1. Agreement. These Power Sales Terms and Conditions and the document incorporating them by reference, including all documents, exhibits, schedules, and attachments thereto or specifically incorporated by reference, constitute the sole and entire agreement ("Agreement") between Hawthorne Machinery Co., Hawthorne Machinery Co. dba Hawthorne Power Systems, or Hawthorne Pacific Corp. as applicable ("Hawthorne") and the purchasing customer ("Customer") (together with Hawthorne, the "Parties," and each a "Party") (except as otherwise provided herein or in the context of reference to "Customer" and "Goods & Services" on) behalf of this Agreement. This Agreement supersedes all prior and contemporaneous understandings and agreements, both written and oral regarding the Goods & Services. No purchase order issued in connection with the Goods & Services shall be binding on Hawthorne unless accepted by Hawthorne in writing. The provision of the Goods & Services to Customer shall not be deemed acceptance and contains conditions contained in any request for proposal, purchase order, statement of work, or other similar document, nor does it serve to modify or amend this Agreement. Any such document shall create a separate contract consisting of the terms of this Agreement and any additional terms proposed by such document to the extent they do not conflict with the terms of this Agreement. Should the terms of any proposal, purchase order, or statement of work issued by Customer or a third party conflict with the terms and conditions of this Agreement, the terms of this Agreement shall prevail. No modification, alteration, or addition to Customer’s equipment or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne’s warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the Goods & Services or failed to bring its account current. All remedies under Hawthorne’s warranty are expressly limited to replacing or repairing, at Hawthorne’s option, any Goods & Services found to be defective. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period or for loss due to, or in connection with, the failure of the repaired equipment, including any and all claims for indirect and consequential damages, are excluded from this limited warranty.

4. Limited Warranty. Hawthorne’s warranty obligations set forth above do not arise unless Customer gives written notice that reasonably describes any defective Goods & Services to Hawthorne within thirty (30) days of discovery of the alleged defect and any applicable warranty period has not expired. If, in its sole discretion, Hawthorne determines there to be a defect in service or materials provided, which defect is directly attributable to use in a normal and customary manner, (ii) defects, errors, or nonconformities due to modifications, alterations, additions or changes to Customer’s equipment not made or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne’s warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the Goods & Services or failed to bring its account current. All remedies under Hawthorne’s warranty are expressly limited to replacing or repairing, at Hawthorne’s option, any Goods & Services found to be defective. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period or for loss due to, or in connection with, the failure of the repaired equipment, including any and all claims for indirect and consequential damages, are excluded from this limited warranty.

10. Late Payments. All late payments shall bear interest at the lesser of the rate of 1.5% per month (18% per annum) or the highest rate permitted under applicable law, calculated daily and compounded monthly, from the date such payment was due until the date paid in full. In addition to all other remedies available to it (which Hawthorne does not waive by the exercise of any right or privilege hereunder), Customer hereby agrees that if Customer defaults in any respect under this Agreement, Hawthorne shall have the right, but not the obligation, to apply any funds paid by Customer to Hawthorne at any time to satisfy unpaid amounts.

11. Taxes. Customer shall be responsible for all sales, use, and excise taxes, and any other similar taxes, duties, and charges of any kind imposed by any federal, state or local governmental entity on any amounts payable by Customer hereunder, excluding any taxes imposed on, or with respect to, Hawthorne’s income, revenues, gross receipts, personnel or property. Hawthorne’s sole discretion. All right to alter or amend the terms hereof, shall be in the sole discretion of Hawthorne. Should the terms of any proposal, purchase order, or statement of work issued by Customer or a third party conflict with the terms and conditions of this Agreement, the terms of this Agreement shall prevail. No modification, alteration, or addition to Customer’s equipment or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne’s warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the Goods & Services or failed to bring its account current. All remedies under Hawthorne’s warranty are expressly limited to replacing or repairing, at Hawthorne’s option, any Goods & Services found to be defective. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period or for loss due to, or in connection with, the failure of the repaired equipment, including any and all claims for indirect and consequential damages, are excluded from this limited warranty.

12. Hours of Operation. Unless specified otherwise in writing, the Goods & Services shall be performed or provided during Hawthorne’s publicized business hours. Goods & Services performed or provided outside of such hours will be billed at applicable overtime or double-time rates.

