

**Master Power Purchase and Sale Agreement**

**by and between**

**The Buyer and County of San Francisco, acting by and through its Public  
Utilities Commission**

**And**

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**POWER PURCHASE AND SALE AGREEMENT**

**COVER SHEET**

This Master Power Purchase Agreement (“Master Agreement”) is entered into between the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF (“Buyer”) and **[insert name of Seller]**, a \_\_\_\_\_ **[include place of formation and business type]** (“Seller”), as of \_\_\_\_\_ (“Execution Date”). The Master Agreement together with the exhibits, attachments, and any written supplements hereto, any designated collateral, credit support, or similar arrangement between the Parties and all Transactions (including any confirmations executed in accordance with Section 2.2) shall be referred to as the “Agreement”.

<b>City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF (Buyer)</b>	<b>Seller:</b>
<b>All Notices:</b>  525 Golden Gate Ave, 7th Floor San Francisco, CA, 94102 Attn: Contract Administration Phone: 415-554-4603 Facsimile: 415-554-3225	<b>All Notices:</b>
<b>Federal Tax ID Number:</b> 946000417	<b>Federal Tax ID Number:</b> <b>DUNS Number:</b>
<b>Invoices:</b> Attn: Phone: Facsimile:	<b>Invoices:</b> Attn: Phone: Facsimile:
<b>Scheduling:</b> Attn: Phone: Facsimile: Email: Scheduling Desk: <a href="mailto:PowerScheduler@sfgwater.org">PowerScheduler@sfgwater.org</a>	<b>Scheduling:</b> Attn: Phone: Facsimile:  Email:
<b>Payments:</b> Attn: Phone: Facsimile:	<b>Payments:</b> Attn: Phone: Facsimile:
<b>Wire Transfer:</b> BNK: ABA (ACH): ACCT:	<b>Wire Transfer:</b> BNK: ABA: ACCT:

## ARTICLE 1: DEFINITIONS

**AC:** Means alternating current.

**Affiliate:** Means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, “control” means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.

**Agreement:** Has the meaning set forth in the Cover Sheet.

**Master Agreement Term:** Has the meaning set forth in Section 2.2.

**Applicable Law:** Means any statute, law, treaty, rule, tariff, regulation, ordinance, code, permit, enactment, injunction, order, writ, decision, authorization, judgment, decree or other legal or regulatory determination or restriction by a court or governmental authority of competent jurisdiction including the CAISO (“Governmental Authority”), or any binding interpretation of the foregoing, as any of them is amended or supplemented from time to time, that apply to either or both of the Parties or the terms of the Agreement.

**Bankrupt:** Means with respect to any entity, such entity (i) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is generally unable to pay its debts as they fall due.

**Board of Supervisors:** Means the Board of Supervisors for the City and County of San Francisco.

**Business Day:** Means any day except a Saturday, Sunday, a Federal Reserve Bank holiday, or a City and County of San Francisco holiday. A Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant Party’s principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

**Buyer:** Means the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF.

**Buyer’s Obligations:** Means the payment obligations of the Buyer under this Agreement and any Transactions entered into pursuant to this Master Agreement.

**CAISO:** Means the California Independent System Operator Corporation or its functional successor.

**CAISO Tariff:** Means the California Independent System Operator Corporation, Fifth Replacement Federal ERC Electric Tariff as it may be amended, supplemented or replaced (in whole or in part) from time to time.

**CEC:** Means the California Energy Commission or any successor agency.

**Change in Law:** Has the meaning set forth in Section 12.5(f).

**CleanPowerSF:** Means the Buyer’s Community Choice Aggregation Program.

**Confidential Information:** Has the meaning set forth in Section 12.2(b).

**Confirmation:** Has the meaning set forth in Section 2.2(a).

**Controller:** Means the Controller for the City and County of San Francisco.

**Costs:** Means, with respect to the Non-Defaulting Party, (a) brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement or entering into new arrangements which replace a Terminated Transaction; and (b) all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of a Transaction.

**CPUC:** Means the California Public Utilities Commission or any successor government agency.

**Credit Rating:** Means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by S&P and/or Moody's.

**Defaulting Party:** Has the meaning set forth in Section 9.1.

**Delivery Term:** Has the meaning set forth in Section 2.2.

**Delivery Point:** Means The point at which Product will be delivered and received, as specified in a Transaction.

**Downgrade Event:** Means a Party's credit rating falls below BBB- from S&P or Baa3 from Moody's.

**Early Termination Date:** Has the meaning set forth in Section 9.2(a).

**Effective Date:** Has the meaning set forth in Section 2.1(d).

**Eligible LC Bank:** Means a U.S. commercial bank or a foreign bank with a U.S. branch, that has a credit rating of at least A3 from Moody's or A- from S&P.

**Energy:** Means three-phase, 60-cycle alternating current electric energy measured in MWh.

**Equitable Defenses:** Means any bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.

**Event of Default:** Has the meaning set forth in Section 9.1.

**Execution Date:** Has the meaning set forth on the Cover Sheet.

**FERC:** Means the Federal Energy Regulatory Commission or any successor agency.

**Force Majeure:** Means an event or circumstance, including a natural disaster, war, riot, or civil disturbance, which prevents one Party ("Claiming Party") from performing its material obligations under this Agreement, which event or circumstance was not anticipated as of the Execution Date, which is not within the reasonable control of, or the result of the action or inaction of, the Claiming Party, and which, by the

exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Neither Party may raise a claim of Force Majeure based in whole or in part on;

- (a) failures or delays by the participating transmission owner and/or the CAISO in entering into, or performing under, any agreements with Seller contemplated by this Master Agreement except to the extent that such delay is solely caused by a Force Majeure;
- (b) a strike, work stoppage or labor dispute;
- (c) Seller's failure to obtain additional funds, including funds authorized by a state or the federal government or agencies thereof, to supplement the payments made by Buyer pursuant to this Master Agreement;
- (d) a Forced Outage except where such Forced Outage is caused by an event of Force Majeure;
- (e) a Curtailment Order; or
- (f) economic conditions that render a Party's performance of this Master Agreement at the Contract Price unprofitable or otherwise uneconomic, including Buyer's ability to buy Product at a lower price, or Seller's ability to sell Product at a higher price).

