

File No. 220652

Committee Item No. 6

Board Item No. 27

## COMMITTEE/BOARD OF SUPERVISORS

### AGENDA PACKET CONTENTS LIST

Committee: Budget and Finance Committee Date July 13, 2022

Board of Supervisors Meeting Date July 19, 2022

#### Cmte Board

<input type="checkbox"/>	<input type="checkbox"/>	Motion
<input type="checkbox"/>	<input type="checkbox"/>	Resolution
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Ordinance
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Legislative Digest
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Budget and Legislative Analyst Report
<input type="checkbox"/>	<input type="checkbox"/>	Youth Commission Report
<input type="checkbox"/>	<input type="checkbox"/>	Introduction Form
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Department/Agency Cover Letter and/or Report
<input type="checkbox"/>	<input type="checkbox"/>	MOU
<input type="checkbox"/>	<input type="checkbox"/>	Grant Information Form
<input type="checkbox"/>	<input type="checkbox"/>	Grant Budget
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<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Contract/Agreement
<input type="checkbox"/>	<input type="checkbox"/>	Form 126 – Ethics Commission
<input type="checkbox"/>	<input type="checkbox"/>	Award Letter
<input type="checkbox"/>	<input type="checkbox"/>	Application
<input type="checkbox"/>	<input type="checkbox"/>	Public Correspondence

#### OTHER (Use back side if additional space is needed)

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Renew Energy &amp; Energy Storage Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Energy Storage Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Project Participation Share Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Project Participation Share Agreement (Renewable Energy)</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Small Renew Power Purchase Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>Exhibit L - DRAFT Buyer Liability Pass Through Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Coordinated Operations Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>DRAFT Renewable Power Purchase Agreement</u>
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<u>PUC Resolution No. 22-0109 6/14/2022</u>

Completed by: Brent Jalipa Date July 7, 2022

Completed by: Brent Jalipa Date July 14, 2022

[Administrative Code - Purchase and Sale of Electricity and Related Products - Public Utilities Commission]

**Ordinance amending the Administrative Code to approve the use of certain form contracts to purchase and sell electricity and related products by the Public Utilities Commission (PUC), grant waivers of specified contract-related requirements in the Administrative and Environment Codes for these transactions, and delegate to the General Manager of the PUC authority under Charter section 9.118 to execute certain contracts with terms in excess of 10 years or requiring expenditures of \$10,000,000 or having anticipated revenue of one million dollars or more subject to specified limitations through June 30, ~~2025~~2027.**

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
**Additions to Codes** are in *single-underline italics Times New Roman font*.  
**Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
**Board amendment additions** are in double-underlined Arial font.  
**Board amendment deletions** are in ~~strikethrough Arial font~~.  
**Asterisks (\* \* \* \*)** indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Chapter 21 of the Administrative Code is amended by adding Section 21.43, to read as follows:

**SEC. 21.43. PURCHASE AND SALE OF CERTAIN ELECTRICITY AND RELATED PRODUCTS BY THE PUBLIC UTILITIES COMMISSION.**

**(a) Findings.**

**(1) The Power Enterprise (“Power Enterprise”) of the Public Utilities Commission (“PUC”) operates a municipal utility, Hetch Hetchy Power, and a community choice aggregation**

1 (“CCA”) program, CleanPowerSF. Both Hetch Hetchy Power and CleanPowerSF purchase and sell  
2 electricity in the wholesale markets to serve their respective retail customers in San Francisco.

3 (2) In May 2016, the City launched CleanPowerSF to provide San Francisco  
4 residents and businesses the option to receive cleaner, more sustainable electricity at rates comparable  
5 to PG&E's rates. See Ordinance Nos. 86-04, 147-07, 232-09, 45-10, 200-12, 78-14 and 75-15 and  
6 Resolution Nos. 348-12 and 331-13.

7 (3) Hetch Hetchy Power serves its customers primarily with electricity generated by  
8 City-owned generation resources; CleanPowerSF serves its customers entirely with electricity  
9 purchased through wholesale market transactions. Both Hetch Hetchy Power and CleanPowerSF  
10 comply with state law and California Independent System Operator market rules, including  
11 requirements to procure renewable energy, Resource Adequacy (RA), and energy storage. In addition,  
12 as a CCA, CleanPowerSF is subject to numerous energy procurement requirements under state law  
13 and California Public Utilities Commission decisions.

14 (4) The PUC is in a unique market position because both Hetch Hetchy Power and  
15 CleanPowerSF directly compete with PG&E and private power providers for retail electricity  
16 customers and with other load serving entities for supplies of electricity and electricity-related products  
17 in the highly competitive wholesale markets. This competitive environment heightens the need to  
18 maintain prices at a level that is competitive with PG&E despite the many regulatory burdens and costs  
19 placed on CCAs and the unique challenges faced by Hetch Hetchy Power due to its reliance on PG&E  
20 for wholesale distribution service.

21 (5) To meet regulatory requirements, secure the best possible prices and terms, keep  
22 rates affordable and competitive, and manage procurement risk, the PUC engages in a continual  
23 process of procuring power and simultaneously negotiating a mix of short, medium, and long-term  
24 contracts for a diverse supply of energy and energy-related products with multiple suppliers, all in an  
25 expedited time frame consistent with regulatory deadlines.

1                   (6)     The PUC is engaged in a number of procurement efforts to fulfill the City's goals  
2 for a carbon-free future, energy independence, equity in access to 100% renewable energy supply;  
3 ensure stable and affordable rates, meet Hetch Hetchy Power's and CleanPowerSF's regulatory  
4 obligations; and contribute to the reliability of the state's energy grid and resource supply.

5                   (7)     These efforts include CleanPowerSF programs to secure a significant number of  
6 long-term agreements to purchase electricity from new renewable and energy storage projects,  
7 including from small renewable projects located in disadvantaged communities under the  
8 Disadvantaged Communities ("DAC") Green Tariff and the Community Solar ("CS") Green Tariff  
9 programs, and renewable and energy storage projects located on City reservoirs within the City. The  
10 DAC and CS Green Tariff programs will provide 100% renewable energy at discounted rates to  
11 residents of disadvantaged communities within the City. The costs expended on procuring energy for  
12 Hetch Hetchy Power and CleanPowerSF are fully recovered by PUC through customer billing.

13                   (8)     Hetch Hetchy Power and CleanPowerSF will also engage in procurement efforts  
14 through competitive bidding processes as necessary for short- and medium-term agreements for energy  
15 and energy-related products. As the PUC manages fluctuations in supply and demand and navigates  
16 the constantly changing regulatory requirements of multiple agencies, it also engages in the sale of  
17 excess energy.

18                   (9)     In Ordinance Nos. 75-15, 223-15, 08-18, and 11-20 (collectively, the "Procurement  
19 Ordinances"), the Board of Supervisors authorized the PUC to use two commonly used industry form  
20 contracts and PUC pro forma contracts with terms that deviated from the City's standard contract  
21 terms, and authorized modifications to the form agreements so long as such modifications, in the  
22 judgment of the General Manager and the City Attorney, did not materially decrease the City's rights  
23 or materially increase its liabilities. These agreements were:

24                   (A)     Western System Power Pool ("WSPP") Agreement;

25                   (B)     Edison Electric Institute (EEI) Master Agreement;

1                    (C)     PUC Renewable Power Purchase Agreement; and

2                    (D)     PUC Energy Purchase and Sale Master Agreement.

3     The Procurement Ordinances approved the use of these contracts and certain waivers for specific  
4     energy and related product procurements starting in 2015.

5                    (10)    For ~~three~~ five years, ending in 2025 ~~2027~~, the PUC will continue to enter into  
6     contracts to meet the energy requirements for Hetch Hetchy Power and CleanPowerSF, and for this  
7     purpose has developed three new form contracts. Each of these form agreements is on file with the  
8     Clerk of the Board of Supervisors, in File No. 220652 and is incorporated herein by reference as  
9     though fully set forth:

10                   (A)     PUC Renewable Power and Energy Storage Purchase Agreement;

11                   (B)     PUC Energy Storage Purchase Agreement; and

12                   (C)     PUC Small Renewable Power Purchase Agreement.

13                   (11)    The PUC will also enter into contracts to meet the energy requirements for  
14     CleanPowerSF, with the Joint Powers Authority California Community Power and will use form  
15     contracts developed by California Community Power with terms that deviate from the City's standard  
16     contract terms. These form agreements are on file with the Clerk of the Board of Supervisors, in File  
17     No. 220652 and are incorporated herein by reference as though fully set forth:

18                   (A)     Buyer Liability Pass Through Agreement;

19                   (B)     Project Participation Share Agreement; and

20                   (C)     Coordinated Operations Agreement.

21                   (b) Approval of Form Agreements. The Board of Supervisors approves the use of the pro  
22     forma contracts and substantially similar agreements described in subsections (a)(9), (a)(10 and  
23     (a)(11)) for the purchase and sale of power and related products, including the indemnification and  
24     limitation of liability provisions therein, notwithstanding that the terms of those agreements may  
25     deviate from the City's standard contract terms. Further, the Board of Supervisors approves hold

1 harmless agreements for the purchase of power and related products. The Board of Supervisors also  
2 authorizes modifications to these form agreements so long as such modifications, in the judgment of the  
3 General Manager of the PUC, the City's Risk Manager, and the City Attorney, do not materially  
4 decrease the City's rights or materially increase its liabilities.

5 (c) Delegation of Approval Authority under Charter Section 9.118. Pursuant to its  
6 authority under Charter Section 9.118, the Board of Supervisors delegates to the General Manager of  
7 the PUC authority to enter into purchases power and related products using contracts with terms in  
8 excess of 10 years or requiring expenditures of 10 million dollars or more including amendments to  
9 such agreements with an impact of greater than \$500,000, so long as the contract term, including any  
10 amendments, does not exceed 25 years. The annual expenditure for all agreements entered under this  
11 section (c) may not exceed 150 million dollars per year. This annual expenditure cap may be increased  
12 by Board of Supervisors Resolution.

13 (d) Delegation of Approval Authority under Charter Section 9.118. Pursuant to its  
14 authority under Charter Section 9.118, the Board of Supervisors delegates to the General Manager of  
15 the PUC authority to enter into contracts for the sale of power and related products having anticipated  
16 revenue in excess of one million dollars or more. The annual revenue for all agreements entered under  
17 this section (d) may not exceed 10 million dollars per year. This annual revenue cap may be increased  
18 by Board of Supervisors Resolution.

19 (e) ~~Annual Reports~~Reporting. The PUC shall ~~quarterly~~ annually report to the Board of  
20 Supervisors the duration, product purchased, and cost of contracts entered into pursuant to subsection  
21 (c). The PUC shall also annually report to the Board the program costs, the rates charged to  
22 CleanPowerSF customers to recover those costs, and a comparison of those rates to PG&E rates.

23 (f) Waiver of Contract-Related Requirements. Where the General Manager of the PUC  
24 finds and documents in writing both that the transaction represents the best opportunity available to the  
25 City to obtain essential services and products in a manner beneficial to the City, and that it is not

feasible to add all standard City contract provisions to the agreement, the Board of Supervisors finds the following waivers to be reasonable and in the public interest, for contracts procured through competitive bidding processes that include language requiring compliance with all applicable federal, state, and local laws:

- (1) Nondiscrimination in contracts (Admin. Code Chapter 12B);
- (2) MacBride Principles (Admin. Code Chapter 12F);
- (3) Local business enterprise utilization and non-discrimination in contracting ordinance (Admin. Code Chapter 14B);
- (4) Consideration of criminal history in hiring (Admin. Code Section 12T);
- (5) Consideration of salary history in hiring (Admin. Code Section 12K);
- (6) Prohibition on contracting in certain states (Admin. Code Section 12X);
- (7) First source hiring (Admin. Code Chapter 83);
- (8) Competitive bidding requirements (Admin. Code Section 21.1); and
- (9) Tropical hardwood and virgin redwood ban (Environ. Code Chapter 8).
- (g) For purposes of the delegation, authorizations, and waivers in this Section 21.43, power and related products and services shall include power supplies, RA, the conveyance or transmission of same, or ancillary services such as spinning reserve, voltage control, as required for assuring reliable services in accordance with good utility practices and applicable laws.
- (h) Sunset Date. This Section 21.43 shall expire by operation of law on July 1, ~~2025~~ 2027.
- Upon expiration of this Section, the City Attorney is authorized to remove this from the Administrative Code.

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Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

APPROVED AS TO FORM:  
DAVID CHIU, City Attorney

By: /s/  
MARGARITA GUTIERREZ  
Deputy City Attorney

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**REVISED LEGISLATIVE DIGEST**  
(Amended in Committee, 7/13/2022)

[Administrative Code - Purchase and Sale of Electricity and Related Products - Public Utilities Commission]

**Ordinance amending the Administrative Code to approve the use of certain form contracts to purchase and sell electricity and related products by the Public Utilities Commission (PUC), grant waivers of specified contract-related requirements in the Administrative and Environment Codes for these transactions, and delegate to the General Manager of the PUC authority under Charter section 9.118 to execute certain contracts with terms in excess of 10 years or requiring expenditures of \$10,000,000 or having anticipated revenue of one million dollars or more subject to specified limitations through June 30, 2025.**

Existing Law

Chapter 21 of the San Francisco Administrative Code establishes the procurement procedures for commodities and services.

Section 9.118(b) of the Charter requires approval by the Board of Supervisors for agreements with an expected term longer than ten years or requiring expenditures of 10 million dollars or more.

The San Francisco municipal codes contain many contracting requirements for the procurement of goods and services. In certain instances, the Board of Supervisors may exempt contracts from these requirements via ordinance.

Amendments to Current Law

This ordinance would amend the Administrative Code by adding Section 21.43 which would delegate authority to the General Manager of the Public Utilities Commission (PUC) to enter contracts for the purchase of electricity and related services that exceed ten years in duration for more than 10 million dollars. The ordinance makes the procurement approval subject to several conditions, including: the duration of any individual contract does not exceed 25 years, inclusive of contract extensions, and; the total cost of the contracts does not exceed 150 million dollars per year. It would also delegate authority to the General Manager to enter into contracts for the sale of power and related products having anticipated revenues in excess of one million dollars per year. The annual revenue cap for the agreements could not exceed 10 million dollars per year. This annual expenditure and/or revenue cap could be increased by Board of Supervisors Resolution.

This ordinance also would authorize the PUC to use two industry standard agreements – the Western Systems Power Pool Agreement and the Edison Electric Institute Master Agreement,

the PUC's power purchase, storage and sale agreements, and form contracts developed by California Community Power. These contracts have terms that deviate from the City's standard contract terms and the ordinance would allow the General Manager to waive certain City contracting requirements for these agreements if it is not feasible to include those requirements.

The procurement authority granted in this ordinance is for a term of five years.

