reduces the likelihood of future disputes over personal property taxes attributable to the Project, establishes tax and economic stability at a time of continuing transition and economic uncertainty in the electric utility industry in Massachusetts and the region, and fixes and maintains mutually acceptable, reasonable and accurate payments in lieu of taxes for the Project that are appropriate and serve their respective interests. Town acknowledges that this Agreement is beneficial to it because it will result in mutually acceptable, steady, predictable, accurate and reasonable payments in lieu of taxes to Town. Developer acknowledges that this Agreement is beneficial to it because it ensures that there will be mutually acceptable, steady, predictable, accurate and reasonable payments in lieu of taxes for the Project. Furthermore, Town and Developer shall act in good faith to carry out and implement this Agreement and to resolve any disputes between them.

17. Miscellaneous.

- a. This Agreement may be executed in several counterparts, each of which shall be an original, and all of which shall constitute but one and the same instrument.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

Executed under seal by the undersigned as of the day and year first written above, each of whom represents that it is fully and duly authorized to act on behalf of and bind its principals.

**TOWN OF UPTON**

**DEVELOPER: UPTON SOLAR, LLC**

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

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

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

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

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

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

**EXHIBIT A**

Legal Description:

**The Property:** A portion of the Property, located off the southerly side of Milford Street (Mass. Highway Route 140), Upton, Massachusetts, and consisting of approximately 18 acres of land more particularly shown on the plan titled “Lease Area and Easement Plan on Milford Street and Chestnut Street in Upton MA for Upton Solar LLC”, dated February 19, 2016, recorded in the Worcester District Registry of Deeds at Plan Book 918, Page 50.

**EXHIBIT B****Annual Payments Schedule**

(Based Upon DC Capacity of 2.6 MW, Subject to Adjustment Under Paragraph 2)

<b><u>Year</u></b>	<b><u>Annual Payment</u></b>
1	\$32,500
2	\$33,150
3	\$33,813
4	\$34,489
5	\$35,179
6	\$35,883
7	\$36,600
8	\$37,332
9	\$38,079
10	\$38,841
11	\$39,812
12	\$40,807
13	\$41,827
14	\$42,873
15	\$43,944
16	\$45,043
17	\$46,169
18	\$47,323
19	\$48,506
20	\$49,719
<b>TOTAL</b>	<b>\$801,890</b>

**EXHIBIT C**

## Inventory

Solar Modules:	7,056 LG 365 watt modules (or equivalent)
DC/AC Inverter	2 Ingeteam Sun 1000 TL U 360 Utility Grade Inverters (or equivalent)
Transformers:	2 Pacific Crest 1000 kVA Transformers (or equivalent)
Shed:	1 12x12 Equipment Shed
Racking:	TerraSmart TerraFarm 2x9 Racking required to support DC capacity of 2.6 MW
Fence:	8' high chain link security fence around perimeter of the project lease area
Other:	Various electronic controls, and other miscellaneous equipment reasonably necessary or related to the operation and maintenance of a 2.6 MW DC solar electric generating facility