**Gains:** Means, with respect to any Party, an amount, determined in a commercially reasonable manner, equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of a Terminated Transaction. Factors used in determining economic benefit may include reference to information either available to the Party internally or supplied by one or more third parties, including quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, market price referent, market prices for a comparable transaction, forward price curves based on economic analysis of the relevant markets, settlement prices for a comparable transaction at liquid trading hubs (e.g., NYMEX), all of which should be calculated for the remainder of the term of a Termination Transaction to determine the value of the Product, including the value of Environmental Attributes and Capacity Attributes, as applicable.

**Governmental Authority:** Any federal or state government, or political subdivision thereof, including, without limitation, any municipality, township or county, or any entity or authority exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including, without limitation, the CAISO or any corporation or other entity owned or controlled by any of the foregoing.

**Guarantor:** Means, with respect to a Party, any Person that (a) is reasonably acceptable to the other Party, (b) has a Credit Rating of A- or better from S&P or a Credit Rating of A3 or better from Moody's, (c) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (d) executes and delivers a Guaranty for the benefit of the other Party.

**Guaranty:** Means a guaranty from a Guarantor provided for the benefit of Buyer as reasonably acceptable to Buyer.

**Indemnified Party:** Has the meaning set forth in Section 10.1.

**Indemnifying Party:** Has the meaning set forth in Section 10.1.

**Investment Grade:** Means a Credit Rating of BBB- or better by S&P and Baa3 or better by Moody's.

**Late Payment Penalty:** Has the meaning set forth in Section 4.1(b).

**Letter(s) of Credit:** Means one or more irrevocable, transferable standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch, with such bank having a credit rating of at least A3 from Moody's or A- from S&P in a form acceptable to the Party in whose favor the letter of credit is issued. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.

**Losses:** Means, with respect to any Party, an amount, determined in a commercially reasonable manner, equal to the present value of the economic loss to it (exclusive of Costs) resulting from termination of a Termination Transaction. Factors used in determining the loss of economic benefit may include reference to information either available to it internally or supplied by one or more third parties, including quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, market price referent, market prices for a comparable transaction, forward price curves based on economic analysis of the relevant markets, settlement prices for a comparable transaction at liquid trading hubs (e.g. NYMEX), all of which should be calculated for the remainder of the term of the Terminated Transaction to determine the value of the Product, including Environmental Attributes and Capacity Attributes, as applicable. If the Non-Defaulting Party is the Seller, then in addition to lost payments for Product pursuant to this Agreement, "Losses" shall exclude any associated loss of investment tax credits and other lost tax benefits.

**Master Agreement:** Has the meaning set forth in the Cover Sheet.

**Master Agreement Term:** Has the meaning set forth in Section 2.2.

**Moody's:** Means Moody's Investor Services, Inc. or its successor.

**NERC:** Means the North American Electricity Reliability Council.

**NERC Business Day:** Means any day except a Saturday, Sunday or a holiday as defined by the North American Electric Reliability Council or any successor organization thereto. A NERC Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant Party's principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

**Non-Defaulting Party:** Has the meaning set forth in Section 9.2.

**Performance Assurance:** Means collateral in the form of either cash, Letter(s) of Credit, a Guaranty from an entity with an Investment Grade Credit Rating, or other security acceptable to the requesting party.

**Pledgor:** Has the meaning set forth in Section 5.1.

**Political Activity:** Has the meaning set forth in Section 12.14.

**Potential Event of Default:** Means an event which, with notice or passage of time or both, would constitute an Event of Default.

**Product:** Means electric capacity, energy, or other products(s) related thereto as specified by the Parties in a Transaction.

**Public Records Laws:** Means the California Public Records Act, California Government Code §§ 6250, et seq., the San Francisco Sunshine Ordinance, San Francisco Administrative Code Chapter 67, the Ralph M.

Brown Act, California Government Code §§ 54950, et seq., and any other applicable law regarding public records as may be amended from time to time.

**Replacement Price:** Means the price at which Buyer, acting in a commercially reasonable manner, purchases for delivery at the Delivery Point a replacement for any Product specified in a Transaction but not delivered by Seller, plus (i) costs reasonably incurred by Buyer in purchasing such substitute Product and (ii) additional transmission charges, if any, reasonably incurred by Buyer to the Delivery Point, (provided Buyer shall use reasonable efforts to minimize any such additional transmission charges), or absent a purchase, the market price at the Delivery Point for such Product not delivered as determined by Buyer in a commercially reasonable manner; provided, however, in no event shall such price include any penalties, ratcheted demand or similar charges, nor shall Buyer be required to utilize or change its utilization of its owned or controlled assets or market positions to minimize Seller's liability. For the purposes of this definition, Buyer shall be considered to have purchased replacement Product to the extent Buyer shall have entered into one or more arrangements in a commercially reasonable manner whereby Buyer repurchases its obligation to sell and deliver the Product to another Buyer the Delivery Point.

**S&P:** Means the Standard & Poor's Financial Services, LLC. (a subsidiary of the McGraw-Hill Companies, Inc.) or its successor.

**Sales Price:** Means the price at which Seller, acting in a commercially reasonable manner, resells any Product not received by Buyer, deducting from such proceeds any (i) costs reasonably incurred by Seller in reselling such Product and (ii) additional transmission charges, if any, reasonably incurred by Seller in delivering such Product to the third party purchasers, (provided Seller shall use reasonable efforts to minimize any such additional transmission charges), or absent a sale, the market price at the Delivery Point for such Product not received as determined by Seller in a commercially reasonable manner; provided, however, in no event shall such price include any penalties, ratcheted demand or similar charges, nor shall Seller be required to utilize or change its utilization of its owned or controlled assets, including contractual assets, or market positions to minimize Buyer's liability. For purposes of this definition, Seller shall be considered to have resold such Product to the extent Seller shall have entered into one or more arrangements in a commercially reasonable manner whereby Seller repurchases its obligation to purchase and receive the Product from another party at the Delivery Point.

**Schedule or Scheduling:** Means the actions of Seller, Buyer and/or their designated representatives, including each Party's Transmission Providers, if applicable, of notifying, requesting and confirming to each other the quantity and type of Product to be delivered on any given day or days during the Delivery Period at a specified Delivery Point.

**Scheduling Coordinator or SC:** Has the meaning set forth in the CAISO Tariff.

**Secured Party:** Has the meaning set forth in Section 5.3.

**Seller:** Means \_\_\_\_\_.

**Settlement Amount:** Means, with respect to a Transaction and the Non-Defaulting Party, the Losses or Gains, and Costs, expressed in U.S. Dollars, which the Non-Defaulting Party incurs as a result of the liquidation of a Termination Transaction pursuant to Section 8.3.