### Background Information

The PUC operates two power businesses—its municipal electric utility, Hetch Hetchy Power (HHP), and its community aggregation program, CleanPowerSF (CPSF). HHP mostly uses clean hydro power from Hetch Hetchy and renewable energy from City facilities, but it sometimes needs to engage in other purchases and sales. CPSF obtains all of its energy through purchases, to meet the needs of enrolled San Franciscans (380,000 accounts) under PG&E tariffs approved by the California Public Utilities Commission (CPUC). PG&E provides transmission, distribution and billing service for CPSF customers. The program has grown from 8,000 customers to 380,000 customers in five years. CleanPowerSF competes for wholesale power supplies in the highly competitive and highly volatile California Independent System Operator energy market and competes with PG&E and private energy suppliers for customers in San Francisco.

CPSF must enter into a large number of contracts for a variety of electricity products and services under compressed timelines to comply with state law and CPUC regulations. This makes Board approval of every power and related service contract in the usual manner neither practical nor possible.

For these reasons, CPSF has sought Board approval through a series of Ordinances for its power and related services contracting. In every instance, the Board has approved the proposals which permit the large power purchases necessary for CPSF to serve San Francisco and meet regulatory compliance starting in 2015. Due to growth of the programs and the number of energy procurements needed in the future, the PUC now seeks delegated authority and contract waivers for CPSF and HHP procurements through June 30, 2025.

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<b>Item 6</b> <b>File 22-0652</b>	<b>Department:</b> Public Utilities Commission (PUC)
<b>EXECUTIVE SUMMARY</b>	
<p style="text-align: center;"><b>Legislative Objectives</b></p> <ul style="list-style-type: none"> <li>The proposed ordinance would amend the Administrative Code to approve form contracts for the San Francisco Public Utilities Commission (SFPUC), grant Administrative and Environment Code waivers for these contracts, and delegate the SFPUC General Manager authority under Charter Section 9.118 to execute certain contracts with terms in excess of 10 years or requiring expenditures of \$10,000,000 or having anticipated revenues of at least \$1,000,000, for a period of five years through June 30, 2027.</li> </ul> <p style="text-align: center;"><b>Key Points</b></p> <ul style="list-style-type: none"> <li>CleanPowerSF and Hetch Hetchy Power must enter into contracts for electricity products under compressed timelines to comply with state law and California Public Utilities Commission (CPUC), California Energy Commission (CEC), and California Independent System Operator (CAISO) rules and regulations. The energy market is highly volatile and increasingly competitive. As such, SFPUC staff believes that Board of Supervisors approval of every power contract is not feasible or convenient, and requests delegating authority to the SFPUC General Manager to enter these contracts.</li> <li>Under the proposed ordinance, SFPUC would use two industry standard agreements, the SFPUC's purchase, storage, and sale agreements, and form contracts developed by California Community Power (CC Power). SFPUC would be required to provide an annual report to the Board of Supervisors including the duration, product purchased, and cost of contracts entered into under the delegated authority, as well the rates charged to CleanPowerSF customers to recover program costs, and a comparison to the PG&amp;E rates.</li> </ul> <p style="text-align: center;"><b>Fiscal Impact</b></p> <ul style="list-style-type: none"> <li>The authority delegated by the proposed ordinance would be used to enter into contracts with total annual expenditures of up to \$150 million, for total maximum potential expenditures of \$750 million over the five-year term. The delegated authority would also allow SFPUC to enter into contracts with total annual revenues of up to \$10 million, for total maximum potential revenues of \$50 million over the five-year term.</li> </ul> <p style="text-align: center;"><b>Recommendation</b></p> <ul style="list-style-type: none"> <li>Because the proposed ordinance waives (1) standard contracting provisions required by the City's municipal codes, and (2) the Board of Supervisors' authority under Charter Section 9.118, authorizing the SFPUC to enter into contracts longer than 10 years or in an amount of \$10 million or more without further Board of Supervisors approval, approval of the proposed ordinance is a policy matter for the Board of Supervisors.</li> </ul>	

**MANDATE STATEMENT**

City Charter Section 9.118(b) states that any contract entered into by a department, board or commission that (1) has a term of more than ten years, (2) requires expenditures of \$10 million or more, or (3) requires a modification of more than \$500,000 is subject to Board of Supervisors approval.

City Charter Section 2.105 states that all legislative acts shall be by ordinance, approved by a majority of the members of the Board of Supervisors.

**BACKGROUND**

In 2016, the San Francisco Public Utilities Commission (SFPUC) launched the CleanPowerSF Community Choice Aggregation (CCA) program to provide cleaner and more sustainable electricity at competitive rates to those offered by Pacific Gas & Electric Company (PG&E). CleanPowerSF uses clean and renewable energy purchased from various sources, including SFPUC's Hetch Hetchy Power.

In February 2021, the Board of Supervisors authorized CleanPowerSF to join a nine-member Joint Powers Agency (JPA) with other community choice aggregators in Northern California (Ordinance 25-21). The JPA, called California Community Power or "CC Power," was formed in April 2021.

**Delegated Authority of Power Contracts**

In May 2015, the Board of Supervisors authorized the SFPUC General Manager to use pro forma agreements to purchase and sell electricity to operate the Hetch Hetchy and CleanPowerSF programs without further Board of Supervisors approval (File 15-0408).<sup>1</sup> In December 2015, the Board of Supervisors authorized the SFPUC General Manager to enter into agreements requiring expenditures of \$10 million or more for electric power and related products and services to launch the initial phases of CleanPowerSF (File 15-1123). In January 2018, the Board of Supervisors approved an ordinance delegating authority under City Charter Section 9.118(b) to the SFPUC General Manager to enter into agreements exceeding 10 years or \$10 million for power and related products and services required for CleanPowerSF, which applied to power agreements procured through two Requests for Offers (RFO) issued in 2017 (File 17-1172). In February 2020, the Board of Supervisors approved an ordinance delegating authority to the SFPUC to (1) enter into contracts with up to nine providers of renewable energy products from a 2019 RFO that have terms of up to 25 years and have a combined annual cost of up to \$35 million using standardized power contracts without further Board of Supervisors' approval and (2) waive certain standard contracting provisions required by the City's municipal codes for such contracts (File 19-1203). In each case of the delegated authority, the SFPUC has used pro forma contracts developed by the SFPUC with the City Attorney's Office and standard contract templates provided by the Western System Power Pool Agreement and the Edison Electric Institute.

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<sup>1</sup> The Board of Supervisors similarly authorized the use of pro forma agreements to purchase and sell electricity to operate the Hetch Hetchy program prior to 2015 and the operation of the CleanPowerSF program. See, for example, File 01-0225.

According to Barbara Hale, SFPUC Assistant General Manager, CleanPowerSF and Hetch Hetchy Power must enter into contracts for electricity products under compressed timelines to comply with state law and California Public Utilities Commission (CPUC), California Energy Commission (CEC), and California Independent System Operator (CAISO) rules and regulations, such as Resource Adequacy requirements.<sup>2</sup> The energy market is highly volatile and increasingly competitive, as in addition to six Investor Owned Electric Utilities and 71 Publicly Owned Electric Utilities, there are now 24 CCA programs operating in California and 19 Energy Service Providers supplying wholesale customers and retail customers. The time-limited pricing typically offered in the industry cause the SFPUC to size commitments to the authority of the General Manager to secure power supplies on market timelines, even when the SFPUC is aware that a larger purchase commitment may have produced more favorable outcomes for ratepayers were the SFPUC able to execute a contract within the time-limited window. As such, SFPUC staff believes that Board of Supervisors approval of every power contract is not feasible or convenient, though the Department did so twice for two CC Power agreements in 2022 (Files 22-0145 and 22-0331, where the contract execution window was 90 days). In June 2022, the SFPUC Commission approved a resolution that delegated its authority to execute power contracts to the SFPUC General Manager (SFPUC Resolution 22-0109).

#### DETAILS OF PROPOSED LEGISLATION

The proposed ordinance would amend the Administrative Code to approve the use of form contracts to purchase and sell electricity and related products by the SFPUC, grant Administrative and Environment Code waivers for these contracts, and delegate to the SFPUC General Manager authority under Charter Section 9.118 to execute certain contracts with terms in excess of 10 years or \$10 million, or having anticipated revenue of over \$1 million, for a period of five years through June 2027.

Under the proposed ordinance, SFPUC would use two industry standard agreements, the SFPUC's purchase, storage, and sale agreements, and form contracts developed by California Community Power (CC Power).<sup>3</sup> According to Assistant General Manager Hale, the Western Systems Power Pool Agreement and Edison Electric Institute Master Agreement<sup>4</sup> are widely used across the United States and have been used by SFPUC for decades and were included in the 2017 and 2019 delegations of authority approved by the Board of Supervisors. The CC Power form agreements include Buyer Liability Pass Through, Project Participation Share, and Coordinated Operations Agreements, and are consistent with the agreements approved by the Board of Supervisors with Tumbleweed Energy Storage LLC (File 22-0145) and Goal Line Energy Storage System 1, LLC (File 22-0331).

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<sup>2</sup> State law requires all electric service providers, including CleanPowerSF and Hetch Hetchy Power, to maintain certain quantities of Resource Adequacy (RA) to ensure sufficient electric generation resources to meet unusually high levels of consumer demand.

<sup>3</sup> CC Power is a Joint Powers Authority comprised of 10 California CCA programs, including CleanPowerSF.

<sup>4</sup> SFPUC is a member of the Western Systems Power Pool, which is a group of more than 300 publicly owned and private utilities. Edison Electric Institute is an association that represents investor-owned electric companies in the U.S. They have developed the master agreement in collaboration with 80 member utilities, power marketers, and customer representatives.

The form agreements do not include provisions required under the City's Administrative Code, such as: (1) non-discrimination in contracts (Chapter 12B); (2) MacBride Principles (Chapter 12F); (3) local business enterprise utilization and non-discrimination in contracting (Chapter 14B); (4) consideration of criminal history in hiring (Chapter 12T); (5) consideration of salary history in hiring (Chapter 12K); (6) prohibition on contracting in certain states (Chapter 12X); (7) first source hiring (Chapter 83); (8) competitive bidding requirements (Section 21.1); and (9) tropical hardwood and virgin redwood ban (Environment Code Chapter 8). The proposed ordinance would allow the General Manager to waive these provisions, where they find and document in writing that the transaction represents the best opportunity available to the City to obtain essential services and products in a manner beneficial to the City, for contracts procured through competitive bidding processes that include language requiring compliance with all applicable federal, state and local laws.

The proposed ordinance would delegate the Board of Supervisors' authority to enter into agreements with terms of at least 10 years or expenditures of at least \$10 million, as well as with revenues of at least \$1 million, to the SFPUC General Manager. The total annual expenditures for these contracts may not exceed \$150 million, and the total annual revenues may not exceed \$10 million. No contract entered into under this authority may exceed 25 years. SFPUC would be required to provide an annual report to the Board of Supervisors including the duration, product purchased, and cost of contracts entered into under the delegated authority, as well the rates charged to CleanPowerSF customers to recover program costs, and a comparison of those rates to the PG&E rates. The authority would sunset in five years.

#### **FISCAL IMPACT**

The authority delegated by the proposed ordinance would be used to enter into contracts with total annual expenditures of up to \$150 million, or less than 50 percent of FY 2021-22 expenditures and FY 2022-23 and FY 2023-24 budgeted expenditures. The maximum total potential expenditures over the five-year term of the ordinance would be \$750 million. According to Michael Hyams, CleanPowerSF Director, SFPUC's power supply budgetary expenditure projections are a combination of projected costs from existing multi-year contracts and estimates of future costs that are not yet contracted. In future years, SFPUC's un-contracted power supply grows, so SFPUC is constantly in the market adding new contracts to meet demand. This "laddering" of future contracts is a standard power portfolio risk management practice.

The delegated authority would also allow SFPUC to enter into contracts with total annual revenues of up to \$10 million, for total maximum potential revenues of \$50 million over the five-year term.<sup>5</sup> Costs for these contracts would be recovered from rates paid by Hetch Hetchy Power and CleanPowerSF customers.

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<sup>5</sup> According to Assistant General Manager Hale, Hetch Hetchy Power typically produces more power than is needed for its customers, which are mostly municipal facilities. Hetch Hetchy Power and CleanPowerSF also purchase Resource Adequacy (RA) to meet state requirements. RA requirements are determined by the CAISO and CPUC and the calculations often change near the compliance deadline. As such, Hetch Hetchy Power and CleanPowerSF typically purchase excess RA capacity, which may be resold to other electric providers.

**FY 2021-22 Revenues & Expenditures**

According to Director Hyams, total power contract expenditures in FY 2021-22 were approximately \$241.2 million for CleanPowerSF and \$70.2 million for Hetch Hetchy Power, for total expenditures of approximately \$311.4 million. FY 2021-22 power wholesale revenues were approximately \$4.5 million for CleanPowerSF and \$20.2 million for Hetch Hetchy Power, for total revenues of approximately \$24.7 million. However, the Hetch Hetchy Power revenues include California Independent System Operator (CAISO) revenues that are not subject to the proposed ordinance because they are approved by the Board of Supervisors through the Scheduling Coordinator Agreement with APX (File 22-0074).<sup>6</sup> Director Hyams estimates that annual Hetch Hetchy Power sales that would be authorized under the proposed ordinance are approximately \$5 million per year, but would vary depending on hydrologic conditions, wholesale market demand, and regulatory conditions.

**POLICY CONSIDERATION****Waivers of Administrative Code and Environment Code Provisions**

As noted above, the proposed ordinance would delegate authority to the SFPUC General Manager to waive certain standard contract and City code provisions. According to SFPUC, the City's standard contract terms identified in the proposed ordinance are not standard electric industry terms and many energy sellers reject such terms or will mark up the cost of energy to account for what they may consider a non-market condition and liability.

**Delegation of Contracting Authority to SFPUC General Manager**

The proposed ordinance would delegate the Board of Supervisors' authority to enter into power agreements with terms up to 25 years and that have combined annual expenditures of up to \$150 million, and combined annual revenues of \$10 million to the SFPUC General Manager. Since the SFPUC Commission has also delegated its approval authority to the General Manager, the terms of power purchase and sale agreements may not be publicly visible prior to the SFPUC entering into the agreements if the proposed ordinance is approved. SFPUC requests delegated authority due to the volatility and competition in the energy market, and the need to conduct business at an accelerated, commercial pace. As we noted above, the SFPUC has brought two power agreements to both its Commission and the Board of Supervisors in 2022.