14. Exclusions from Limited Warranty. Any limited warranty offered by Hawthorne does not cover (i) defects, error, or damage to Customer’s equipment due to accident, abuse, misuse, negligent use, failure to follow proper maintenance procedures, and any use other than use in a normal and customary manner, (ii) defects, errors, or nonconformities due to modifications, alterations, additions or changes to Customer’s equipment not made or authorized by Hawthorne, (iii) normal wear and tear, or (iv) damage caused by force of nature or by an act of any third party. Hawthorne’s warranty shall be null and void and have no legal effect in the event Customer has failed to pay for the Goods & Services or failed to bring its account current. All remedies under Hawthorne’s warranty are expressly limited to replacing or repairing, at Hawthorne’s option, any Goods & Services found to be defective. Claims for losses arising out of any failure of repaired equipment to operate for the warranty period or for loss due to, or in connection with, the failure of the repaired equipment, including any and all claims for indirect and consequential damages, are excluded from this limited warranty.

15. Limitation of Liability. In no event shall Hawthorne be liable to Customer or any third party for any loss of use, revenue or profit or loss of data or diminution in value, or for any consequential, indirect, incidental, special, exemplary or punitive damages (including attorneys’ fees and costs and expert-witness fees and costs) arising out of or related to breach of contract, tort (including negligence) or otherwise, regardless of whether such damages were foreseeable and whether or not Customer has been advised of the possibility of such damages. With the exception of any indemnity obligations, in no event will Hawthorne’s liability arising out of or related to this Agreement, whether arising out of or related to breach of contract, tort (including negligence) or otherwise, exceed the greater of (i) the fees paid or payable to Hawthorne pursuant to the Agreement in the one-year period preceding the breach or (ii) an amount equal to the purchase price for the Goods & Services if Customer fails to pay any amounts due. If Customer fails to pay any amounts due, all unpaid sums shall become immediately due and payable within ten (10) days. Additionally, Hawthorne shall have the right, but not the obligation, to apply any funds paid by Customer to Hawthorne at any time to satisfy unpaid amounts.

16. Disclaimer of Warranties. EXCEPT FOR THE LIMITED WARRANTY ABOVE, HAWTHORNE MAKES NO WARRANTY WHATSOEVER WITH RESPECT TO THE Goods & Services, INCLUDING ANY (i) WARRANTY OF MERCHANTABILITY; (ii) WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE; (iii) WARRANTY OF TITLE; OR (iv) WARRANTY AGAINST INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS OF A THIRD PARTY, WHETHER EXPRESS OR IMPLIED BY LAW, COURSE OF DEALING, COURSE OF PERFORMANCE, USAGE OF TRADE OR OTHERWISE. HAWTHORNE IS NEITHER A MANUFACTURER OF ANY PARTS USED IN THE Goods & Services NOR AN AGENT THEREOF, ALTHOUGH HAWTHORNE MAY ADMINISTER WARRANTIES ISSUED BY A MANUFACTURER, INCLUDING ANY MANUFACTURER’S WARRANTIES OR ANY WARRANTIES BY SUCH MANUFACTURER ARE NOT THE RESPONSIBILITY OF HAWTHORNE; (2) SUCH MANUFACTURER’S WARRANTY MAY CONTAIN LIMITATIONS; AND (3) CUSTOMER MAY INCUR CERTAIN REPAIR, TRANSPORTATION OR OTHER CHARGES WHICH ARE NOT COVERED BY SUCH MANUFACTURER’S WARRANTY.

17. Limitation of Liability. In no event shall Hawthorne be liable to Customer or any third party for any loss of use, revenue or profit or loss of data or diminution in value, or for any consequential, indirect, incidental, special, exemplary or punitive damages (including attorneys’ fees and costs and expert-witness fees and costs) arising out of or related to breach of contract, tort (including negligence) or otherwise, regardless of whether such damages were foreseeable and whether or not Customer has been advised of the possibility of such damages. With the exception of any indemnity obligations, in no event will Hawthorne’s liability arising out of or related to this Agreement, whether arising out of or related to breach of contract, tort (including negligence) or otherwise, exceed the greater of (i) the fees paid or payable to Hawthorne pursuant to the Agreement in the one-year period preceding the breach or (ii) an amount equal to the purchase price for the Goods & Services if Customer fails to pay any amounts due. If Customer fails to pay any amounts due, all unpaid sums shall become immediately due and payable within ten (10) days. Additionally, Hawthorne shall have the right, but not the obligation, to apply any funds paid by Customer to Hawthorne at any time to satisfy unpaid amounts.