**SFPUC:** Means the San Francisco Public Utilities Commission or any successor government agency.

**Termination Payment:** Means, with respect to the Non-Defaulting Party, the sum of (a) the Losses or Gains, and Costs which such Party incurs as a result of the termination of this Master Agreement pursuant

to Section 9.3, plus (b) the sum of all amounts then owed to the Non-Defaulting Party by the Defaulting Party determined as of the Early Termination Date.

**Transaction:** Means a particular transaction agreed to by the Parties related to the sale and purchase of a Product pursuant to this Master Agreement.

## ARTICLE 2: CONDITIONS PRECEDENT AND TERM

**2.1 Conditions Precedent.** The Term of this Master Agreement shall not commence until the occurrence of all of the following:

- (a) For Each Party: Each Party has received Collateral Assurance from the other Party as required under Article 5.
- (b) For Seller: A copy of each of:
  - (i) the articles of incorporation, certificate of incorporation, operating agreement or similar applicable organizational document of Seller,
  - (ii) the by-laws or other similar document of Seller (collectively, “Charter Documents”) as in effect, or anticipated to be in effect, on the Execution Date,
  - (iii) A certificate from the jurisdiction of Seller’s incorporation or organization certifying that Seller is duly organized, validly existing and in good standing under the laws of such jurisdiction, and
  - (iv) Evidence of insurance as set forth in Exhibit E.
- (c) For Buyer:
  - (i) This Master Agreement has been approved, if required, by the San Francisco Public Utilities Commission and/or San Francisco Board of Supervisors; and
  - (ii) The Controller has certified in accordance with the City Charter that sufficient unencumbered balances are available in the proper fund.
- (d) Effective Date. The Effective Date of this Master Agreement shall be the date that all of the Conditions Precedent set forth above have been satisfied or waived in writing by both Parties.
- (e) Failure to meet all Conditions Precedent. If the Conditions Precedent set forth in this Section are not satisfied or waived in writing by both Parties within ninety (90) days of full execution of this Master Agreement, then either Party may terminate this Master Agreement effective upon receipt of notice by the other Party. Neither Party shall have any obligation or liability to the other, including for a Termination Payment or otherwise, as a result of such termination.

## 2.2 Master Agreement Term and Transactions

- (a) Master Agreement Term. The term of this Master Agreement shall commence and this Master Agreement shall be effective upon the Effective Date, unless earlier terminated

pursuant to an express provision of this Master Agreement, and shall remain in effect until the delivery to Buyer of all of the Environmental Attributes under this Master Agreement (the “Term”).

(b) Transactions.

- (i) A Transaction shall be entered into upon agreement of the Parties in writing, through the execution of a confirmation in form and substance mutually agreed to by the Parties (“Confirmation”). No Confirmation shall be binding until executed by the SFPUC on behalf of the City in accordance with all applicable City contracting requirements and by Seller. Neither Party is obligated to enter into any Transaction or any Confirmation pursuant to this Master Agreement and no Party shall have any obligation to purchase or sell any Product unless and until the Parties have executed a Confirmation.
- (ii) Unless otherwise specifically agreed, each Transaction between the Parties shall be governed by this Master Agreement. This Master Agreement (including all exhibits, schedules, and any written supplements hereto), any designated collateral, credit support, margin agreement, or similar arrangement between the Parties and all Transactions executed in accordance with Section 2.2(b)(i) shall form a single integrated agreement between the Parties. Any inconsistency between any terms of this Master Agreement and any terms of the Confirmation shall be resolved in favor of the terms of such Confirmation.

### ARTICLE 3: PURCHASE AND SALE

#### 3.1 Purchase and Sale of Product.

- (a) Transaction. With respect to each Transaction, Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Product at the Delivery Point.
- (b) Title and Risk of Loss. Title to and risk of loss as to all Product purchased by Buyer shall pass from Seller to Buyer at the Delivery Point. Seller shall be responsible for any costs, fees, taxes, assessments, or charges associated with the Product or its delivery of the Product up to the Delivery Point. Buyer shall be responsible for any costs, or charges imposed on or associated with the Product or the delivery of the Product at and from the Delivery Point. Seller warrants that it shall deliver all Product to Buyer free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto created by any Person other than Buyer.
- (c) Transmission and Scheduling**Error! Bookmark not defined.** Seller shall arrange and be responsible for transmission service to the Delivery Point and shall Schedule or arrange for Scheduling services to deliver the Product to the Delivery Point. Buyer shall arrange and be responsible for transmission service at and from the Delivery Point and shall Schedule or arrange for Scheduling services to receive the Product at the Delivery Point.

## ARTICLE 4: BILLING AND PAYMENT

### 4.1 Billing and Payment.

- (a) Monthly Invoices. No sooner than ten (10) days after the end of each calendar month, Seller shall provide to Buyer an invoice for the Product delivered in the prior month based on \_\_\_\_\_. The invoice shall include: \_\_\_\_\_.
- (b) Payment. All invoices shall be due and payable on or before the forty-fifth (45th) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day (“Due Date”). Any amount not paid by the Due Date shall be subject to a late payment penalty equal to a daily rate of \$5.50 per \$100,000.00 (“Late Payment Penalty”) for a maximum period of ninety (90) calendar days after such payment is due.
- (c) City Vendor Requirements. Notwithstanding any other provision of this Master Agreement, Buyer shall not be deemed to be in default of this Master Agreement and no Late Payment Penalty shall be assessed if an invoice under this Master Agreement cannot be processed by Buyer due to Seller’s failure to comply with all applicable Buyer requirements for Buyer’s contractors, including but not limited to, certification of vendors under Chapter 12 of the San Francisco Administrative Code, payment of business license fees or taxes, or any other current or future Buyer requirement for vendor payment processing. Seller understands and acknowledges that vendor certifications may include annual renewals and additional certification requirements may apply to assignees or changes in ownership or control of Seller.
- (d) Disputes and Adjustments of Invoices. A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Master Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with the Late Payment Penalty from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with the Late Payment Penalty from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 4.1 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made. If an invoice is not rendered within twelve (12) months after the close of the month during which performance of a Transaction occurred, the right to payment for such performance is waived.
- (e) CAISO Adjustments. If the CAISO makes any adjustment to any CAISO meter data for a given time period, Seller agrees that it shall submit revised monthly invoices, pursuant to Section 4.1, covering the entire applicable time period in order to conform fully such adjustments to the meter data. Seller shall submit any such revised invoice no later than

thirty (30) days from the date on which the CAISO provides to Seller such binding adjustment to the meter data.