As noted above, the proposed ordinance would require SFPUC to provide an annual report to the Board of Supervisors including the duration, product purchased, and cost of contracts entered

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<sup>6</sup> The California Independent System Operator (CAISO) controls and operates the transporting of electric power over California's electric transmission system. The SFPUC does not meet the CAISO requirements for a "scheduling coordinator," an entity that is allowed to complete power transactions on the CAISO network and is able to make payments to CAISO for power transactions, so SFPUC has contracted with APX for these services.

into under the delegated authority, as well the rates charged to CleanPowerSF customers to recover program costs, and a comparison of those rates to the PG&E rates.<sup>7</sup>

Because the proposed ordinance waives (1) standard contracting provisions required by the City's municipal codes, and (2) the Board of Supervisors' authority under Charter Section 9.118, authorizing the SFPUC to enter into contracts longer than 10 years or in an amount of \$10 million or more without further Board of Supervisors approval, approval of the proposed ordinance is a policy matter for the Board of Supervisors.

#### **RECOMMENDATION**

Approval of the proposed ordinance is a policy matter for the Board of Supervisors.

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<sup>7</sup> SFPUC Resolution 22-0109 requires the General Manager to report on a quarterly basis to the Commission, the duration, product purchased, and cost of contracts entered into pursuant to the delegated authority.



## RENEWABLE ENERGY AND ENERGY STORAGE AGREEMENT

### COVER SHEET

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

**Seller:**

**Facility:** [Name, location, size] [hybrid] [co-located]

#### A. Transaction

Product: Renewable Product and Storage Product

Renewable Product: Energy, Capacity Attributes, and Environmental Attributes

Guaranteed Installed Renewable Capacity:

Renewable Contract Price: XX/MWh (flat) with no escalation

Storage Product: Storage Capacity, Capacity Attributes, Discharging Energy, Ancillary Services

Guaranteed Installed Storage Capacity: XX MW of at \_\_ (--) hours of continuous discharge, [Degrading] [Nondegrading]

Storage Contract Price: XX/kW-mo. (flat) with no escalation

Anticipated Flexible Capacity: Amount: \_\_\_\_\_ (MW) Category: \_\_\_\_\_

Guaranteed Storage Availability: 98%

Guaranteed Round Trip Efficiency Rate: As set forth in Exhibit M

RA Guarantee Date: Commercial Operation Date

Maximum Storage Facility Cycles Per Year: 365 + 90 carry forward/yr

Delivery Term:

Deliverability: Full Capacity Delivery Service

#### B. Milestones

Site Control:

Permitting:

Phase I and II Interconnection study results:

Executed Interconnection Agreement:

Financial Close:

Guaranteed Construction Start Date:

Mechanical Completion:

Initial Synchronization:



Network Upgrades completed:

Guaranteed Commercial Operation Date:

**C. Seller Collateral:**

Development Assurance: \$60/kW multiplied by the Guaranteed Installed Renewable Capacity plus \$90/kW multiplied by the Guaranteed Installed Storage Capacity

Performance Assurance: \$60/kW multiplied by the Guaranteed Installed Renewable Capacity plus \$105/kW multiplied by the Guaranteed Installed Storage Capacity



**D. Notices:**

<b>Buyer:</b> City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF	<b>Seller:</b>
<b>All Notices:</b> 525 Golden Gate Ave, 7th Floor San Francisco, CA, 94102 Attn: Contract Administration Phone: Email:	<b>All Notices:</b>  Phone: Email:
<b>Federal Tax ID Number:</b>	<b>Federal Tax ID Number:</b> <b>DUNS Number:</b>
<b>Invoices:</b> Attn: Phone: Email:	<b>Invoices:</b> Attn: Phone: Email:
<b>Scheduling:</b> Attn: Phone: Email:	<b>Scheduling:</b> Attn: Phone: Email:
<b>Payments:</b> Attn: Phone: Email:	<b>Payments:</b> Attn: Phone: Email:
<b>Wire Transfer:</b> BNK: ABA (ACH): ACCT:	<b>Wire Transfer:</b> BNK: ABA: ACCT:
<b>Credit and Collections:</b> Attn: Phone: Email:	<b>Credit and Collections:</b> Attn: Phone: Email:
<b>With additional Notices of an Event of Default or Potential Event of Default to:</b>  Attn: Phone: Email:	<b>With additional Notices of an Event of Default or Potential Event of Default to:</b>  Attn: Phone: Email:

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## **EXHIBITS**

The follows Exhibits constitute a part of this Agreement and are incorporated into the Agreement by reference.

<b>EXHIBIT A</b>	SELLER DOCUMENTATION OF CONDITIONS PRECEDENT
<b>EXHIBIT B</b>	FACILITY DESCRIPTION AND SITE DRAWINGS
<b>EXHIBIT C</b>	CONTRACT QUANTITY
<b>EXHIBIT D</b>	INSURANCE COVERAGES
<b>EXHIBIT E</b>	CONSTRUCTION START CERTIFICATION
<b>EXHIBIT F</b>	PROGRESS REPORT
<b>EXHIBIT G-1</b>	COMMERCIAL OPERATION CERTIFICATION
<b>EXHIBIT G-2</b>	INSTALLED CAPACITY CERTIFICATION
<b>EXHIBIT H-1</b>	FORM OF LETTER OF CREDIT
<b>EXHIBIT H-2</b>	FORM OF SIGHT DRAFT
<b>EXHIBIT I</b>	FORM OF REPLACEMENT RA NOTICE
<b>EXHIBIT J</b>	OPERATING PARAMETERS
<b>EXHIBIT K</b>	STORAGE CAPACITY TESTS
<b>EXHIBIT L</b>	AVAILABILITY GUARANTEE
<b>EXHIBIT M</b>	ROUND TRIP EFFICIENCY GUARANTEE

## RENEWABLE ENERGY AND ENERGY STORAGE AGREEMENT

This Renewable Energy and Energy Storage Agreement (“Agreement”) is entered into between the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF (“Buyer”) and \_\_\_\_\_, a \_\_\_\_\_ (“Seller”), as of \_\_\_\_\_ (the “Execution Date”). The Agreement shall include the exhibits, attachments, any written and fully executed supplements hereto, and any designated collateral, credit support, or similar arrangement between the Parties.

### RECITALS

1. Seller intends to develop, finance, build, own and operate a \_\_\_\_\_ powered generating facility and energy storage facility located in \_\_\_\_\_; and,
2. Buyer operates CleanPowerSF, a community choice aggregator that serves retail customers in the City and County of San Francisco; and,
3. Buyer is willing to purchase, and Seller is willing to sell, the Product of the Facility, on the terms and conditions and at the prices set forth in this Agreement.

**NOW THEREFORE**, in consideration of the recitals above and the following covenants, terms and conditions, the Parties agree as follows:

### ARTICLE 1: DEFINITIONS

**AC:** Alternating current.

**Affiliate:** 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 preamble.

**Ancillary Services:** Means frequency regulation, spinning reserve, non-spinning reserve, regulation up, regulation down, black start, voltage support, and any other ancillary services that the Facility is capable of providing consistent with the Operating Parameters, as each is defined in the CAISO Tariff.

**Annual Forecast:** Has the meaning set forth in Section 5.9(a)(i).

**Applicable Law:** 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, 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.

**Availability Adjustment:** Has the meaning set forth in Exhibit L.

**Availability Excused Event:** Has the meaning set forth in Exhibit L.

**Availability Notice:** Has the meaning set forth in Section 5.9(b)(ii).

**Availability Standards:** Has the meaning set forth in the CAISO Tariff.

**Available Capacity:** Means the capacity of the Storage Facility, expressed in whole MWs, that is mechanically available to charge and discharge Energy and provide Ancillary Services.

**Bankrupt:** With respect to any entity, such entity (a) 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 and such case filed against it is not dismissed within sixty (60) calendar days, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) 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 (e) is generally unable to pay its debts as they fall due.

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

**Business Day:** Any day except a Saturday, Sunday, a Federal Reserve Bank holiday, or a City and County of San Francisco holiday, between the hours of 8:00 a.m. and 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:** The City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF.

**Buyer Bid Curtailment:** An event in which an Economic Bid or Self-Schedule for Energy or Ancillary Services for the Renewable Facility submitted for a Settlement Interval in accordance with this Agreement results in a Real Time Energy Production Schedule awarded or deployed by the CAISO that fails to provide for the delivery of the full quantity of Renewable Energy that could have been delivered as determined by the Final Output Estimate for that Settlement Interval.

**Buyer Dispatched Test:** Has the meaning set forth in Section 5.4(c).

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

**Buyer's WREGIS Account:** Has the meaning set forth in Section 3.4(c)(i).

**CAISO:** The California Independent System Operator Corporation, or its functional successor.

**CAISO Certification:** Means the certification and testing requirements for an energy storage unit set forth in the CAISO Tariff that are applicable to the Storage Facility, including certification and testing for all Ancillary Services, PMAX, and PMIN associated with such storage units, that are applicable to the Storage Facility.

**CAISO Charges Invoice:** Has the meaning set forth in Section 5.6(c).

**CAISO Dispatch:** Any Charging Notice or Discharging Notice given by the CAISO to the Storage Facility, whether through Automated Dispatch System, Automatic General Control (as those terms are defined in the CAISO Tariff), or any successor communication protocol, communicating an Ancillary Service Award (as defined in the CAISO Tariff) or directing the Storage Facility to charge or discharge at a specific MW rate for a specified period of time or amount of MWh.

**CAISO Tariff:** The California Independent System Operator Corporation, Fifth Replacement FERC Electric Tariff, Business Practices Manuals (BPMs), and Operating Procedures as may be amended, supplemented, or replaced (in whole or in part) from time to time.

**Capacity Attributes:** Any current or future defined characteristic (including the ability to generate at a given capacity level, provide Ancillary Services, and ramp up or ramp down at a given rate), certificate, tag, credit, flexibility, or dispatchability attribute, whether general in nature or specific as to the location or any other attribute of the Facility, intended to value any aspect of the capacity of the Facility to produce energy, including any accounting construct, or any other measure by the CPUC, the CAISO, the FERC, or any other Governmental Authority with jurisdiction, including Resource Adequacy Benefits.

**Capacity Damages:** Has the meaning set forth in Section 5.3(j).



**Capacity Procurement Mechanism (CPM) Soft Offer Cap:** Has the meaning set forth in the CAISO Tariff.

**CEC:** The California Energy Commission or any successor agency.

**CEC Certification:** Means that the CEC has certified, or pre-certified, that the Renewable Facility is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Energy produced by the Renewable Facility qualifies as generation from an ERR for purposes of the RPS.

**CEQA:** The California Environmental Quality Act, California Public Resources Code Sections 21000, et. seq., as it may be amended from time to time.

**Change in Law:** Has the meaning set forth in Section 11.5(f).

**Charging Energy:** The Energy delivered to the Storage Facility pursuant to a Charging Notice as measured by the Storage Meter. All Charging Energy shall be used solely to charge the Storage Facility.

**Charging Notice:** The operating instruction and any subsequent updates given by Buyer, Buyer's SC, or the CAISO to Seller, directing the Storage Facility to charge at a specific MW rate for a specified period of time or amount of MWh.

**City:** The City and County of San Francisco.

**CleanPowerSF:** Buyer's community choice aggregation program.

**Commercial Operation:** The condition of the Facility existing when Seller has fulfilled all of the conditions set forth in Section 2.2(b)(ii) and Seller has provided notice to Buyer in the form of the Commercial Operation Certification set forth in Exhibit G-1.

**Commercial Operation Certification:** Seller's certification of Commercial Operation in the form set forth as Exhibit G-2, executed by a Licensed Professional Engineer.

**Commercial Operation Date or COD:** The date upon which Commercial Operation is achieved as specified in the Commercial Operation Certification.

**Commercial Operation Date Delay Damages or COD Delay Damages:** An amount equal to the Development Assurance divided by sixty (60).

**Compliance Cost Cap:** Has the meaning set forth in Section 3.9.

**Compliance Costs:** Has the meaning set forth in Section 3.9(a).

**Confidential Information:** Has the meaning set forth in Section 11.2.

**Construction Start:** Has the meaning set forth in Section 5.3(a)(i).

**Construction Start Date:** Has the meaning set forth in Exhibit E.

**Construction Start Delay Damages:** An amount equal to the Development Assurance divided by one hundred twenty (120).

**Contract Year:** A period of twelve (12) consecutive months, commencing at 12:00 a.m. on the COD, and each subsequent Contract Year commencing on the twelve (12) month anniversary of the COD.

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

**Costs:** With respect to a 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 entered into pursuant to this Agreement or entering into new arrangements which replace this Agreement and (b) all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of this Agreement.

**Cover Sheet:** The cover sheet to this Agreement.

**CPUC:** The California Public Utilities Commission or any successor entity.

**CPUC System RA Penalty:** The CPUC-adopted penalty imposed on load serving entities for system RA deficiencies as that penalty may be updated or revised from time to time.

**Credit Rating:** 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 unsecured senior long-term debt, then the rating assigned to such entity as an issuer rating by Standard & Poor's Financial Services and/or Moody's Investors Service. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

**Curtailment Cap:** For each Contract Year, the quantity in MWh equal to XXX (XX) hours times the Renewable Installed Capacity.

**Curtailment Order:** An order, direction, alert, or notice of the CAISO, Transmission Provider (whether directly or through a Scheduling Coordinator or the Transmission Provider), to curtail deliveries of Energy or Discharging Energy for any reason, including, but not limited to, any System Emergency, any warning of an anticipated System Emergency, or any warning of an imminent condition or situation which could jeopardize the CAISO's or Transmission Provider's electric system integrity or the integrity of other systems to which the CAISO or the Transmission Provider is connected, including curtailment in accordance with Seller's obligations under its Interconnection Agreement with the Transmission Provider.

**Curtailment Period:** The period of time, measured using Settlement Intervals, during which Seller reduces generation from the Facility pursuant to a Curtailment Order, including the time required for the Facility to ramp down and ramp up.

**Damage Payment:** The amount to be paid by the Defaulting Party to the Non-defaulting Party in the event of a termination of this Agreement prior to the COD as calculated pursuant to Section 8.2(b).

**Day-Ahead Forecast:** Has the meaning set forth in Section 5.9(a)(iv).

**Day-Ahead Market or DAM:** Has the meaning set forth in the CAISO Tariff.

**Deemed Delivered Energy:** Means the amount of Energy expressed in MWh that the Renewable Facility could have produced and delivered to the Delivery Point, adjusted for Station Uses and Electrical Losses and excluding Renewable Energy delivered to the Storage Facility as Charging Energy, but was not produced and delivered to the Delivery Point solely due to a Buyer Bid Curtailment, as adjusted pursuant to Section 5.8(c)(iv). Deemed Delivered Energy shall be calculated as the difference in MWh between the Final Output Estimate and Delivered Energy.

**Defaulting Party:** The Party that has caused an Event of Default.

**Delivered Energy:** Means Renewable Energy delivered to the Delivery Point and measured by the Renewable Meter, as adjusted for Electrical Losses and Station Uses.