18. Mutual Indemnification. SUBJECT TO THE TERMS AND CONDITIONS SET FORTH HEREIN, HAWTHORNE WILL INDEMNIFY, HOLD HARMLESS, AND DEFEND THE OTHER PARTY, ITS AFFILIATES AND THEIR RESPECTIVE OWNERS, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS, SUCCESSORS AND PERMITTED AssignS

A LARGER FONT COPY OF THESE TERMS AND CONDITIONS IS AVAILABLE UPON REQUEST.

Rev. 8/21/2020
23. Termination by Hawthorne. Hawthorne may terminate this Agreement for any reason upon ten (10) days written notice to Customer ("Notice of Termination") or Customer's bankruptcy, insolvency, reorganization, or assignment for the benefit of creditors. If Customer becomes insolvent, files a petition for bankruptcy, commences or has commenced against it proceedings relating to bankruptcy, receivership, reorganization or assignment for the benefit of creditors Hawthorne may terminate the Agreement and Customers rights under the Agreement, declare the balance of all unpaid amounts and all other charges of any kind required of Customer under the Agreement to be payable immediately, and be entitled to the balance due together with interest at the rate of 10% per annum from the date of notification, and if the Agreement is terminated without legal process first of all rights and interests of Customer to the Equipment. Customer authorizes Hawthorne or Hawthorne's agent to enter onto any premises where the Equipment is located and repossession and remove it. Customer specifically waive any right of action Customer might otherwise have arising out of the aforementioned entry and repossession and releases Hawthorne of any claim for trespass or damage caused by such entry and repossession. Failure to comply with any of the requirements of this Section may result in reasonable expenses of repossession and enforcement of Hawthorne's rights and remedies, together with interest at the rate of 10% per annum from the date of payment.

Notwithstanding any other provision of this Agreement, Customer will pay, subject to any limits under applicable law, Hawthorne's attorneys' fees and legal expenses of any kind to enforce any provision in this Agreement.

Customer shall not be liable, nor be deemed to have defaulted or breached this Agreement, for any failure or delay caused by or resulting from acts or circumstances beyond Hawthorne's reasonable control including, without limitation, acts of God, flood, fire, earthquake, explosion, governmental actions, war, invasion or hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest, national emergency, revolution, insurrection, epidemic, lock-outs, strikes or other labor disputes (whether or not relating to either Party's workforce), restraints or delays affecting carriers, an inability or delay in obtaining supplies of adequate or suitable materials, telecommunication breakdown or power outage.

25. Communications. All notices, requests, consents, claims, demands, waivers and other communications required or permitted to be made under this Agreement shall be in writing and addressed to the other Party at the address the receiving Party has designated in accordance with this Section. Unless otherwise agreed to in writing, all Communications must be delivered by facsimile, e-mail, personal delivery, courier or certified or registered mail (return receipt requested, postage prepaid). A Communication is effective only on receipt by the receiving Party if the receiving Party has given the sending Party a written notice of its facsimile, e-mail, personal delivery, courier or certified or registered mail address.

All such Communications shall be deemed received (i) if given by facsimile or e-mail, on the date of transmission if sent prior to 3:00 p.m. (PST) on a business day and otherwise on the following business day, (ii) if by courier or personal delivery, on the date of delivery, and (iii) if by mail, two (2) days after the date of mailing.

Any dispute or controversy arising under or in connection with this Agreement shall first be resolved by informal discussion between senior management of the Parties. If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California or Honolulu, Hawaii with a mutually agreeable mediator. If mediation fails to produce a resolution, or if the Parties cannot agree on an agreement to mediate, then the Agreement shall first be resolved by informal discussion between senior management of the Parties. If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California or Honolulu, Hawaii with a mutually agreeable mediator.

If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California or Honolulu, Hawaii with a mutually agreeable mediator.