#### **4.2 Designated Fund [For CleanPowerSF]**

- (a) Auto-Appropriating Designated Fund. The Buyer's Obligations under this Master Agreement shall be paid from a SFPUC designated fund that will automatically appropriate CleanPowerSF revenues on an annual basis without further Buyer action and which shall be used solely for CleanPowerSF costs and expenses, including the Buyer's Obligations. Buyer agrees to set CleanPowerSF rates and charges that are sufficient to maintain revenues necessary to pay the Buyer Obligations and all of Buyer's payment obligations under its other contracts for the purchase of energy for CleanPowerSF. Buyer shall provide Seller with reasonable access to account balance information with respect to the SFPUC designated fund at all times during the Delivery Period of a Transaction.
- (b) Limited Obligations. The Buyer's Obligations are special limited obligations of Buyer payable solely from the revenues of CleanPowerSF. The Obligations are not a charge upon the revenues or general fund of the SFPUC or the Buyer or upon any non-CleanPowerSF moneys or other property of the SFPUC or the Buyer.

#### **4.3 Guaranteed Maximum Cost.**

- (a) Controller Certification. The Buyer's Obligations hereunder shall not at any time exceed the amount certified by the Controller for the purpose and period stated in such certification. Except as may be provided by laws governing emergency procedures, officers and employees of the Buyer are not authorized to request, and the Buyer is not required to reimburse Seller for, commodities or services beyond the agreed upon contract scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of the Buyer are not authorized to offer or promise, nor is the Buyer required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract is certified without certification of the additional amount by the Controller. The Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation.
- (b) Biannual Budget Process. For each City biannual budget cycle during the term of this Master Agreement, Buyer agrees to take all necessary action to include the maximum amount of the Buyer's payment obligations under this Master Agreement in its budget submitted to the Buyer's Board of Supervisors for that budget cycle.

### **ARTICLE 5: CREDIT AND COLLATERAL REQUIREMENTS**

**5.1 Grant of Security Interest/Remedies.** To secure its obligations under this Master Agreement, each Party (a "Pledgor") hereby grants to the other Party (the "Secured Party") a present and continuing security interest in, and lien on (and right of setoff against), and assignment of, the Pledgor's Collateral Posting posted with the other Party in the form of cash collateral or cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, such Secured Party. Within thirty (30) calendar day of the delivery of the Collateral Posting, each Party agrees to take such action as the other Party reasonably requires in order to perfect the Secured Party's first-priority security interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof. Upon or any time after the

occurrence or deemed occurrence and during the continuation of an Event of Default or an Early Termination Date, the Non-Defaulting Party may do any one or more of the following:

- (a) exercise any of the rights and remedies of a Secured Party with respect to all Collateral Posting, including any such rights and remedies under law then in effect;
- (b) draw on any outstanding Letter of Credit or Guaranty issued for its benefit, and;
- (c) liquidate any Collateral Posting then held by or for the benefit of the Secured Party free from any claim or right of any nature whatsoever of the Defaulting Party, including any equity or right of purchase or redemption by the Defaulting Party.

The Secured Party shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce the Pledgor's obligations under the Master Agreement (the Pledgor remaining liable for any amounts owing to the Secured Party after such application), subject to the Secured Party's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

## **5.2 Buyer Credit Protection. [TO BE NEGOTIATED]**

**5.3 Letter of Credit.** Any Collateral Posting provided in the form of a Letter of Credit shall be substantially in the form set forth in Exhibit XXXX subject to the following provisions:

- (a) Renewal of Letter of Credit. If a Party has provided a Letter of Credit pursuant to any of the applicable provisions in this Article 5, then such Party shall renew or cause the renewal of each outstanding Letter of Credit on a timely basis in accordance with this Master Agreement.
- (b) Failure of Letter of Credit and Cure. In the event the issuer of such Letter of Credit at any time: fails to maintain the requirements of an Eligible LC Bank or Letter of Credit, becomes Bankrupt, indicates its intent not to renew such Letter of Credit, or fails to honor Buyer's properly documented request to draw on such Letter of Credit, Seller shall cure such occurrence by complying with either (i) or (ii) below in an amount equal to the outstanding Letter of Credit, and by completing the action within five (5) Business Days after the date of Buyer's notice to Seller of an occurrence listed in this subsection (Seller's compliance with either (i) or (ii) below is considered the "Cure"):
  - (i) providing a substitute Letter of Credit that is issued by an Eligible LC Bank other than the bank which is the subject of Buyer's notice to Seller in this section 6.3(b),
  - (ii) providing a Guaranty, or
  - (iii) posting cash.
- (c) Failure to Cure. If Seller fails to cure or if such Letter of Credit expires or terminates without a full draw thereon by Buyer, or fails or ceases to be in full force and effect at any time that such Letter of Credit is required pursuant to the terms of this Master Agreement, then Seller shall have failed to meet the collateral requirements of Section 5.3 and Buyer may declare an Event of Default as set forth in Article 9.

- (d) Letter of Credit Costs. In all cases, the reasonable costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Seller.

**5.4 Guaranty.** If at any time the Pledgor's Guarantor or Guaranty is no longer acceptable to the Secured Party, in its reasonable discretion, the Pledgor shall replace the Guaranty within five (5) Business Days following a written request for replacement of the Guaranty. The Pledgor shall provide for the benefit of the Secured Party either (1) cash, (2) a replacement Guaranty from a different Guarantor meeting the criteria set forth in the definition of Guarantor, or (3) a replacement Letter of Credit from an issuer meeting the criteria set forth in the definition of Letter of Credit. If Pledgor fails to provide replacement collateral as required in this Section 5.5, then Buyer may declare an Event of Default as set forth in Article 9.

## ARTICLE 6: FINANCIAL STATEMENTS

**6.1 Seller's Obligations.** If requested by Buyer, Seller shall deliver, or make available on its website, (i) within six (6) months following the end of each fiscal year, a copy of Seller's annual report containing audited consolidated financial statements for such fiscal year (or if not available, unaudited consolidated financial statements for such fiscal year), and (ii) within forty-five (45) days after the end of each of its first three (3) fiscal quarters of each fiscal year, a copy of Seller's quarterly report containing unaudited consolidated financial statements for such fiscal quarter. In all cases the statements shall be for the most recent accounting period and prepared in accordance with generally accepted accounting principles and shall be certified by the Chief Financial Officer or equivalent officer of Seller on behalf of Seller; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not be an Event of Default so long as Seller diligently pursues the preparation, certification and delivery of the statements.