**Delivery Point:** \_\_\_\_\_.

**Delivery Term:** Has the meaning set forth in Section 2.2(b)(i).

**Development Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(a) of this Agreement.

**Discharging Energy:** All Energy discharged from the Storage Facility to the Delivery Point as measured by the Storage Meter, as adjusted by the CAISO for Electrical Losses and Station Uses.

**Discharging Notice:** An operating instruction, and any subsequent updates, given by Buyer, Buyer's SC, or the CAISO to the Storage Facility, directing the Storage Facility to discharge Discharging Energy at a specific MW rate for a specified period of time or to an amount of MWh.

**Dispatch Notice:** Any Charging Notice, Discharging Notice, and any subsequent updates, given by the CAISO, Buyer, or Buyer's SC, to Seller directing the Storage Facility to charge Charging Energy or to

discharge Discharging Energy at a specific MWh rate to a specified Stored Energy Level; provided, any such operating instruction or updates shall be in accordance with the Operating Parameters.

**Dispatch Instruction:** Has the meaning set forth in the CAISO Tariff.

**Early Termination Date:** Has the meaning set forth in Section 8.2(a)(i).

**Economic Losses:** With respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from the termination of this Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Section 8.2(c) and 8.3. Factors used in determining the loss of economic benefit may include reference to information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including Environmental Attributes and Capacity Attributes. The Non-Defaulting Party shall not be required to enter into replacement transactions to establish Economic Losses. Economic Losses shall exclude any (1) associated loss of investment tax credits and other lost tax benefits, (2) any costs, penalties, fees, or charges associated with the termination of related financing agreements or similar obligations, and (3) consequential, incidental, punitive, exemplary, indirect, or business interruption damages.

**Effective Date:** The date on which all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties.

**Effective Flexible Capacity or EFC:** The effective flexible capacity (in MWs) of the Storage Facility pursuant to the counting conventions set forth in the Resource Adequacy Rulings and the CAISO Tariff.

**Effective FCDS Date:** The date identified in Seller's notice to Buyer (along with a Full Capacity Deliverability Status Finding from CAISO) as the date that the Facility has attained Full Capacity Deliverability Status.

**Electric System Upgrades:** Any Network Upgrades, distribution upgrades, or Interconnection Facilities that are determined to be necessary by the CAISO or Transmission Provider, as applicable, to physically and electrically interconnect the Facility to the Transmission Provider's electric system for receipt of Energy at the Point of Interconnection.

**Electrical Losses:** All transmission and transformation losses associated with delivery of Energy between the Renewable Facility and the Delivery Point and between the Storage Facility and the Delivery Point associated with delivery of Charging Energy and Discharging Energy.

**Eligible Intermittent Resources Protocol:** Has the meaning set forth in the CAISO Tariff.

**Eligible LC Bank:** 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 with an outlook designation as "stable", or A- from S&P with an outlook designation of "stable".

**Eligible Renewable Energy Resource or ERR:** Has the meaning set forth in California Public Utilities Code Section 399.12(e) and California Public Resources Code Section 25741(a), as either code provision is amended or supplemented from time to time.

**Energy:** Three-phase, 60-cycle alternating current electric energy measured in kilowatt hours or megawatt hours. Energy shall include without limitation, reactive power and any other electrical energy products that may be developed or evolve from time to time during the Term.

**Environmental Attributes:** Any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to generation from the Facility or Expansion Facility(ies) and its avoided emission of pollutants. Environmental Attributes include, without limitation, Renewable Energy Credits as well as:

- (a) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants;
- (b) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by Applicable Law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and
- (c) the reporting rights to these avoided emissions such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser's discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tag are accumulated on a MWh basis and one Green Tag represents the Environmental Attributes associated with one (1) MWh of Energy.

Environmental Attributes do not include:

- (i) any Energy, capacity, reliability or other power attributes from the Facility,
- (ii) production tax credits associated with the construction or operation of the Facility and other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation,
- (iii) fuel-related subsidies or "tipping fees" that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or
- (iv) emission reduction credits encumbered or used by a Facility for compliance with local, state, or federal operating and/or air quality permits. If the Facility is a biomass or biogas facility and Seller receives any tradable Environmental Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Environmental Attributes to ensure that there are zero net emissions associated with the production of electricity from the Facility.

**Environmental Costs:** Means all costs, taxes, charges, and fees pertaining to, or incurred in connection with: acquiring and maintaining all environmental permits and licenses for the Facility and the Product; the Product's and Facility's compliance with all applicable environmental laws, rules, and regulations, including capital costs for pollution mitigation or installation of emissions control equipment required to permit or license the Facility; all operating and maintenance costs for operation of pollution mitigation or control equipment; all costs of permit maintenance fees and emission fees as applicable; the costs of all emission reduction credits or marketable emission trading credits; any costs related to greenhouse gas emissions, required by any applicable environmental laws, rules, regulations, and Permits to operate; costs associated with the storage, use, disposal, transportation, and clean-up of Hazardous Substances introduced to the Site, and; the decontamination or remediation, on or off the Site, necessitated by the introduction of such hazardous substances on the Site.

**EPC Contractor:** An engineering, procurement, and construction contractor, or if not utilizing an engineering, procurement, and construction contractor, the entity having lead responsibility for the management of overall construction activities, selected by Seller, with substantial experience in the engineering, procurement, and construction of utility-scale renewable generating projects and energy storage projects.

**Event of Default:** Has the meaning set forth in Section 8.1.

**Excess Renewable Quantity:** Has the meaning set forth in Section 3.2(a).

**Excess Storage Capacity:** Has the meaning set forth in Section 3.2(d).

**Execution Date:** Has the meaning set forth in the preamble.

**Expansion Facility:** Any expansion of the Storage Facility or the Renewable Facility from the Installed Storage Capacity or Installed Renewable Capacity, or any other Energy generating or Energy storage facility owned or controlled by Seller or its affiliates, located at the Site. Each such expansion of the Storage Facility, Renewable Facility, or additional facility shall be deemed to be an “Expansion Facility.”

**Expansion Facility Product:** All Energy, discharging energy, capacity, Capacity Attributes, Environmental Attributes, Ancillary Services, contributions towards Resource Adequacy or reserve requirements, and any other reliability or power attributes produced by Seller at any Expansion Facility.

**Extended Delivery Term:** Has the meaning set forth in Section 2.3.

**Facility:** The Renewable Facility and the Storage Facility.

**FERC:** The Federal Energy Regulatory Commission and any successor organization.

**Fifteen Minute Market or FMM:** Has the meaning set forth in the CAISO Tariff.

**Final Output Estimate:** The final estimate of the quantity of Energy the Renewable Facility reasonably could have generated based on Renewable Facility availability, insolation, and other relevant meteorological conditions. The Final Output Estimate shall be equal to the RTM Forecast initially and may be replaced pursuant to Section 5.9(a).

**Financial Close:** Seller and/or one of its Affiliates has obtained debt and/or equity financial commitments from one or more Lenders or Seller’s owners sufficient to construct the Facility.

**Fiscal Year:** The period commencing on July 1 and ending on June 30 in the following calendar year.

**Flexible Capacity:** With respect to any particular Showing Month, the number of MWs of Product which are eligible to satisfy Flexible RAR.

**Flexible RAR:** The flexible capacity requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff or the Resource Adequacy Rulings.

**Force Majeure Event:** An event or circumstance, including without limitation, a natural disaster, war, riot, act of terrorism, sabotage, destruction by a third party, or civil disturbance, which prevents one Party (“Claiming Party”) from performing all or a portion of 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 (whether direct or indirect), 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 Transmission Provider and/or the CAISO in entering into, or performing under, any agreements with Seller contemplated by this Agreement, including a failure to complete, or a delay in completing, interconnection or Electric System Upgrades by the Commercial Operation Date except to the extent that such delay is solely caused by a Force Majeure Event;
- (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 Agreement;
- (d) Seller’s inability to obtain Permits of any type, except where such failure is solely caused by a Force Majeure event;
- (e) Seller’s inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, except to the extent such inability is caused by a Force Majeure event;
- (f) any equipment failure, except to the extent such inability is caused by a Force Majeure event;
- (g) a Forced Outage except where such Forced Outage is caused by a Force Majeure event;

- (h) a Curtailment Order, to the extent such inability is caused by a Force Majeure event; or
- (i) economic conditions that render a Party's performance of this Agreement at the Renewable Contract Price or Storage Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs), including Buyer's ability to buy Product at a lower price, or Seller's ability to sell Product at a higher price.

**Forced Labor:** Has the meaning set forth in Section 5.1(g).

**Forced Outage:** Any unplanned reduction or suspension of the operation of the Facility or unavailability of the Product in whole or in part caused by a mechanical, electrical, or equipment malfunction and any other unavailability of the Facility, in whole or in part, for maintenance or repair that is not a Planned Outage and not the result of Force Majeure.

**Forward Certificate Transfers:** Has the meaning set forth in Section 3.4(c)(i).

**Full Capacity Deliverability Status or FCDS:** Has the meaning set forth in the CAISO Tariff.

**Full Capacity Deliverability Status or FCDS Finding:** A written or electronic confirmation from the CAISO that the Facility is eligible for FCDS.

**Full Cycle:** The quantity of Discharging Energy equal to the then effective Storage Contract Capacity multiplied by XXX (X) hours and expressed in MWh.

**Gains:** With respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of the Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c) and 8.3. Factors used in determining economic benefit may include information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including the value of Environmental Attributes and Capacity Attributes.

**GEP Liquidated Damages or GEP LDs:** Has the meaning set forth in Section 3.7(a)(i).

**GEP Period:** Successive periods consisting of two (2) consecutive Contract Years with the first GEP Period commencing on the COD, and with each subsequent GEP Period commencing on the twelve (12) month anniversary of the commencement of the prior GEP Period.

**GEP Shortfall:** Has the meaning set forth in Section 3.7(a)(i).

**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.

**Grid Charging Date:** Has the meaning set forth in Section 5.7(i).

**Guaranteed Annual Capacity:** For each Contract Year of the Delivery Term, the capacity of the Storage Facility as set forth in Exhibit C.

**Guaranteed Commercial Operation Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Construction Start Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Energy Production, or GEP:** Has the meaning set forth in Section 3.7(a).

**Guaranteed Installed Renewable Capacity:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Installed Storage Capacity:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Round Trip Efficiency or GRTE Rate:** Has the meaning set forth in Exhibit M.

**Guaranteed Storage Availability:** Has the meaning set forth in Section 3.7(d)(i).

**Hazardous Substance:** (a) any chemical, material or substance that is listed or regulated under Applicable Laws as a “hazardous” or “toxic” substance or waste, or as a “contaminant” or “pollutant” or words of similar import, (b) any petroleum or petroleum products, flammable materials, explosives, radioactive materials, asbestos, urea formaldehyde foam insulation, and transformers or other equipment that contain polychlorinated biphenyls, and (c) any other chemical or other material or substance for which exposure to or release of such substance is prohibited, limited, or regulated by Applicable Laws.

**Indemnified Party:** Has the meaning set forth in Section 9.2.

**Indemnifying Party:** Has the meaning set forth in Section 9.2.

**Initial Synchronization:** The initial delivery of Renewable Energy and Discharging Energy from the Facility to the Delivery Point.

**Installed Renewable Capacity:** The maximum dependable generating capacity of the Renewable Facility that achieves Commercial Operation, as measured by the Renewable Meter and adjusted for ambient conditions on the date of the performance test and as set forth in the Installed Capacity Certificate substantially in the form set forth in Exhibit G-2.

**Installed Storage Capacity:** The maximum dependable operating capability of the Storage Facility to discharge Energy that can be sustained for XX (X) consecutive hours that achieves Commercial Operation as measured by the Storage Meter and adjusted for Electrical Losses to the Delivery Point, as determined by a Storage Capacity Test and as set forth in the Installed Capacity Certificate substantially in the form set forth in Exhibit G-2.

**Interconnection Agreement:** The agreement and associated documents (or any successor agreement and associated documentation) by and among Seller, the Transmission Provider, and the CAISO governing the terms and conditions of the Facility’s interconnection with the CAISO grid, including any description of the plan for interconnection of the Facility to the Transmission Provider’s system.

**Interconnection Facilities:** The interconnection facilities, control and protective devices and metering facilities required to connect the Facility to the transmission or distribution system as set forth in the Interconnection Agreement.

**Investment Grade:** Means a Credit Rating of “Baa3” or better from Moody’s or “BBB-” or better from S&P.

**ITC:** The investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.

**kW:** Kilowatt.

**LAR Attributes:** Means any and all resource adequacy attributes (or other location attributes related to system reliability) of the Facility, as may be identified from time to time by the CPUC, CAISO, or other Governmental Authority having jurisdiction, that can be counted toward a load serving entity’s LAR.

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

**Lender(s):** Any Person(s) providing money or extending credit (including any capital lease) to Seller, including in the form of debt or tax equity, for (a) the construction of the Facility, (b) the term or permanent financing of the Facility, or (c) working capital or other ordinary business requirements for the Facility. “Lender(s)” shall not include any trade creditor(s) of Seller.

**Letter of Credit or LC:** An irrevocable, non-transferable standby letter of credit issued by an Eligible LC Bank in a form that is substantially similar to the form contained in Exhibit H-1. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.

**Licensed Professional Engineer:** A third party acceptable to Buyer in its reasonable judgment who (a) is licensed to practice engineering in California, (b) has training and experience in the power industry specific to the technology of the Facility, (c) has no economic relationship, association, or nexus with Seller or Buyer, other than to meet the obligations of Seller pursuant to this Agreement, (d) is not a representative of a consultant, engineer, contractor, designer or other individual involved in the development of the Facility or of a manufacturer or supplier of any equipment installed at the Facility, and (e) is licensed in an appropriate engineering discipline for the required certification being made.

**Local Area Requirements or LAR:** The local area reliability requirements established for load serving entities by the CPUC pursuant to the Resource Adequacy Rulings, by CAISO pursuant to the Tariff, or by other Governmental Authority having jurisdiction. LAR may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirement in other regulatory proceedings or legislative actions.

**Locational Marginal Price, or LMP:** Has the meaning set forth in the CAISO Tariff.

**Master File:** Has the meaning set forth in the CAISO Tariff.

**Mechanical Completion:** The condition of the Facility existing when (i) all components and systems of the Facility have been properly constructed, installed and functionally tested according to Seller's EPC contract requirements in a safe and prudent manner that does not void any equipment or system warranties or violate any permits, approvals or Applicable Laws; (ii) the Facility is ready for startup testing and commissioning; (iii) Seller has provided written acceptance to the EPC Contractor of mechanical completion as that term is specifically defined in the EPC contract.

**Milestones:** The key development activities required for the construction and operation of the Facility, as set forth more particularly in Section 5.2.