27. Waiver of Jury Trial. EACH PARTY KNOWINGLY, VOLUNTARIALLY, IRREVOCABLY AND UNCONDITIONALLY WAIVES ITS RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED ON OR ARISING OUT OF THIS AGREEMENT OR THE SUBJECT MATTER THEREOF (INCLUDING, WITHOUT LIMITATION, CONTRACT, TORT, BREACH OF DUTY, AND ALL OTHER COMMON LAW AND STATUTORY CLAIMS), AND WILL NOT BE SUBJECT TO ANY EXCEPTIONS. EACH PARTY (i) UNDERSTANDS THAT THIS IS A WAIVER OF IMPORTANT LEGAL RIGHTS AND (ii) ACKNOWLEDGES HAVING HAD A REASONABLE OPPORTUNITY TO DISCUSS THIS WAIVER AND ITS EFFECTS WITH LEGAL COUNSEL.

28. Dispute Resolution. Any dispute or controversy arising under or in connection with this Agreement shall first be resolved by informal discussion between senior management of the Parties. If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California or Honolulu, Hawaii with a mutually agreeable mediator. If mediation fails to produce a resolution, or if the Parties cannot agree on an agreement to mediate, then the Agreement shall first be resolved by informal discussion between senior management of the Parties. If informal discussion fails to produce a resolution, the Parties must then attend non-binding mediation in the San Diego County, California or Honolulu, Hawaii with a mutually agreeable mediator.
remedies or a waiver of any such rights and/or remedies. Remedies hereunder shall not be exclusive, but shall be cumulative and in addition to all other remedies existing at law or in equity. The receipt, acceptance and/or negotiation of, or any endorsement on, any check or draft received from one Party will not operate to waive or release, in whole or in part, any claim of the other Party arising hereunder or in connection herewith (except as to the portion thereof actually received by the other Party in cash or other good funds)

33. Assignment. Hawthorne may assign any of its rights or obligations under the Agreement without the prior written consent of Customer. If an assignee agrees to assume the obligations of Hawthorne, Customer agrees that Hawthorne shall be released from all further liability hereunder. Customer shall not assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of Hawthorne. Any purported assignment or delegation in violation of this Section shall be null and void. No assignment or delegation shall relieve Customer of any of its obligations under this Agreement.

34. No Third Party Beneficiaries. This Agreement benefits solely the Parties and their respective permitted successors and assigns. Nothing in this Agreement, whether express or implied, confers on any other person any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.

35. Headings. Headings are for reference and do not affect the interpretation of the Agreement.

36. Time to Bring Claim. No claim which concerns a dispute arising under this Agreement may be commenced by Customer more than one year after the Goods & Services are performed or delivered.

37. Equipment Management Electronic Data Sharing Product Link™, Vision Link® User Agreement/Privacy Notice, and Data Governance. For machines equipped with Product Link™ and VisionLink®, Customer understands that data concerning the machine, its condition, and operation will be transmitted to Caterpillar Inc. and/or its dealers to better serve Customer and improve upon Caterpillar Inc. products and services. The information transmitted may include but is not limited to machine serial number, machine location, operational data, fault codes, emissions data, fuel usage, service meter hours, software and hardware version numbers, and installed attachments. Caterpillar Inc. recognizes and respects customer privacy. Caterpillar Inc. and/or its dealers will not sell or rent collected information to any third party and will exercise all reasonable efforts to keep the information secure. Customer, by executing the Agreement, understands the disclosures in this Section and grants permission to allow the referenced data to be accessed by Caterpillar Inc. and/or its dealers. Customer, by executing the Agreement, also agrees to and executes the Caterpillar Data Governance Consent Form and any and all exhibits, appendices, and attachments referenced therein, which includes but is not limited to the Caterpillar Data Governance Statement, both of which can be found at www.hawthornecat.com/terms.

38. Title to Goods. Hawthorne retains title to goods until Customer performs all of its obligations under the Agreement. In order to secure payment and performance of the obligations, Customer hereby grants to Hawthorne a security interest in the purchased goods and all proceeds thereof described in this agreement to secure the performance of all of Customer’s obligations under this Agreement.

39. Equipment. Should the Agreement include the purchase of machines or equipment from Hawthorne, when the machines necessary for the Agreement have been identified and appropriated, Customer agrees on demand to execute and deliver to Hawthorne all notes, contracts, security agreements, and financing statements required by Hawthorne to evidence the transaction. In the event Customer fails to execute and deliver said notes, contracts, security agreements and financing statements to Hawthorne, the entire balance of the purchase price of the equipment shall, at Hawthorne’s option, become immediately due and payable.