**6.2 Buyer's Obligations.** If requested by Seller, Buyer shall deliver to Seller (i) within six (6) months following the end of each fiscal year, a copy of Buyer's annual report containing audited consolidated financial statements for such fiscal year (or if not available, unaudited consolidated financial statements for such fiscal year) and (ii) within forty-five (45) calendar days after the end of each of its first three (3) fiscal quarters of each fiscal year, a copy of Buyer's quarterly report containing unaudited consolidated financial statements for such fiscal quarter. In all cases, the statements shall be for the most recent accounting period and shall be prepared in accordance with GAAP, provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not constitute an Event of Default so long as Buyer diligently pursues the preparation, certification and delivery of the statements.

## ARTICLE 7: FORCE MAJEURE

**7.1 Remedial Action.** A Party shall not be liable to the other Party if the Party is prevented from performing its obligations hereunder due to a Force Majeure Event. The Party rendered unable to fulfill an obligation by reason of a Force Majeure Event shall take all action necessary to remove such inability with all due speed and diligence. The non-performing Party shall be prompt and diligent in attempting to mitigate the effects of and to remove the cause of its failure to perform, and nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. Notwithstanding the foregoing, the existence of a Force Majeure Event shall not excuse any Party from its obligations to make payment of amounts due hereunder.

**7.2 Notice.** In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party suffering the Force Majeure Event shall, as soon as practicable under the circumstances, notify the

other Party, in writing, of the nature, cause, date of commencement, and the anticipated extent of any delay or interruption in performance.

**7.3 Termination Due To Force Majeure Event.** If a Party is prevented in any material respect from performing any material obligations under this Master Agreement solely due to a Force Majeure Event lasting for a period of twelve (12) consecutive months or longer, the unaffected Party may terminate this Master Agreement, without liability of either Party to the other, upon thirty (30) calendar days' prior written notice at any time following expiration of such period of twelve (12) consecutive months. This Section 8.3 shall not affect the rights and remedies associated with any other termination rights set forth in this Master Agreement.

## **ARTICLE 8: EVENTS OF DEFAULT; REMEDIES**

**8.1 Events of Default.** The occurrence of any of the following shall constitute an Event of Default by a Party (a "Defaulting Party"):

- (a) the breach of any material covenant or obligation set forth in this Master Agreement and such Party fails to cure such breach within thirty (30) calendar days after written notification of default by the other Party; however, the Parties may mutually agree upon a longer period for cure if the Event of Default cannot reasonably be cured within such initial (30) day period;
- (b) subject to Section 4.3 the failure to make, when due, any payment required pursuant to a Transaction if such failure is not remedied within ten (10) Business Days after written notice that such payment is due;
- (c) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated, and is not cured or remedied within thirty (30) days after written notice;
- (d) such Party becomes Bankrupt; the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article 5;
- (e) such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of such Party under this Master Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party;

**8.2 Termination for Default.**

- (a) Declaration of an Early Termination Date. If an Event of Default with respect to a Defaulting Party has occurred, is continuing, and has not been cured, the other Party (the "Non-Defaulting Party") shall have the right to:
  - (i) designate a day, no earlier than ten (10) calendar days after such notice is deemed to be received, as an early termination date ("Early Termination Date");

- (ii) accelerate all amounts owing between the Parties and to liquidate and terminate all, but not less than all, Transactions (each referred to as a “Terminated Transaction”) between the Parties and terminate this Master Agreement;
  - (iii) collect as of the Early Termination Date the Termination Payment;
  - (iv) withhold any payments due to the Defaulting Party under this Master Agreement, and;
  - (v) suspend performance;
  - (vi) exercise its rights pursuant to Article 5 of this Master Agreement to draw upon and retain any Collateral Posting;
  - (vii) exercise any other right of remedy available at law or in equity to the extent otherwise permitted under this Master Agreement.
- (b) Calculation of Termination Payment.
- (i) The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for each such Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transactions are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable). Third parties supplying such information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors, and other sources of market information.
  - (ii) The Non-Defaulting Party shall aggregate all Settlement Amounts into a single amount by: netting out (a) all Settlement Amounts that are due to the Defaulting Party, plus, at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to Article 8, plus any or all other amounts due to the Defaulting Party under this Master Agreement against, (b) all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Master Agreement, so that all such amounts shall be netted out to a single liquidated amount (the “Termination Payment”).
  - (iii) Notwithstanding the foregoing, if the aggregation of Settlement Amounts results in a Termination Payment being owed to the Defaulting Party, the Termination Payment shall be deemed to be zero (\$0).
  - (iv) The Non-Defaulting Party shall not be required to enter into replacement transactions to establish a Termination Payment.
  - (v) The Termination Payment shall be the sole and exclusive remedy available to the Non-Defaulting Party and shall not include consequential, incidental, punitive, exemplary, indirect, or business interruption damages.

- (c) Notice of Termination Payment. As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment, if any. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made by the Defaulting Party within fifteen (15) Business Days after such notice is effective.
- (d) Disputes with Respect to Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; provided, however, that if the Termination Payment is due from the Defaulting Party, the Defaulting Party shall first transfer Performance Assurance to the Non-Defaulting Party in an amount equal to the Termination Payment. Disputes regarding the Termination Payment shall be resolved in accordance with Section 12.3.

### **8.3 LIMITATION OF LIABILITY AND DAMAGES.**

- (a) **THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED.**
- (b) **THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS MASTER AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN OR IN A TRANSACTION, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION SET FORTH IN THIS MASTER AGREEMENT OR OTHERWISE; PROVIDED, HOWEVER, NOTHING IN THIS SECTION SHALL AFFECT THE ENFORCEABILITY OF THE PROVISIONS OF THIS MASTER AGREEMENT RELATING TO REMEDIES FOR FAILURE TO DELIVER IN ARTICLE 8 AND EXHIBIT D, AND CALCULATION AND PAYMENT OF THE TERMINATION PAYMENT IN SECTIONS 8.2 AND 8.3. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES**

**REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS IMPRACTICABLE. THE PARTIES FURTHER AGREE THAT PAYMENT OF SUCH AMOUNTS SHALL BE AS AND FOR LIQUIDATED DAMAGES AND NOT AS A PENALTY AND ARE THEREFORE NOT SUBJECT TO AVOIDANCE UNDER CALIFORNIA CIVIL CODE SECTION 1671.**