**Minimum Deliveries Liquidated Damages or Minimum Deliveries LDs:** Has the meaning set forth in Section 3.7(b)(i).

**Monthly Payment:** Has the meaning set forth in Section 4.1(a)(i).

**Monthly Renewable Forecast:** Has the meaning set forth in Section 5.9(a)(ii).

**Monthly Storage Availability:** Has the meaning set forth in Exhibit L.

**Monthly Storage Forecast:** Has the meaning set forth in Section 5.9(b)(i).

**Moody's:** Moody's Investors Service, Inc.

**MW:** Megawatt.

**MWh:** Megawatt hour.

**Negative LMP:** In any Settlement Interval, whether in the Day-Ahead Market or Real-Time Market, the LMP at the Delivery Point is less than zero dollars (\$0).

**NERC:** Means the North American Electric Reliability Corporation or a successor organization.

**Net Qualifying Capacity or NQC:** Has the meaning set forth in the CAISO Tariff.

**Network Upgrades:** Has the meaning set forth in the CAISO Tariff.

**Non-Defaulting Party:** Has the meaning set forth in Section 8.2(a).

**Notice to Proceed:** The full notice to proceed provided by Seller to the EPC Contractor following execution of the EPC contract between Seller and such EPC Contractor and satisfaction of all conditions to performance of such contract, by which Seller authorizes such EPC Contractor to begin construction of the Facility without any delay or waiting periods.

**Operating Parameters:** Means the criteria for operating the Storage Facility set forth in Exhibit K.

**Outage Schedule:** Has the meaning set forth in Section 5.10(a)(i).



**Partial Cycle:** Has the meaning set forth in Exhibit J.

**Parties:** Buyer and Seller, and their respective successors and permitted assignees.

**Party:** Buyer or Seller, and each such Party's respective successors and permitted assignees.

**Performance Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(b) of this Agreement.

**Permits:** All material federal, state or local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, ownership, operation and maintenance of the Facility, including any such permits or approvals required under CEQA or the National Environmental Policy Act, 42 U.S.C. Sections 4321 et. seq.

**Permitted Extensions:** Has the meaning set forth in Section 5.3(c).

**Person:** An individual, partnership, corporation, business trust, limited liability company, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity.

**Planned Outage:** The removal of equipment from service availability for inspection and/or general overhaul of one or more major equipment groups. To qualify as a Planned Outage, the maintenance (a) must actually be conducted during the Planned Outage, and in Seller's sole discretion must be of the type that is necessary to reliably maintain the Facility, (b) cannot be reasonably conducted during Facility operations, and (c) causes the generation level of the Facility to be reduced by at least ten percent (10%) of the Installed Renewable Capacity or Storage Contract Capacity.

**PMax:** Means the applicable CAISO-certified maximum operating level of the Renewable or the Storage Facility.

**PMin:** Means the applicable CAISO-certified minimum operating level of the Renewable Facility or the Storage Facility.

**PNode:** Has the meaning set forth in the CAISO Tariff.

**Point of Interconnection or POI:** The point on the electrical system where the Facility is physically interconnected with the Transmission Provider's system as further described in the Interconnection Agreement.

**Product:** Storage Product and Renewable Product.

**Product Content Category 1, or PCC 1 Energy:** Means any Renewable Energy Credit and associated generation of electricity from an Eligible Renewable Energy Resource that meets the criteria set forth in California Public Utilities Code Section 399.16(b)(1), as may be amended from time to time or as further defined or supplemented by Applicable Laws.

**Progress Report:** A report containing the information set forth in Exhibit F.

**Prudent Operating Practice:** Means (a) the applicable practices, methods and acts required by or consistent with Applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric utility industry during the relevant time period with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States, or (b) any of the practices, methods and acts which, in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States. Prudent Operating Practice includes compliance with Applicable Laws, applicable reliability criteria, and the criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules and standards of any successor organizations.

**Public Records Laws:** The California Public Records Act, California Government Code Sections 6250 et seq., and the San Francisco Sunshine Ordinance, San Francisco Administrative Code, Chapter 67, the Ralph M. Brown Act, California Government Code Sections 54950, et seq., and any other applicable law regarding public records as may be amended from time to time.

**Qualifying Capacity:** Has the meaning set forth in the CAISO Tariff.

**RA Compliance Showing:** Means the (a) Local RAR compliance or advisory showings (or similar or successor showings), (b) RAR compliance or advisory showings (or similar or successor showings), and (c) Flexible RAR compliance or advisory showings (or similar successor showings), in each case, an entity is required to make to the CAISO pursuant to the CAISO Tariff, to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings, or to any Governmental Authority.

**RA Deficiency Amount:** The liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month as calculated in accordance with Section 3.5(d)(i).

**RA Guarantee Date:** The date set forth in the Cover Sheet which is the date the Facility is expected to achieve Full Capacity Deliverability Status.

**RA Shortfall:** Has the meaning set forth in Section 3.5(d)(i).

**RA Shortfall Month:** Commencing on the RA Guarantee Date, any month during which (a) the Facility has not achieved FCDS, or (b) the Net Qualifying Capacity of the Facility for such month was either (i) not published by the Notification Deadline, or (ii) was less than the Qualifying Capacity of the Facility for such month.

**Real-Time Market or RTM:** Has the meaning set forth in the CAISO Tariff.

**Reliability Coordinator:** Has the meaning set forth in the CAISO Tariff.

**Renewable Contract Price:** Has the meaning set forth in Section 3.2.

**Renewable Contract Quantity:** The annual expected Energy production from the Renewable Facility set forth in Exhibit C.

**Renewable Energy:** Energy generated by the Renewable Facility.

**Renewable Energy Credit or REC:** Has the meaning set forth in California Public Utilities Code Section 399.12(h) and CPUC Decision 08-08-028, as may be amended from time to time or as further defined or supplemented by Applicable Laws.

**Renewable Facility:** The power generation facility, interconnection facilities, and associated facilities and equipment for the generation and delivery of Energy, to be constructed, owned and operated by Seller on the Site in accordance with this Agreement, as described in the Cover Sheet and Exhibit B.

**Renewable Meter:** The CAISO-approved, revenue quality meter or meters dedicated solely to the Renewable Facility, that meet all applicable CAISO metering requirements, along with a CAISO-approved compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Renewable Energy delivered to the Delivery Point. The Renewable Facility may contain multiple measurement devices that will make up the Facility Meter, and, unless otherwise indicated, references to the Renewable Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

**Renewable Portfolio Standard or RPS:** The California Renewable Portfolio Standard as set forth in California Public Utilities Code Sections 399.11 et. seq. and California Public Resources Code Sections 25740, et. seq., as such provisions are amended or supplemented from time to time.

**Renewable Product:** The Energy, Environmental Attributes, Capacity Attributes, Ancillary Services, and any and all other reliability, power, or environmental attributes which are or can be produced by or associated with the Renewable Facility.

**Replacement Price:** In dollars per MWh (\$/MWh), Buyer's actual, reasonable and reasonably documented cost of Replacement Product, plus liquidated damages of five percent (5%) of such cost for Replacement Product purchased by Buyer pursuant to Section 3.7(a)(i) or Section 3.7(b)(i) provided, however, that if Buyer did not purchase Replacement Product during such period, then the Replacement Price shall be calculated as the sum of (1) the price of Energy based on the hourly Day-Ahead Market price at the NP 15 EZ Gen Hub, plus liquidated damages five percent (5%) of such cost, for hours ending 7 through 22 during the applicable period, and (2) the price of Environmental Attributes and Capacity Attributes, if applicable, based on information either available to Buyer internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product.

**Replacement Product:** Energy produced from a facility other than the Renewable Facility that at the time of delivery to Buyer qualifies as an ERR and which (1) has the same or similar Environmental Attributes, including PCC 1 Renewable Energy Credits, that would have been generated by the Renewable Facility during the Contract Year for which the Replacement Product is provided, and (2) equivalent Capacity Attributes that would have been provided by the Facility during the Contract Year for which the Replacement Product is provided.

**Replacement RA:** Resource Adequacy provided by Seller to Buyer from a facility other than the Facility which pursuant to Section 3.5(d)(ii) has the same flexible attributes and local, zonal or other locational attributes associated with the Facility.

**Resource Adequacy Benefits:** The rights and privileges attached to the Facility that satisfy any entity's resource adequacy obligations, as those obligations are set forth in any Resource Adequacy Rulings and shall include Flexible Capacity, and any local, zonal or otherwise locational attributes associated with the Facility.

**Resource Adequacy Requirements or RAR:** the resource adequacy capacity requirements, including LAR and Flexible RAR, for load serving entities established by the Resource Adequacy Rulings.

**Resources Adequacy Rulings:** The CPUC's existing or subsequent decisions, resolutions, or rulings addressing resource adequacy issues, or any other resource adequacy laws, rules, or regulations enacted, adopted, or promulgated by any other Governmental Authority having jurisdiction, including the CAISO, as those decisions, resolutions, rulings, laws, rules, or regulations may be amended or modified from time to time.

**Round Trip Efficiency or RTE Rate:** Means the ratio of the amount of Energy that is discharged from the Facility compared to the amount of Energy that is used to charge the Facility as calculated in accordance with Exhibit M.

**Round Trip Efficiency or RTE Adjustment Factor:** Has the meaning set forth in Exhibit M.

**RTM Forecast:** The final forecast of the Energy to be produced by the Renewable Facility prepared by the CAISO or its designee in accordance with the Eligible Intermittent Resources Protocol and communicated to the Scheduling Coordinator for the Facility for use in submitting bids in the Real-Time Market.

**Schedule:** Has the meaning set forth in the CAISO Tariff.

**Scheduled Energy:** The Energy economically bid or Self-Scheduled by the SC that clears the applicable CAISO market.

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

**Self-Schedule:** Has the meaning set forth in the CAISO Tariff.

**Seller:** Has the meaning in the Preamble, and any successor or permitted assignee.

**Seller Day-Ahead Forecast:** Has the meaning set forth in Section 5.9(a)(iv).

**Seller Excused Product:** For any period of time, an amount of Energy expressed in MWh, equal to the Final Output Estimate, that could have been produced but which was not produced by the Renewable

Facility as a result of Curtailment Orders, Buyer Bid Curtailment, Force Majeure events, System Emergencies, or forced outages to the transmission or distribution system that prevents delivery of Energy from the Renewable Facility from and after the Delivery Point.

**Seller Initiated Test:** Has the meaning set forth in Section 5.4(c).

**Seller's WREGIS Account:** Has the meaning set forth in Section 3.4(c)(i).

**Settlement Interval:** Has the meaning set forth in the CAISO Tariff.

**SFPUC:** The San Francisco Public Utilities Commission.

**Showing Month:** The calendar month that is the subject of the RA compliance showing as set forth in the Resource Adequacy Ruling and CAISO Tariff.

**Site:** The location of the Facility as described on Exhibit B.

**Standard & Poor's or S&P:** Standard & Poor's Financial Services, LLC (a subsidiary of S&P Global, limited liability company).

**State of Charge or SOC:** The ratio of the (a) amount of Energy stored in the Storage Facility and available for discharging relative to (b) the Storage Contract Capacity multiplied by [XX (X)] hours, expressed as a percentage.

**Station Use:** The Energy used within the Facility to power the lights, motors, control systems and other electrical loads that are necessary for operation of the Facility.

**Storage Facility:** The energy storage facility, interconnection facilities, and associated facilities and equipment for the storage and delivery of Energy, to be constructed, owned, and operated by Seller on the Site for the storage and delivery of electricity as described in the Cover Sheet and Exhibit B.

**Storage Meter:** The CAISO-approved bi-directional revenue quality meter or meters dedicated solely to the Storage Facility that meet all applicable CAISO metering requirements, along with a CAISO-approved compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Charging Energy delivered to the Storage Facility as measured by the Storage Meter and the amount of Discharging Energy delivered to the Delivery Point. The Storage Facility may contain multiple measurement devices that will make up the Facility Meter, and, unless otherwise indicated, references to the Storage Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

**Storage Product:** Means Installed Capacity, Capacity Attributes, Ancillary Services, Discharging Energy, and any and all other reliability, power, environmental, or other products which may be produced by or are related to the Storage Facility.

**Stored Energy Level:** The amount of Energy in the Facility that is available for discharge as Discharged Energy.

**Supplementary Storage Test Protocol:** Has the meaning set forth in Exhibit K.

**Surplus Energy:** Has the meaning set forth in Section 3.2(b).

**System Emergency:** Has the meaning set forth in the CAISO Tariff.

**Tax Credit:** Any state, local, and/or federal production tax credit, depreciation benefit, tax deduction, and/or investment tax credit, including the ITC, specific to investments in renewable energy facilities and/or energy storage facilities.

**Taxes:** Means all federal, state, local, or foreign taxes, levies, assessments, surcharges, duties, and other fees and charges of any nature imposed by a Governmental Authority whether currently in effect or adopted during the Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any related items of withholding, deficiency, penalty, additions, interests, or assessments.

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

**Termination Payment:** With respect to the Non-Defaulting Party, the sum of (a) the Economic Losses and Costs, minus the Gains, which the Non-Defaulting Party incurs as a result of the termination of this Agreement, subject to Sections 8.2(c) and 8.3, provided that if such amount is negative, then the amount determined pursuant to this clause (a) of the definition of Termination Payment will be deemed to be zero dollars (\$0), plus (b) the net of all amounts then owed to the Non-Defaulting Party by the Defaulting Party, or to the Defaulting Party by the Non-Defaulting Party, determined as of the Early Termination Date.

**Test Energy:** Renewable Product (to the extent available) including Environmental Attributes generated by the Renewable Facility and delivered to the Point of Interconnection prior to the COD.

**Three-Month Shortfall:** Has the meaning set forth in Section 3.7(b)(i).

**Transmission Provider:** Any entity or entities that owns, operates and maintains transmission or distribution lines and associated facilities used for the purpose of transmitting Energy from the Facility to or from the Delivery Point.

**WECC:** The Western Electricity Coordinating Council or successor agency.

**Weekly Renewable Forecast:** Has the meaning set forth in Section 5.9(a)(iii).

**WREGIS:** The Western Renewable Energy Generation Information System, or any successor renewable energy tracking program.

**WREGIS Certificate:** Has the meaning set forth in the WREGIS Operating Rules and are designated as eligible for compliance with the California RPS.

**WREGIS Certificate Deficit:** Any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Delivered Energy for the same calendar month, after taking into account applicable delays in the issuance of WREGIS Certificates or otherwise arising under WREGIS Operating Rules.

**WREGIS Operating Rules:** Those operating rules and requirements adopted by WREGIS as of May 2018, as subsequently amended, supplemented or replaced from time to time.