40. Transportation. Customer understands and consents to Hawthorne’s use of third party vendors to provide transportation services (“Transportation Company”). Customer also agrees that Hawthorne’s responsibility for shipment of any goods ceases upon delivery of said goods to a Transportation Company, and any claims for shortages, delays or damages occurring thereafter shall be made timely by Customer directly to the Transportation Company. Any claims against Seller for shortages in shipment shall be made within 15 days after receipt of shipment.

41. Nonconforming Goods. Should the Agreement include Customer purchasing machines or equipment from Hawthorne, Customer shall have the right to reject nonconforming goods, or a nonconforming tender only if such nonconformity impairs the value of the goods by more than ten (10%) percent of the contract price. Customer’s failure to give notice of any claim within ten (10) days from the date of delivery shall constitute an unqualified acceptance of the goods and a waiver by Customer of all claims with respect to the goods. Hawthorne shall have the right to cure nonconformities in the goods or in their tender, provided that Customer notifies Hawthorne within ten (10) days of notification of the nonconformity of its intent to cure. Any such cure must occur within fourteen (14) days of the notification of the nonconformity.

42. Used Goods. Should the Agreement include the purchase of used machinery, parts, or equipment, said used machinery, parts, and equipment are sold “AS IS” AND “WITH ALL FAULTS”. HAWTHORNE MAKES NO WARRANTY RELATED TO THE TITLE OF THE GOODS FOR SALE UNDER THIS AGREEMENT, NOR TO THE RIGHTFUL TRANSFER OF THE GOODS, NOR TO THE EXISTENCE OF SECURITY INTEREST, LIENS, OR OTHER ENCUMBRANCES AGAINST THE GOODS. HOWEVER, HAWTHORNE MAKES NO WARRANTIES THAT, AT THE TIME OF SALE, HAWTHORNE DID NOT KNOW OF ANY HOSTILE CLAIM OF TITLE OR ANY ENCUMBRANCES AGAINST THE GOODS FOR SALE UNDER THIS AGREEMENT.

43. Assumption of Risk. Customer hereby acknowledges and understands that there are risks associated with the use and operation of equipment sold by Hawthorne, which include but are not limited to injury to persons and property as well as death. Customer acknowledges and understands these risks, agrees to assume them, and waives any and all rights to seek compensation, restitution, or indemnification for any injuries, claims, or damages that might arise from said risks.

44. Storage. Should Hawthorne be in possession of Goods or equipment, parts, or merchandise related to the Goods & Services beyond any delivery date contemplated by the Agreement, Customer agrees to pay Hawthorne a monthly storage fee in an amount to be determined by Hawthorne taking into account the size and nature of the equipment or merchandise stored on Customer’s behalf. Customer is entitled to possession of said equipment at any time upon first giving Hawthorne reasonable notice of not less than five (5) business days. Customer agrees that Customer bears all risk of loss or damage to its equipment while stored by Hawthorne. Customer agrees to cover its equipment under its own property damage insurance policy and to name Hawthorne as an additional insured. If Customer fails to pay in full for the Goods and Services or take possession of its property following thirty (30) days’ written notice, Hawthorne may sell or otherwise dispose of Customer’s property as it sees fit and apply any proceeds to amounts due and owing.

45. Survival. Provisions of this Agreement that by their nature should apply beyond their terms will remain in force after any termination or expiration of this Agreement including, but not limited to, Section 16 (Disclaimer of Warranties), Section 17 (Limitation of Liability), Section 18 (Mutual Indemnification), Section 19 (Indemnification Procedure), Section 20 (Exceptions and Limitations on Indemnification), Section 22 (Confidentiality), Section 26 (Applicable Law/Venue), Section 27 (Waiver of Jury Trial), Section 28 (Dispute Resolution), Section 29 (Enforcement), and Section 45 (Survival).

46. Consent to Share Customer Data. By accepting the Agreement, Customer consents to Hawthorne sharing information relating to or generated pursuant to this Agreement, or the Goods & Services, including Confidential Information, with Caterpillar, Inc., its affiliates, subsidiaries, sister companies, or vendors and agrees that such disclosure is not a sale or received for valuable consideration.

47. Trade-in Equipment. Customer warrants that any equipment traded in or described on a document incorporating these terms and for which trade-in allowance is given, is free and clear of all encumbrances.

A LARGER FONT COPY OF THESE TERMS AND CONDITIONS IS AVAILABLE UPON REQUEST.