- (c) **BUYER'S PAYMENT OBLIGATIONS UNDER THE MASTER AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED UNDER THIS CONTRACT, INCLUDING, BUT NOT LIMITED TO, THE COMPENSATION PROVIDED FOR IN ARTICLES 4 AND 8.**

## **ARTICLE 9: INDEMNIFICATION**

### **9.1 Hold Harmless and Indemnification.**

- (a) Each Party shall indemnify, defend and hold harmless the other Party from and against any Claims arising from or out of any event, circumstance, act or incident first occurring or existing during the period when control and title to Product is vested in such Party as provided in Section 3.2. Each Party shall indemnify, defend and hold harmless the other Party against any Governmental Charges for which such Party is responsible under Article 9.
- (b) If a Party determines that it is entitled to defense and indemnification under this Section 10.1 (“Indemnified Party”), such Party shall promptly notify the other Party (“Indemnifying Party”) in writing of the losses, and provide all reasonably necessary or useful information, and authority to settle and/or defend the losses. No settlement that would impose costs or expense upon the Indemnifying Party shall be made without such Party’s prior written consent.
- (c) Notice. If an Indemnified Party determines that it is entitled to defense and indemnification under this Section 9.1, such Indemnified Party shall promptly notify the Indemnifying Party in writing of the losses, and provide all reasonably necessary or useful information, and authority to settle and/or defend the losses. No settlement that would impose costs or expense upon the Indemnified Party shall be made without such Party’s prior written consent.

## **ARTICLE 10: REPRESENTATIONS AND WARRANTIES**

**10.1 Seller’s Representations and Warranties.** In addition to the representations and warranties set forth in other sections of this Master Agreement, Seller represents and warrants to Buyer that as of the Execution Date:

- (a) Seller is duly organized and validly existing as a \_\_\_\_\_ under the laws of \_\_\_\_\_, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this Master Agreement, and Seller is duly qualified in California and each jurisdiction wherein the nature of the business transacted by it makes such qualification necessary;

- (b) Seller has the legal power and authority to make and carry out this Master Agreement and each Transaction and to perform all of its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part;
- (c) The execution, delivery and performance of this Master Agreement by Seller shall not conflict with its governing documents, any Applicable Laws, or any covenant, agreement, understanding, decree or order to which Seller is a party or by which it is bound or affected;
- (d) This Master Agreement has been duly and validly executed and delivered by Seller and, as of the Execution Date, constitutes a legal, valid and binding obligation of Seller, enforceable in accordance with its terms against Seller, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity;
- (e) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Seller, threatened, in writing, against Seller or any of its affiliates, at law or in equity, before any Governmental Authority, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Seller, or to result in any impairment of Seller's ability to perform its obligations under this Master Agreement;
- (f) It is not Bankrupt and there are no proceedings pending or being contemplated by it or any of its affiliates, or, to its knowledge, threatened against it or its affiliates which would result in it being or becoming Bankrupt; and
- (g) It is a forward contract merchant within the meaning of the U.S. Bankruptcy Code (as in effect as of the Execution Date of this Master Agreement).

**10.2 Buyer Representations and Warranties.** Buyer represents and warrants to Seller that as of the Execution Date:

- (a) Buyer is a municipal corporation, duly organized and validly existing, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this Master Agreement;
- (b) Buyer has the legal power and authority to make and carry out this Master Agreement and each Transaction and to perform its obligations hereunder and all such actions have been duly authorized by all necessary proceedings on its part;
- (c) The execution, delivery and performance of this Master Agreement by Buyer shall not conflict with its governing documents, any Applicable Laws or any covenant, agreement, understanding, decree or order to which Buyer is a party or by which it is bound or affected;
- (d) This Master Agreement has been duly and validly executed and delivered by Buyer and, as of the Execution Date, constitutes a legal, valid and binding obligation of Buyer, enforceable in accordance with its terms against Buyer, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the rights of creditors generally or by general principles of equity;

- (e) There are no actions, suits, proceedings or investigations pending or, to the knowledge of Buyer, threatened, in writing, against Buyer, at law or in equity, before any Governmental Authority, which individually or in the aggregate are reasonably likely to have a materially adverse effect on the business, properties or assets or the condition, financial or otherwise, of Buyer, or to result in any impairment of Buyer's ability to perform its obligations under this Master Agreement;
- (f) It is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt; and
- (g) It is a forward contract merchant within the meaning of the U.S. Bankruptcy Code (as in effect as of the Execution Date of this Master Agreement).

**10.3 Covenants.** In addition to other covenants in this Master Agreement, each Party covenants that throughout the Delivery Term:

- (a) it shall continue to be duly organized, validly existing and in good standing under the Applicable Laws of the jurisdiction of its formation;
- (b) it shall maintain (or obtain from time to time as required, including through renewal, as applicable) all regulatory authorizations necessary for it to legally perform its obligations under this Master Agreement; and
- (c) it shall perform its obligations under this Master Agreement in a manner that does not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any Applicable Law.

## ARTICLE 11: MISCELLANEOUS

### 11.1 Assignment.

- (a) Consent. Except as provided in Sections 12.2(b) and (c), neither Party shall assign this Master Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed so long as among other things, (i) the assignee assumes the transferring Party's payment and performance obligations under this Master Agreement, (ii) the assignee agrees in writing to be bound by the terms and conditions hereof, (iii) the transferring Party delivers financial statements, information and other evidence satisfactory to the non-transferring Party of the proposed assignee's technical and financial capability to fulfill the assigning Party's obligations hereunder, and (iv) the transferring Party delivers such tax and enforceability assurance as the other Party may reasonably request.
- (b) Assignment in Connection with a Change in Control. Notwithstanding any provision to the contrary in this Section 12.1, any direct or indirect change of control of Seller (whether voluntary or by operation of Law) shall be deemed an assignment and shall require the prior written consent of Buyer, which consent shall not be unreasonably withheld, conditioned or delayed. At Buyer's request, Seller shall promptly deliver financial statements, information and other evidence satisfactory to Buyer regarding the proposed change of control of Seller.

- (c) Unauthorized Assignment. Any assignment or purported assignment in violation of this Section 12.1 is void.