## ARTICLE 2: CONDITIONS PRECEDENT AND TERM

### 2.1 Conditions Precedent to Term of Agreement

- (a) Conditions Precedent. The Term of this Agreement shall not commence until the occurrence of all of the following:
  - (i) Buyer receives all necessary approvals from the SFPUC and the Board of Supervisors;
  - (ii) Buyer receives from Seller the conditions precedent documentation listed in Part I of Exhibit A; and
  - (iii) Buyer receives from Seller the Development Assurance; and
  - (iv) The Controller has certified in accordance with the City's Charter that sufficient unencumbered balances are available in the proper fund.
- (b) Effective Date. The Effective Date of this Agreement shall be the date that all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties. Buyer will notify Seller promptly in writing when the condition in Section 2.1(a)(i) has been met.
- (c) Failure to Meet All Conditions Precedent. If the Conditions Precedent set forth in Section 2.1(a) are not satisfied or waived in writing by both Parties within ninety (90) days of full execution of this Agreement, then either Party may terminate this 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 and Buyer shall return all Development Assurance to Seller.

## **2.2 Term, Delivery Term, and Extension**

- (a) Term. The term of this Agreement shall commence, and this Agreement shall be effective, upon the Effective Date and, unless earlier terminated pursuant to an express provision of this Agreement, shall remain in effect until delivery to Buyer of all of the Environmental Attributes associated with Energy delivered under this Agreement subject to Section 11.5(u) ("Term").
- (b) Delivery Term.
  - (i) The delivery term shall commence on the Commercial Operation Date and continue for \_\_\_\_\_ years ("Delivery Term"), unless terminated as provided by the terms of this Agreement.
  - (ii) The Delivery Term shall not commence until Seller has completed to Buyer's reasonable satisfaction each of the following conditions:
    - (A) Seller has delivered to Buyer the Commercial Certification in substantially the form set forth at Exhibit G-1, the Installed Capacity Certification in substantially the form set forth at Exhibit G-2, and a SCT report for the pre-COD Storage Capacity Test as specified in Exhibit K;
    - (B) equipment for the Facility with a capacity of no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Renewable Capacity and Guaranteed Installed Storage Capacity has been installed;
    - (C) Seller has obtained the precertification approval component of the CEC Certification requirement for the Renewable Facility;
    - (D) Seller has obtained CAISO Certification for the Storage Facility;
    - (E) the Facility has successfully completed all testing required by Prudent Operating Practice and any applicable requirement to operate the Facility;
    - (F) Seller has secured and maintained in full force and effect all necessary approvals, authorizations, and permits from CAISO and any other Governmental Authority with jurisdiction to enable Seller to operate the Facility and deliver Product to Buyer and all conditions thereof that are capable of being satisfied on the COD have been satisfied and are in full force and effect;
    - (G) Seller has delivered to Buyer a fully executed Interconnection Agreement between Seller and the Transmission Provider for the Facility, which agreement shall be in full force and effect;
    - (H) Seller has delivered to Buyer a fully executed Participating Generator Agreement and Meter Services Agreement between Seller and the CAISO for the Facility, which agreements shall be in full force and effect;
    - (I) Seller has taken all necessary steps to allow the RECs from the Renewable Facility to be tracked in WREGIS and transferred to Buyer and all other requirements applicable to Seller to enable Buyer to use such RECs for its RPS requirements;

- (J) Seller has taken all actions and executed all documents required to authorize Buyer or its designee to act as Scheduling Coordinator for the Facility and Buyer or its designee is authorized to act as SC;
  - (K) Seller has demonstrated satisfaction of all requirements under this Agreement that commence prior to or as of the Delivery Term, including payment of all amounts owed to Buyer under this Agreement, if any; and
  - (L) Seller has delivered Performance Assurance to Buyer.
- (c) The Parties agree that, in order for Buyer to dispatch the Facility as of the Commercial Operation Date, the Parties must perform certain of their Delivery Term obligations in advance of the Commercial Operation Date. The Parties shall cooperate with each other in order for Buyer to be able to dispatch the Facility as of the Commercial Operation Date.

**2.3 Extended Delivery Term and Purchase Option.** At its sole discretion, Buyer may provide notice to Seller no later than twenty-four (24) months prior to the end of Delivery Term of its intent to (i) extend the Delivery Term of this Agreement (“Extended Delivery Term”), or (ii) purchase the Renewable Facility or the Storage Facility. Buyer and Seller shall promptly enter into good faith negotiations on the price and other terms that will apply to any Extended Delivery Term or Storage Facility or Renewable Facility purchase and sale. If the Parties have not reached agreement on such price and other terms within ninety (90) days after delivery of Buyer’s notice under this Section 2.3 in the case of an Extended Delivery Term, or one-hundred and twenty (120) days in the case of a purchase and sale of the Storage Facility or the Renewable Facility, then neither Party shall have any further obligation to negotiate for an Extended Delivery Term or purchase and sale. Upon termination of negotiations under this Section 2.3, Seller may enter into negotiations and definitive agreements with one or more third parties for the sale of the Product, the Facility, or any component thereof with respect to the period occurring after the end of the Delivery Term.

### **ARTICLE 3: PURCHASE AND SALE OF PRODUCT**

- 3.1 Purchase and Sale.** During the Delivery Term, subject to the terms and conditions of this Agreement, Buyer will purchase all of the Product produced by or associated with the Facility and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility.
- (a) Exclusive Right. Buyer shall have the exclusive right to all Product associated with the Facility, except for Discharging Energy associated with a Seller Initiated Test. Buyer shall have the exclusive right to use, market, or resell the Product and the right to all revenues generated from the use, resale, or remarketing of the Product. Seller shall take all commercially reasonable actions and execute all documents or instruments reasonably necessary to facilitate a resale of Product by Buyer and to allow subsequent purchasers to use such resold Product. If Buyer incurs any liability to a subsequent purchaser due to the failure of Seller to comply with this Section 3.1, Seller shall be liable to Buyer for the amounts Seller would have owed Buyer under this Agreement if Buyer had not resold the Product.
  - (b) No Substitution. Except as otherwise set forth in this Agreement, Seller shall not substitute or purchase any element of the Product from sources other than the Facility or sell Product from the Facility to a third party.
  - (c) Title to Product. Commencing on the Commercial Operation Date through the end of the Delivery Term, Seller shall supply and deliver the Product to Buyer at the Delivery Point, and Buyer shall take delivery of and title to the Product at the Delivery Point in accordance with the terms of this Agreement. Title to and risk of loss as to Environmental Attributes shall pass from Seller to Buyer upon transfer of such Environmental Attributes in WREGIS. Seller represents and warrants that it shall deliver all Product to Buyer free and

clear of all liens, security interests, claims and encumbrances or any interest created by any Person other than Buyer. Subject to Section 5.6(b)(i), Seller shall be responsible for any costs, fees, Taxes, assessments, or charges associated with the Product or the delivery of the Product up to the Delivery Point and Buyer shall be responsible for any costs, fees, Taxes, assessments, or charges imposed on or associated with the Product or the delivery of the Product at and from the Delivery Point (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees). If a Party is required to remit or pay Taxes that are the other Party's responsibility, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other Party for such Taxes.

**3.2 Contract Price.** Buyer shall pay Seller \_\_\_\_\_ dollars per MWh (\$ \_\_\_\_/MWh) for Renewable Product delivered pursuant to this Agreement and Deemed Delivered Energy, as adjusted pursuant to Section 3.2 ("Renewable Contract Price") and \_\_\_\_\_ dollars per kw-month (\$ \_\_\_\_/kW-mo, as adjusted pursuant to Sections 3.2 and 3.7, for Storage Product ("Storage Contract Price"). The Renewable Contract Price and Storage Contract Price shall be the total compensation owed by Buyer for the Product, adjusted as follows:

- (a) Excess Renewable Quantity. Buyer has the right, but not the obligation, to purchase any Renewable Product in excess of one hundred and ten percent (110%) of the Renewable Contract Quantity for the then-current Contract Year ("Excess Renewable Quantity"). Buyer shall pay Seller fifty percent (50%) of the Renewable Contract Price for Excess Renewable Quantity. In each Contract Year, if the Renewable Facility achieves ninety percent (90%) of the Renewable Contract Quantity, Seller shall (i) provide notice to Buyer and (ii) request written confirmation from Buyer that Buyer intends to purchase any Excess Quantity. If Buyer does not respond within ten (10) Business Days, Seller shall have the right to sell any Excess Renewable Quantity that Buyer does not elect to purchase to a third party; provided that if Buyer is SC and does not elect to purchase the Excess Renewable Quantity, the Parties shall cooperate on settlements such that Buyer passes through to Seller any applicable CAISO costs and revenues.
- (b) Surplus Energy Price. If during any Settlement Interval, Seller delivers Renewable Product amounts in excess of the quantity of Renewable Energy that would be delivered consistent with the power rating of the Installed Renewable Capacity ("Surplus Energy"), then the price applicable to all such MWh or Surplus Energy shall be zero dollars (\$0). If the real-time LMP at the Delivery Point during any Settlement Interval is less than zero dollars (\$0), Seller shall pay to Buyer an amount equal to the absolute value of the LMP multiplied by the amount of Surplus Energy in MWh.
- (c) Non-availability of Storage Product. Notwithstanding any other provision of this Agreement, Buyer's obligation to make payment for Storage Product shall be excused during the pendency of (i) a Force Majeure event, (ii) a Curtailment Period, or (iii) a period of Buyer suspension due to a Seller Default pursuant to Article 8. In addition, Buyer has no obligation to purchase from Seller any Storage Product for which the associated Discharging Energy is not or cannot be delivered to the Delivery Point as a result of a total or partial outage of the Storage Facility.
- (d) Excess Storage Capacity. **[FOR DEGRADING CAPACITY FACILITIES ONLY]** Buyer has the right, but not the obligation, to purchase Storage Contract Capacity in excess of one hundred ten percent (110%) of the Guaranteed Annual Storage Capacity set forth in Exhibit C for the then-current Contract Year ("Excess Storage Capacity"). Buyer shall pay Seller seventy-five percent (75%) of the Storage Contract Price for Excess Storage Capacity. If an annual Storage Capacity Test demonstrates Excess Storage Capacity, Buyer shall notify Seller within thirty (30) days after the completion of the Storage Capacity Test of its intent to purchase or not to purchase the Excess Storage Capacity. Such Buyer election shall only apply in the then-current Contract Year.



### 3.3 Renewable Contract Quantity.

- (a) Renewable Contract Quantity. The Renewable Contract Quantity is set forth in Exhibit C.
- (b) Test Energy. Buyer may elect to purchase Test Energy for a period of up to ninety (90) days prior to the Commercial Operation Date and up to the commencement of the Delivery Term pursuant to the terms of this Agreement, provided that the decision to produce and deliver Test Energy shall be at the sole discretion of Seller. Buyer shall provide notice to Seller of its election at least sixty (60) days prior to the start of Renewable Facility testing. If Buyer does not elect to purchase Test Energy, Seller may sell the Test Energy and associated Environmental Attributes to a third party and Buyer shall facilitate interactions with CAISO regarding Test Energy as necessary in accordance with Seller's directions. If Buyer elects to purchase Test Energy, Seller's full compensation for Test Energy sold to Buyer shall be the net amount resulting from (i) the CAISO revenues and other payments for the Test Energy from the Facility, including revenues associated with CAISO dispatches, and (ii) the debits, costs, penalties and interest that are directly assigned by the CAISO to the Facility for, or attributable to, scheduling and deliveries of Test Energy from the Renewable Facility under this Agreement, which amount may be a negative or positive value.

### 3.4 Environmental Attributes.

- (a) Purchase and Sale of Environmental Attributes. During the Term, Seller shall transfer to Buyer, and Buyer shall receive from Seller, all right, title and interest in and to the Environmental Attributes associated with Renewable Energy or Storage Product, whether now existing or subsequently created by a Governmental Authority after the Execution Date. Seller shall, at its sole expense, take all actions and execute all documents or instruments necessary to transfer all rights, title, and interest in and to the Environmental Attributes, whether now existing or that come into existence in the future, associated with the Renewable Energy or Storage Product. Seller shall transfer and make such Environmental Attributes available to Buyer as soon as practicable upon Seller's production of the Environmental Attributes.
- (b) Buyer's Right to Report Ownership of Environmental Attributes. Seller shall not report to any Person or entity that the Environmental Attributes belong to anyone other than Buyer, and Buyer may report under any program that such Environmental Attributes purchased hereunder belong to it.
- (c) Renewable Energy Credits. Seller shall, at its sole expense take all actions and execute all documents or instruments necessary to ensure that all WREGIS Certificates associated with all Renewable Energy Credits corresponding to all Delivered Energy are issued and tracked for purposes of satisfying the applicable requirements of the California RPS and transferred within three (3) months of creation to Buyer for Buyer's sole benefit. Seller shall comply with all Applicable Laws, including, without limitation, the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. In addition:
  - (i) Prior to the Commercial Operation Date, Seller shall register the Facility with WREGIS and establish an account with WREGIS ("Seller's WREGIS Account"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS Certificates using "Forward Certificate Transfers" (as described in the WREGIS Operating Rules) from Seller's WREGIS Account to the WREGIS account(s) of Buyer or another account identified by Buyer ("Buyer's WREGIS Account"). Seller shall be responsible for all expenses associated with registering the Facility with WREGIS, establishing and maintaining Seller's WREGIS Account, paying WREGIS Certificate issuance and transfer fees, and transferring

WREGIS Certificates from Seller's WREGIS Account to Buyer's WREGIS Account.

- (ii) Seller shall cause Forward Certificate Transfers to occur on a monthly basis in accordance with the certification procedure established by the WREGIS Operating Rules. Any fractional MWh amounts shall be carried forward until sufficient generation is accumulated for the creation of a WREGIS Certificate.
- (iii) Due to the delay in the creation of WREGIS Certificates relative to the timing of the monthly invoice payment under this Agreement, Buyer may make an invoice payment for a given month before the WREGIS Certificates for such month are formally transferred to Buyer in accordance with the WREGIS Operating Rules and this Section 3.4(c). Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller.
- (iv) Seller shall, at its sole expense, ensure that the WREGIS Certificates for a given calendar month correspond with the Delivered Energy for such calendar month. If any WREGIS Certificate Deficit is caused by, or the result of any action or inaction, by Seller, then the amount of Delivered Energy in such calendar Month shall be reduced by the amount of the WREGIS Certificate Deficit for the purposes of calculating Buyer's payment(s) to Seller under Article 4 and the Guaranteed Energy Production for the applicable GEP Period. Any amount owed by Seller to Buyer because of a WREGIS Certificate Deficit shall be made as an adjustment to Seller's next monthly invoice to Buyer in accordance with Article 4, and Buyer shall net such amount against Buyer's subsequent payment(s) to Seller.
- (v) Without limiting Seller's obligations, to the extent a WREGIS Certificate Deficit is caused by an error or omission of WREGIS, the Parties shall cooperate in good faith to cause WREGIS to correct its error or omission.
- (vi) If WREGIS changes the WREGIS Operating Rules after the Execution Date or applies the WREGIS Operating Rules in a manner inconsistent with this Agreement, the Parties shall promptly modify this Agreement as reasonably required (A) to cause and enable Seller to transfer to Buyer's WREGIS Account a quantity of WREGIS Certificates for each given calendar month that corresponds to the Delivered Energy in the same calendar month, or (B) as may otherwise be reasonably appropriate to address such inconsistency.