## 11.2 Proprietary or Confidential Information.

- (a) Buyer Confidential Information. Seller understands and agrees that, in the performance of this Master Agreement or in contemplation thereof, Seller may have access to private or confidential information which may be owned or controlled by Buyer and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to Buyer. Seller agrees that all private and confidential information disclosed by Buyer to Seller shall be held in confidence and used only in performance of the Master Agreement. Seller shall exercise the same standard of care to protect such information as a reasonably prudent person would use to protect its own proprietary data.
- (b) Public Records Act and Sunshine Ordinance. Seller acknowledges that Buyer is a public agency subject to the disclosure requirements of the Public Records Laws. If documents or information submitted to Buyer contain Seller's proprietary and confidential information and Seller claims that such information falls within one or more Public Records Laws exemptions, Seller must clearly mark such information "CONFIDENTIAL AND PROPRIETARY", and identify the specific lines containing such information (the "Confidential Information"). Buyer shall disclose such Confidential Information to third parties only to the extent required by California law (including, without limitation, the California Constitution, the Public Records Laws, and other Applicable Law.
- (c) Disclosure of Confidential Information by Buyer. In the event of a third party request for Buyer to disclose such Confidential Information, Buyer shall make reasonable efforts to provide notice to Seller prior to disclosure. If Seller contends that any Confidential Information is exempt from the Public Records Laws and wishes to prevent disclosure, Seller shall obtain a protective order, injunctive relief or other appropriate remedy from a court of law in San Francisco County before Buyer's deadline for responding to the disclosure request. If Seller fails to obtain such remedy prior to Buyer's deadline for responding to the request, Seller agrees that Buyer may disclose the requested Confidential Information. Seller further agrees that Buyer shall have no liability to Seller arising out of any disclosure by Buyer of any Seller Confidential Information before Seller has timely obtained an order, injunctive relief or other appropriate remedy to prevent Buyer from making the requested third party disclosure.
- (d) Non-Confidential Information. Notwithstanding anything to the contrary in this Section 12.2 nothing shall restrict any Party from using or disclosing information related to this Master Agreement, including Confidential Information if such information (i) is generally available to the public; (ii) was within the using or disclosing Party's possession prior to it being furnished hereunder, provided that such information is not subject to another confidentiality agreement with, or other contractual, legal or fiduciary obligation of confidentiality to, any other party with respect to such information; (iii) is rightfully obtained by a Party from third parties authorized to make such disclosure without restriction; (iv) is legally required to be disclosed by judicial or other governmental action as determined by such Party's attorney acting in good faith; or (v) is disclosed without a duty of confidentiality to a third party by, or with the authorization of, the disclosing Party; or (vi) is furnished to the non-disclosing Party's Affiliates, and to each of such person's

auditors, attorneys, advisors or lenders which are required to keep the information that is disclosed in confidence.

- (e) Nondisclosure of Private Information. If this Master Agreement requires Buyer to disclose "Private Information" to Seller within the meaning of San Francisco Administrative Code Chapter 12M, Seller shall use such information only in accordance with the restrictions stated in Chapter 12M and in this Master Agreement and only as necessary in performing this Master Agreement. Seller is subject to the enforcement and penalty provisions in Chapter 12M.

### **11.3 Dispute Resolution; Choice of Law; Venue.**

- (a) Negotiation; Dispute Resolution. The Parties will attempt in good faith to resolve any dispute or controversy arising out of or relating to the performance of this Master Agreement by negotiation. The status of any dispute or controversy notwithstanding, each Party shall proceed diligently with the performance of its obligations under this Master Agreement in accordance with and subject to the terms of this Master Agreement. If agreed by both Parties in writing, disputes may be resolved by a mutually agreed-upon alternative dispute resolution process. Neither Party will be entitled to legal fees or costs for matters resolved under this section.
- (b) Choice of Law; Venue. This Master Agreement and the rights and duties of the Parties hereunder shall be construed, enforced and performed in accordance with the laws of the state of California, and/or the laws of the United States, as applicable, without regard to principles of conflicts of law which may direct the application of the laws of another jurisdiction. Venue shall be in the County of San Francisco, State of California

**11.4 Audit.** Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Master Agreement. The Parties shall maintain such data and records in an accessible location and condition for a period of not fewer than five (5) years after final payment under this Master Agreement or until after final audit has been resolved, whichever is later.

### **11.5 General.**

- (a) Entire Agreement. This Master Agreement; the exhibits, attachments, and any written and fully executed supplements hereto, and any designated collateral, credit support, or margin agreement or similar arrangement between the Parties constitute the entire agreement between the Parties relating to the subject matter.
- (b) Construction. This Master Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.
- (c) Amendments. Except to the extent herein provided for, no amendment or modification to this Master Agreement shall be enforceable unless reduced to writing and executed by both Parties. Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Master Agreement, such amendment will not in any way affect outstanding Transactions under this Master Agreement without the prior written consent

of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Master Agreement.

- (d) No Third Party Beneficiaries. This Master Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Master Agreement).
- (e) No Waiver. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.
- (f) Change in Law. If any provision of this Master Agreement is rendered unlawful by action by any Governmental Authority, or any change in Applicable Law (a “Change in Law”) occurring after the Execution Date, the remaining lawful obligations that arise under this Master Agreement shall not be affected. If the Change in Law results in material changes to the Parties’ obligations with regard to any Product sold hereunder and that has the effect of changing the transfer and sale procedure set forth in this Master Agreement so that the implementation of this Master Agreement becomes impossible or impracticable, or otherwise modifies the RPS or language required to conform to the RPS, the Parties shall work in good faith to revise this Master Agreement in a manner that maintains to the greatest extent practicable the original intent of the Parties under this Master Agreement so that the Parties may perform their obligations regarding the purchase and sale of Product. If the Parties cannot reach a good faith agreement on amendments, the Master Agreement shall be terminated by mutual agreement without liability for either Party.
- (g) Headings. The headings used herein are for convenience and reference purposes only.
- (h) Assigns. This Master Agreement shall be binding on each Party’s successors and permitted assigns.
- (i) No Dedication. No undertaking by one Party to the other under any provision of the Master Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or to the public or affect Seller as an independent entity and not a public utility.
- (j) Relationship of the Parties. The duties, obligations and liabilities of the Parties are independent of one another and shall be limited to those expressly set forth herein. This Master Agreement shall not be interpreted or construed to create an association, joint venture, fiduciary relationship or partnership between Seller and Buyer or to impose any partnership obligation or liability or any trust or agency obligation or relationship upon either Party. Seller and Buyer shall not have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or act as or be an agent or representative of or otherwise bind the other Party. Seller and Buyer intend to act as energy supplier and energy purchaser, respectively, and do not intend to act as, or to be treated as, partners in, co-venturers in, or lessor/lessee with respect to any generating facility or any business related to a generating facility.
- (k) Severability. Should any provision of the Master Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of the Master Agreement shall not be affected and shall continue in full force and effect. The Parties shall, however, use their best endeavors to agree on the replacement of the void, illegal, or

unenforceable provision(s) with legally acceptable clauses which correspond as closely as possible to the sense and purpose of the affected provision.

- (l) Survival. All rights pursuant to (i) Section 4.1(d) (Disputes and Adjustment of Invoices); Article 10 (Events of Default; Remedies; Limitations), (iii) Article 11 (Indemnification), (iv) Section 13.2 (Confidential Information); (v) Section 13.3 (Dispute Resolution/Choice of Law), and (vi) Section 13.4 (Audit); (vii) Section 13.6(c) (Prohibition of Political Use of City Funds); (viii) Section 13.6(e) (False Claims), and; (ix) Section 13.6(f) (City Opinion) shall survive termination of this Master Agreement.

## **11.6 City Contracting Requirements.**

- (a) Compliance with Americans with Disabilities Act. Seller acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. Seller shall provide the services specified in this Master Agreement in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. Seller agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Master Agreement and further agrees that any violation of this prohibition on the part of Seller, its employees, agents or assigns will constitute a material breach of this Master Agreement.
- (b) Limitations on Contributions. Through execution of this Master Agreement, Seller acknowledges that it is familiar with Section 1.126 of City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with City for the rendition of personal services or for the furnishing of any material, supplies or equipment to City, whenever such transaction would require approval by City's elective officer of the board on which that elective officer serves, from making any campaign contribution to the officer at any time from the commencement of negotiations for the contract until the later of either: (1) the termination of negotiations for such contract, or (2) three months after the date this Master Agreement is approved by the City's elective officer or the board on which that elective officer serves.
- (c) Prohibition on Political Activity with City Funds. In accordance with San Francisco Administrative Code Chapter 12.G, Seller may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure in San Francisco (collectively, "Political Activity") in the performance of this Master Agreement. Seller agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the Controller. The terms and provisions of Chapter 12.G are incorporated herein by this reference. In the event Seller violates the provisions of this Section, Buyer may, in addition to any other rights or remedies available hereunder, (i) terminate this Master Agreement, and (ii) prohibit Seller from bidding on or receiving any new City contract for a period of two years. The Controller will not consider Seller's use of profit as a violation of this Section.
- (d) Non-Discrimination Requirements.
  - (i) Seller shall comply with the provisions of Chapter 12B of the San Francisco Administrative Code. Seller shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a) and 12B.2(c)-(k) of the San Francisco

Administrative Code and shall require all subcontractors to comply with such provisions. Seller is subject to the enforcement and penalty provisions in Chapters 12B and 12C.

- (ii) Seller represents that it does not as of the date of this Master Agreement, and will not during the term of this Master Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the Buyer elsewhere in the United States, discriminate in the provision of employee benefits between employees with domestic partners and employees with spouses and/or between the domestic partners and spouses of such employees, subject to the conditions set forth in San Francisco Administrative Code Section 12B.2.
- (e) Submitting False Claims; Monetary Penalties. Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the Buyer for the statutory penalties set forth in that section. A contractor, subcontractor or consultant will be deemed to have submitted a false claim to the Buyer if the contractor, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of the Buyer a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the Buyer; (c) conspires to defraud the Buyer by getting a false claim allowed or paid by the Buyer; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Buyer; or (e) is a beneficiary of an inadvertent submission of a false claim to the Buyer, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the Buyer within a reasonable time after discovery of the false claim.
- (f) Use of Buyer Opinion. Seller shall not quote, paraphrase, or otherwise refer to or use any opinion of Buyer, its officers or agents, regarding Seller or Seller's performance under this contract without prior written permission of the SFPUC.
- (g) Compliance with Laws. Seller shall keep itself fully informed of the City Charter, codes, ordinances and regulations of the City and of all state, and federal laws in any manner affecting the performance of its obligations under this Master Agreement, and must at all times materially comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time. Buyer shall provide notice to Seller of any such amendment to City's Charter, codes, ordinances and regulations of which it becomes aware
- (h) Conflict of Interest. Through its execution of this Master Agreement, Seller acknowledges that it is familiar with the provision of Section 15.103 of City's Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Section 87100 et seq. and Section 1090 et seq. of the Government Code of the State of California, and certifies that it does not know of any facts which constitutes a violation of said provisions and agrees that it will immediately notify the Buyer if it becomes aware of any such fact during the term of this Master Agreement.

**11.7 Mobile Sierra.** Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of this Master Agreement, whether proposed by a Party (to the extent that any waiver in subsection (b) below is unenforceable or ineffective

as to such Party), a non-party or FERC acting sua sponte, shall be the “public interest” standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

**11.8 Forward Contract.** The Parties acknowledge and agree that this Master Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code.

**11.9 Notices.** Unless otherwise stated in this Master Agreement, any notice, demand, request, or communication required or authorized by this Master Agreement shall be delivered either by hand, facsimile, electronic mail, overnight courier or mailed by certified mail, return receipt requested with postage prepaid, to the contacts set forth in the Cover Sheet. Either Party may change any information listed in the Notice section of the Cover Sheet, by written notice as provided in this Section. Any such notice, demand, request, or communication shall be deemed received on the Business Day on which the notice was transmitted if delivery was made by hand, facsimile or electronic mail, or (ii) upon receipt by the receiving Party if sent by overnight courier or mailed by certified mail, return receipt requested with postage prepaid.

**11.10 Counterparts.** This Master Agreement may be executed in one or more counterparts and by different Parties on separate counterparts, all of which shall be deemed one and the same agreement and each of which shall be deemed an original. Delivery of an executed counterpart of this Master Agreement by electronic means shall be deemed as effective as delivery of an originally executed counterpart. Any Party delivering an executed counterpart of this Master Agreement by electronic means shall also deliver an originally executed counterpart, but the failure of any Party to deliver an originally executed counterpart of this Master Agreement shall not affect the validity or effectiveness of this Master Agreement.

IN WITNESS WHEREOF, the Parties have caused this Master Agreement to be duly executed as of the Execution Date.

City and County of San Francisco,  
acting by and through its  
Public Utilities Commission

By: \_\_\_\_\_  
Harlan J. Kelly, Jr.  
General Manager,  
San Francisco Public Utilities Commission

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Approved as to Form:

Dennis J. Herrera  
City Attorney

By: \_\_\_\_\_  
Deputy City Attorney