**3.5 Capacity Attributes and Resource Adequacy.** Throughout the Delivery Term, Seller grants, pledges, assigns, and otherwise commits to Buyer all of the Installed Renewable Capacity and Installed Storage Capacity, including the Capacity Attributes, from the Facility for any purpose, including to enable Buyer to meet its Resource Adequacy Requirements or successor program requirements as the CPUC, CAISO, and/or other Governmental Authority may prescribe.

- (a) Full Capacity Deliverability Status. Seller shall be solely responsible for and take all necessary actions to obtain Full Capacity Deliverability Status for the Facility by the RA Guarantee Date and to maintain FCDS throughout the Delivery Term.
- (b) Resource Adequacy. From the Execution Date and throughout the Delivery Term, Seller shall perform all actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits from the Facility to Buyer. Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing any and all documents or instruments necessary to enable Buyer to use or resell all of the Resource Adequacy Benefits committed to Buyer under this Agreement.
- (c) NQC. Seller shall take all commercially reasonable actions as necessary for Buyer to obtain and maintain an NQC value that is equal to the Qualifying Capacity for the Facility.

- (d) Resource Adequacy Guarantee. For each RA Shortfall Month, Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages and/or provide Replacement RA as the sole remedy for the Capacity Attributes that Seller failed to convey to Buyer.
- (i) For any RA Shortfall Month, Seller shall pay liquidated damages to Buyer in an amount equal to the product of (A) the Qualifying Capacity minus the NQC, as the NQC may be adjusted by the CAISO to reflect the CAISO's capacity evaluations of the Facility (including for Forced Outages) for the RA Shortfall Month ("RA Shortfall"), multiplied by (B) the sum of (1) the CPM Soft Offer Cap, or any successor value adopted or implemented by the CAISO for procurement of backstop capacity resources and (2) the applicable CPUC System RA Penalty, or any successor value adopted or implemented by the CPUC and imposed on load-serving entities for RA deficiencies ("RA Deficiency Amount"). If a RA Shortfall Month occurs during the period between the COD and the Effective FCDS Date, for the purpose of this Section 3.5(d)(i), the Qualifying Capacity shall be the amount of Qualifying Capacity the Facility would reasonably be estimated to qualify for, based on the CPUC-adopted qualifying capacity methodologies then in effect, provided, the amount shall be deemed to be zero (0) if the NQC has not been published by the CAISO by the Notification Deadline for the RA Shortfall Month.
- (ii) Seller may offer to provide Replacement RA to Buyer in the amount of the Qualifying Capacity of the Facility minus the Net Qualifying Capacity for the applicable RA Shortfall Month. Seller shall provide notice to Buyer of the offer of Replacement RA substantially in the form of Exhibit I at least ninety (90) days prior to the applicable Showing Month for the purpose of monthly RAR reporting. Buyer may elect to accept some or all of the Replacement RA by providing notice to Seller of its election within fifteen (15) days of Seller's offer. If Buyer does not elect to accept all or some of the Replacement RA, Seller shall pay to Buyer the RA Deficiency Amount for the RA Shortfall minus the Replacement RA provided to Buyer, if any, for the RA Shortfall Month.
- (iii) If within ten (10) Business Days of the end of a RA Shortfall Month, Seller does not either provide an offer to Buyer to provide Replacement RA or deliver payment of the RA Deficiency Amount to Buyer, Buyer shall be entitled to collect the RA Deficiency Amount by electing, in its sole discretion, one or more of the following, (1) to draw upon the Performance Assurance; and/or (2) netting under Section 4.1(c).

**3.6 Ancillary Services.** Buyer shall have the exclusive rights to all Ancillary Services from, or associated with, the Facility.

**3.7 Performance Guarantees.**

- (a) Guaranteed Energy Production. For each GEP Period throughout the Term, Seller shall deliver no less than eighty (80%) of (i) the sum of the Renewable Contract Quantities for the GEP Period, minus (ii) the Seller Excused Product ("Guaranteed Energy Production" or "GEP").
- (i) If Seller fails to meet the GEP, then within sixty (60) days after the end of the relevant GEP Period, Buyer shall notify Seller of the quantity of the shortfall calculated for the relevant GEP Period as: eighty percent (80%) of (A) the sum of the Contract Quantities for the GEP Period minus (B) the sum of (1) Delivered Energy quantities, plus (2) Seller Excused Product, plus (3) the MWh equivalent of any Replacement Product or Minimum Deliveries Liquidated Damages that Seller provided to Buyer for any Three-Month Shortfalls within the GEP Period ("GEP Shortfall") and the amount of liquidated damages owed under this Section

- 3.7(a)(i). Within ten (10) Business Days after the receipt of notice of the GEP Shortfall, Seller shall either (C) offer to provide Replacement Product in the amount of the GEP Shortfall in accordance with the procedures set forth in Section 3.7(c)(i), or (D) pay Buyer liquidated damages calculated as: the positive difference obtained by subtracting the (i) Renewable Contract Price from (ii) the Replacement Price; multiplied by the GEP Shortfall (“GEP LDs”). Buyer shall not be obligated to purchase Replacement Product.
- (ii) If within ten (10) Business Days of receipt of notice of a GEP Shortfall, Seller does not either provide an offer to Buyer to provide Replacement Product or deliver payment of the GEP LD amount to Buyer, Buyer shall be entitled to collect the GEP LDs by electing, in its sole discretion, one or more of the following, (1) to draw upon the Performance Assurance; and/or (2) netting under Section 4.1(c).
  - (iii) As set forth in Section 8.1(b)(iii), Seller’s failure to deliver in any two (2) consecutive Contract Years at least seventy percent (70%) of the sum of the expected Contract Quantities for the relevant Contract Years, excluding Seller Excused Hours, shall constitute a default of this Agreement.
  - (iv) No less frequently than quarterly during each year, Seller shall calculate and provide notice to Buyer of the then-cumulative amount of the Seller Excused Product for such year, along with an explanation in reasonable detail of the calculation based on historical Renewable Facility data, meteorological data, Renewable Energy projections (including by the CAISO, if applicable) and other relevant data. The calculation shall be subject to Buyer’s reasonable review and approval.
- (b) Minimum Deliveries. Notwithstanding any other provision of this Agreement, during any consecutive three (3) calendar month period of the Delivery Term, Seller shall deliver no less than fifty percent (50%) of the quantities for each month as set forth in the applicable Annual Forecasts for the Renewable Facility for that three (3) month period minus Seller Excused Product (“Minimum Deliveries”).
- (i) If Seller fails to meet the Minimum Deliveries, Buyer shall notify Seller of the quantity of the shortfall, calculated as the Minimum Deliveries minus the sum of the Delivered Energy quantities for the relevant three (3) month period (“Three-Month Shortfall”) and the amount of liquidated damages owed under this Section 3.7(b)(i). Within ten (10) Business Days after receipt of notice from Buyer, Seller shall either (A) offer to provide Replacement Product in accordance with the procedures set forth in Section 3.7(c)(i) in the amount of the Three-Month Shortfall, or, (B) pay Buyer liquidated damages, calculated as the positive difference obtained by subtracting the (1) Renewable Contract Price from (2) the Replacement Price; multiplied by the Three-Month Shortfall (“Minimum Deliveries Liquidated Damages” or “Minimum Deliveries LDs”). Buyer shall not be obligated to purchase Replacement Product. The payment of Minimum Deliveries LDs under this Section 3.7(b)(i) shall not excuse Seller’s obligations under Section 3.7(a)(i) to pay GEP Liquidated Damages to the extent there is a GEP Shortfall after accounting the MWh equivalent of any Replacement Product or Minimum Deliveries LDs in accordance with Section 3.7(c)(ii).
  - (ii) If within ten (10) Business Days of receipt of notice of a Three-Month Shortfall, Seller does not either provide notice to Buyer of its election to provide Replacement Product or deliver payment of the Minimum Deliveries LDs amount to Buyer, Buyer shall be entitled to collect the Minimum Deliveries LDs by electing, in its sole discretion, one or more of the following, (1) drawing upon the Performance Assurance; and/or (2) netting under Section 4.1(c).

- (iii) As set forth in Section 8.1(b)(iv), Seller's failure to deliver at least fifty percent (50%) of the expected monthly quantities as set forth in the Annual Forecast, excluding Seller Excused Hours, for twelve (12) consecutive months (measured as of the end of each month during the Delivery Term) shall constitute a default of this Agreement.
- (c) Replacement Product and Cure.
  - (i) If Seller provides an offer to Buyer to provide Replacement Product pursuant to Sections 3.7(a) or (b), then Buyer shall have fifteen (15) days after receipt of Seller's notice to confirm whether it will accept Replacement Product from Seller. If Buyer agrees to accept the Replacement Product, the Parties shall mutually agree upon a delivery schedule. All Replacement Product shall be delivered to Buyer at the NP 15 EZ Gen Hub. Buyer will pay Seller for all such Replacement Product provided pursuant to this Section 3.7(c)(i) at the Contract Price. If Buyer rejects the offer of Replacement Product, Seller shall pay the GEP LDs or Minimum Deliveries Liquidated Damages to Buyer.
  - (ii) Buyer's receipt of Replacement Product, GEP Liquidated Damages, or Minimum Delivery LDs shall cure the performance issue that triggered such remedy as follows:
    - (A) The MWhs of Replacement Product delivered and the MWhs used in the calculation of GEP LDs or Minimum Deliveries LDs which were paid to Buyer pursuant to Section 3.7(a)(i) and Section 3.7(b)(i) shall be treated as actual deliveries in the most recent month in which the applicable shortfall occurred when assessing Seller's compliance with its obligations under this Agreement including delivery obligations under Section 3.7(a).
    - (B) The quantities of Energy for which Seller paid GEP LDs or delivered Replacement Product in the second Contract Year of a GEP Period shall be included in the calculation of the GEP Shortfall for the first Contract Year of the following GEP Period.
- (d) Guaranteed Storage Availability.
  - (i) During the Delivery Term, the Facility shall maintain a Monthly Storage Availability of no less than ninety-eight percent (98%) (the "Guaranteed Storage Availability"). The Monthly Storage Availability shall be calculated in accordance with Exhibit L.
  - (ii) If the Monthly Storage Availability during any month is less than the Guaranteed Storage Availability, Buyer's payment for the Storage Product shall be adjusted by the Availability Adjustment set forth in Exhibit L.
  - (iii) Failure to maintain an average Monthly Storage Availability of at least seventy percent (70%) over a consecutive twenty-four (24) month period shall constitute a Seller Event of Default as set forth in Section 8.1(b).
- (e) Round Trip Efficiency Guarantee.
  - (i) During the Delivery Term, the Facility shall maintain a Round Trip Efficiency Rate of no less than the Guaranteed RTE Rate set forth in Exhibit M.
  - (ii) If the Round Trip Efficiency Rate during any month is less than the applicable GRTE Rate, Buyer's monthly payment for the Storage Product shall be adjusted by the RTE Adjustment Factor set forth in Exhibit M.

- (iii) Failure to maintain an average RTE Rate of at least seventy percent (70%) over a consecutive twelve (12) month period shall constitute a Seller Event of Default as set forth in Section 8.1(b).

(f) Storage Capacity.

- (i) During the Delivery Term, Seller shall maintain the Guaranteed Annual Capacity as set forth in Exhibit C. Seller's failure to maintain at least seventy-five percent (75%) of the Guaranteed Annual Capacity on a prorated basis over a consecutive twelve (12) month period shall constitute a Seller Event of Default as set forth in Section 8.1(b).
- (ii) Without limiting Seller's rights or obligations to maintain the Storage Facility as set forth in this Agreement, if as a result of any Storage Capacity Test after the initial Storage Capacity Test, the Storage Contract Capacity is lower than the Guaranteed Annual Capacity for that Contract Year as set forth in Exhibit C, Seller may, at its sole discretion, add facilities and equipment to the Storage Facility to increase the Storage Capacity up to, but not in excess of, the applicable level of the Guaranteed Annual Capacity. Seller shall conduct a subsequent Storage Capacity Test to determine the Storage Contract Capacity. Seller shall provide Buyer with thirty (30) days advance written notice of Seller's intent to add facilities or equipment pursuant to this Section 3.7(f).

**3.8 Surplus Cycles Carry-over.** If the Facility is dispatched for less than the equivalent of three hundred sixty-five (365) Full Cycles during any Contract Year, Buyer shall be entitled to carry forward up to the equivalent of ninety (90) Full Cycles to the following Contract Year at no additional cost.

**3.9 Compliance Cost Cap.** If Seller establishes to Buyer's reasonable satisfaction that a change in Applicable Law has occurred after the Effective Date that results in Compliance Costs as defined in Section 3.9(a), then Seller's Compliance Costs during the Delivery Term shall be capped in the aggregate throughout the Delivery Term at twenty-five thousand dollars (\$25,000.00) per MW of Installed Capacity ("Compliance Cost Cap").

- (a) Compliance Costs. This Section shall apply to Seller's additional, reasonable out-of-pocket costs paid to applicable Governmental Authorities for obtaining, maintaining, conveying, or complying with: (i) CEC Certification, (ii) Environmental Attributes including WREGIS certificates, (iii) Capacity Attributes, and (iv) Sections 10.1(g) through 10.1(j) ("Compliance Costs"). Compliance Costs includes only those new costs associated with the change in Applicable Law after the Execution Date that are in excess of the reasonably anticipated compliance costs as of the Execution Date.
- (b) Reimbursement. In the event that the Compliance Costs exceed the Compliance Cost Cap, Buyer shall either reimburse Seller for such Compliance Costs that exceed the Compliance Cost Cap, or excuse Seller from performing those obligations that cause the Compliance Costs to exceed the Compliance Cost Cap. If Buyer agrees to reimburse Seller, Seller shall perform the additional compliance actions and shall include the Compliance Costs in the monthly invoice.

Notice. Seller shall notify Buyer within sixty (60) calendar days after the change in Applicable Law if it anticipates that its Compliance Costs will exceed the Compliance Cost Cap and provide an estimate of the Compliance Costs. Buyer shall notify Seller within ninety (90) calendar days of receipt of the notice whether Buyer (i) agrees to reimburse Seller for the additional costs, or (ii) waives Seller's performance of such obligations.

**3.10 Expansion Facility and Expansion Facility Product.**

- (a) Buyer's Right of First Refusal. During the Term, Seller may, at its sole discretion, develop, finance, construct, and/or operate an Expansion Facility. Each time such a determination

is made, Seller shall offer, in writing, to sell the Expansion Facility Product to Buyer. The offer shall include the price to be paid by Buyer for the Expansion Facility Product, the term, and other principal terms and conditions of the proposed sale. If Buyer wishes to accept such offer to purchase all of the Expansion Facility Product or Expansion Facility Product related to either the Storage Facility expansion or the Renewable Facility expansion, Buyer shall notify Seller within ninety (90) calendar days of its receipt of such offer. Buyer and Seller shall promptly thereafter enter into good faith negotiation for modifications to this Agreement incorporating the Expansion Facility Product offer.

- (b) Buyer's Right to Purchase Expansion Facility Product. If Buyer does not accept Seller's offer to purchase all or a portion of the Expansion Facility Product within ninety (90) calendar days of receipt of Seller's offer, Seller shall be deemed authorized to offer to sell that portion of the Expansion Facility Product that Buyer declines to purchase to one or more third parties at a price and on other terms and conditions which, taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer. If Seller offers to disaggregate the Expansion Facility Product for the purpose of selling such Product to multiple buyers, Seller shall notify Buyer, in writing, of the terms and conditions of such offers, and Buyer shall again have the right of first refusal consistent with the terms set forth above for each of the lesser amounts being offered to the third parties. If Buyer does not purchase the Expansion Facility Product and Seller sells such Expansion Facility Product to a third party, Seller shall promptly certify, in writing, to Buyer that the terms and conditions of sale of such Expansion Facility Product to such third party, taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer, and, Seller shall provide the relevant final contract and any other supporting documentation for such certification by Buyer. Upon the sale of such Expansion Facility Product in compliance with this Agreement, Buyer shall have no further rights to be offered or to purchase such Expansion Facility Product. Buyer's refusal, in writing, of the Expansion Facility Product from one Expansion Facility shall not affect Buyer's right to purchase the Expansion Facility Product from a subsequently developed Expansion Facility under the terms of this Agreement. Notwithstanding any provision to the contrary herein, Seller shall not sell or provide the Expansion Facility Product to any third party, unless Seller can do so without compromising in any material way its ability to provide the Product or Expansion Facility Product, if any, to Buyer hereunder. The materiality of any such impact shall be determined by Buyer, acting in its reasonable discretion.

#### **ARTICLE 4: BILLING, PAYMENT, AND CERTIFICATION**

##### **4.1 Billing and Payment.**

- (a) Monthly Invoices. Seller shall provide to Buyer no sooner than the tenth (10th) calendar day of each month an invoice for the Product and Deemed Delivered Energy for the prior month based upon meter data for Energy delivered in such calendar month, and for other amounts due to or from Seller hereunder. Each invoice shall be in a form reasonably specified by Buyer and shall include sufficient data as is reasonably necessary to verify each element of the calculation of the Monthly Payment and other charges and credits as set forth in this Agreement. Except for Deemed Delivered Energy and Replacement Product, all Renewable Energy purchased under this Agreement must be measured by the Renewable Meter to be eligible for payment under this Agreement.
- (i) The "Monthly Payment" for each month will be an amount equal to the summation of the following :
- (A) the product of (1) the Delivered Energy for each Settlement Interval, multiplied by (2) the Renewable Contract Price; plus

- (B) the product of (1) the Deemed Delivered Energy for each Settlement Interval, multiplied by (2) the Renewable Contract Price; plus
    - (C) the product of the Storage Contract Price multiplied by the Storage Contract Capacity for that month, multiplied by the Availability Adjustment, multiplied by the Round Trip Efficiency Factor; plus
    - (D) credits for any amounts owed from Seller to Buyer under Sections 5.7 and 5.8(b); plus
    - (E) any other amounts netted against the monthly invoice under Section 4.1(c).
  - (ii) The Invoice shall include:
    - (A) the hourly quantities of Delivered Energy delivered in the prior month;
    - (B) a calculation of the Monthly Payment as set forth in Section 4.1(a)(i);
    - (C) credits for WREGIS Certificate Deficits pursuant to Section 3.4(c)(iv), if any;
    - (D) the quantity of Replacement Product provided by Seller in such month;
    - (E) a calculation of the Deemed Delivered Energy for such month;
    - (F) CAISO metering and transaction data sufficient to document and verify the amounts of Charging Energy and Discharging Energy as measured by the Storage Meter;
    - (G) the amount of Replacement RA delivered to Buyer (if any);
    - (H) any adjustments to the Monthly Payment as set forth in Sections 3.2 and 3.7; and
    - (I) the calculation of any other amounts due to or from Seller hereunder.
  - (iii) Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.
- (b) Payment. Unless otherwise specified under this Agreement, all payment shall be due and payable on or before the thirtieth (30th) calendar day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Any amount not paid when due shall be considered late and a Late Payment Fee equal to a daily rate of five dollars and fifty cents (\$5.50) per one hundred thousand dollars (\$100,000) on the unpaid balance for a maximum period of ninety (90) days after the date the payment is due ("Late Payment Fee") shall be added to the outstanding amount.
  - (c) Netting. Except as otherwise set forth in this Agreement, the Parties shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting. All amounts owed by each Party to the other Party under this Agreement, including for the purchase and sale of Product during the monthly billing period, any damages set forth under this Agreement, CAISO Charges Invoices, Late Payment Fees, and payments or credits, shall be netted so that only the excess amount remaining shall be paid by the Party who owes it.
  - (d) City Vendor Requirements. Notwithstanding any other provision of this Agreement, Buyer shall not be deemed to be in default of this Agreement and no Late Payment Fee shall be assessed if an invoice under this Agreement cannot be processed by Buyer due to Seller's failure to comply with all applicable City requirements for City 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, insurance requirements, registration in the City's vendor payment processing system, or any other current or future City 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.

- (e) 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 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 Fee from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Buyer from subsequent payments. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 4.1(e) 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 delivery of Product occurred, the right to payment for such delivery is waived.
- (f) CAISO Adjustments. If the CAISO makes any adjustment to any CAISO meter data or applicable market prices for a given time period, the Parties shall share information necessary to revise the monthly invoices pursuant to Section 4.1 and Seller agrees that it shall submit revised monthly invoices 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 Seller receives such binding adjustment to the meter data.

#### **4.2 Designated Fund/Limited Obligations.**

- (a) Auto-Appropriating Designated Fund. Buyer's payment obligations under this 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 obligations under this Agreement. Buyer agrees to establish CleanPowerSF rates and charges that are sufficient to maintain revenues necessary to pay its obligations under this Agreement 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 upon request during the Delivery Term.
- (b) Limited Obligations. Buyer's payment obligations are special limited obligations of the Buyer payable solely from the revenues of CleanPowerSF. Buyer's payment obligations under this Agreement are not a charge upon the revenues or general fund of the SFPUC or the City and County of San Francisco or upon any non-CleanPowerSF moneys or other property of the SFPUC or the City.

#### **4.3 Guaranteed Maximum Costs.**

- (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 Buyer are not authorized to request, and Buyer is not required to reimburse Seller for, commodities or services beyond the agreed upon Agreement scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of Buyer are not authorized to offer or promise, nor is 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) Biennial Budget Process. For each City biennial budget cycle during the term of this Agreement, Buyer agrees to take all necessary action to include the Buyer's payment obligations under this Agreement in its budget submitted to the Board of Supervisors for that budget cycle.

## ARTICLE 5:

### FACILITY DEVELOPMENT, OPERATION, AND MAINTENANCE

**5.1 General Obligations.** Seller covenants that at its sole cost and expense, unless otherwise specifically stated in this Agreement, it shall:

- (a) Records. Seller shall keep complete and accurate design, operating, and other records and all other data for the purposes of proper administration of this Agreement, including such records as may be required by any Governmental Authority or Prudent Operating Practice;
- (b) Further Development Information. Seller shall provide to Buyer such other information regarding the permitting, engineering, construction, or operations of the Facility as Buyer may from time to time reasonably request, subject to licensing or other restrictions of Seller or a third party with respect to confidentiality, disclosure or use; provided, nothing herein shall limit Buyer's right to obtain such information upon agreeing to confidentiality or signing a confidentiality agreement with regard to such information;
- (c) Insurance. Seller shall obtain and maintain the policies of insurance in the amounts and with the coverages as set forth on Exhibit D;
- (d) Vendor Certification. Seller shall obtain, renew, and maintain, all City required vendor certifications and requirements during the Term of this Agreement;
- (e) Construction. Design, develop, finance, and construct the Facility;
- (f) Prevailing Wages. Pay any person performing labor in the construction of the Facility not less than the applicable prevailing wage rate for the county in which the Facility will be located, as determined by the California Department of Industrial Relations. Seller shall require in any contract related to the construction of the Facility the payment of the prevailing wage rate for the work to be performed. Seller shall provide to Buyer upon request, certified payroll reports with respect to all persons performing labor in the construction of the Facility;
- (g) Forced Labor. Not knowingly utilize equipment or resources for the construction, operation or maintenance of the Facility that rely on work or services exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily ("Forced Labor"). Consistent with the business advisory jointly issued by the U.S. Departments of State, Treasury, Commerce and Homeland Security on July 1, 2020, equipment or resources sourced from the Xinjiang region of China are presumed to involve Forced Labor.

- (h) Interconnection and Transmission. Take all necessary actions, including arranging and paying for any and all necessary Electric System Upgrades, obtaining all required regulatory approvals, and executing and maintaining in full force and effect all necessary agreements sufficient to allow Seller to interconnect the Facility to the CAISO grid or distribution system, and deliver the Product to the Delivery Point by the Commercial Operation Date in accordance with this Agreement. Seller shall comply with all applicable requirements, rules, contractual obligations, and Prudent Operating Practice to maintain any Interconnection Facilities and to cause delivery of the Product to Buyer;
- (i) RPS and Green-e® Certification. Prior to the Commercial Operation Date and throughout the Delivery Term, take all actions necessary to obtain and maintain for the Facility (A) CEC Certification, (B) tracking and transfer of RECs associated with the Product in WREGIS, and (C) Green-e® Energy eligibility for renewable energy and greenhouse gas emissions as administered by the Center for Resource Solutions;
- (j) CEC Certification. Take all necessary steps including, but not limited to, making or supporting timely filings with the CEC to obtain and maintain CEC Certification for the Facility throughout the Delivery Term, including compliance with all applicable requirements for certified facilities set forth in the current version of the RPS Eligibility Guidebook (or its successor). Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the Commercial Operation Date, Seller shall apply with the CEC for final CEC Certification. Within one hundred eighty (180) days after the Commercial Operation Date, Seller shall obtain and maintain throughout the remainder of the Delivery Term the final CEC Certification. Seller shall take all necessary action to cause the creation of retroactive WREGIS Certificates for the period prior to the final CEC Certification. Seller must promptly notify Buyer and the CEC of any changes to the information included in Seller's application for CEC Certification for the Facility;
- (k) Environmental Costs. Be solely responsible for all Environmental Costs; and
- (l) Compliance with Laws. Seek, obtain, maintain, and comply with all Applicable Laws, Permits, certificates, agreements, or other authorizations or approvals which are required for the ownership, construction, operation, and maintenance of the Facility and the generation, delivery, and sale of the Product pursuant to this Agreement.

## 5.2 Facility Construction and Milestones.

- (a) Time is of the Essence. The Parties agree that time is of the essence in the performance of this Agreement. Seller covenants that it shall diligently pursue to completion each of the following Milestones:
  - (i) Site control: [\_\_\_\_\_];
  - (ii) Final and non-appealable discretionary authorizations, Permits, and approvals: [\_\_\_\_\_];
  - (iii) Phase I and II Interconnection study results: [\_\_\_\_\_];
  - (iv) Executed Interconnection Agreement: [\_\_\_\_\_];
  - (v) Financial Close: [\_\_\_\_\_];
  - (vi) Construction Start: [\_\_\_\_\_] ("Guaranteed Construction Start Date");
  - (vii) Mechanical Completion: [\_\_\_\_\_] ;
  - (viii) Initial Synchronization: [\_\_\_\_\_];
  - (ix) Network Upgrades completed (evidenced by a permission to parallel letter from the Transmission Provider): [\_\_\_\_\_]; and,

- (x) Commercial Operation: [ ] (“Guaranteed Commercial Operation Date”).
- (b) Progress Report. Seller shall provide to Buyer a Progress Report concerning the progress towards construction and completion of the each of the Milestones (including whether Seller has met or is on target to meet each of the Milestones), which shall be substantially similar in form and substance to that attached as Exhibit F, and include such additional information as reasonably required by Buyer. Commencing on the Effective Date, Seller shall provide Progress Reports every three (3) months prior to the Guaranteed Construction Start Date and monthly Progress Reports thereafter. Seller agrees to meetings between representatives of Buyer and Seller to review such Progress Reports and discuss Seller’s construction progress, as Buyer may request from time to time.
- (c) Certification of Completion of Milestones. Within five (5) Business Days of the completion of each Milestone, Seller shall provide a certification to Buyer (along with any relevant supporting documentation), stating Seller’s achievement or satisfaction of each such Milestone.
- (d) Notice of Failure to Achieve Milestone. Upon becoming aware that it shall, or is reasonably likely to, fail to achieve any Milestone by the required date for any reason, Seller shall notify Buyer in writing as soon as is reasonably practical but no later than thirty (30) days prior to the Milestone date. If the delay is caused by a Force Majeure event and thirty (30) days’ notice is not feasible, Seller shall notify Buyer in writing as soon as reasonably practical. The notice shall provide information regarding the cause of the delay, provide a revised estimated date for achievement of the Milestone(s), and describe Seller’s plan for meeting the Milestone(s) in sufficient detail to enable Buyer to reasonably assess the sufficiency of the plan to remedy the delay and achieve the Milestone. Seller’s notice shall also explain any impact such delay may or shall have on any other Milestone, and measures to be taken to mitigate such impact. Subject to the provisions of Section 5.3, Seller shall not be considered in default of this Agreement for failure to meet a Milestone if Seller complies with its obligations under this Section 5.2(d).

### 5.3 **Guaranteed Construction Start Date and Guaranteed Commercial Operation Date.**

- (a) Construction Start.
  - (i) “Construction Start” will occur when Seller has (i) obtained all necessary approvals, Permits, and authorizations for the construction of the Facility, (ii) executed an EPC contract and engaged all necessary contractors, (iii) ordered all essential equipment and supplies that are necessary to commence physical construction of the Facility and to proceed to completion without a foreseeable interruption of material duration, (iv) issued a final Notice to Proceed to the EPC Contractor, and (v) commenced mobilization at the Site by Seller or its agents, including site preparation at a sufficient level to reasonably demonstrate that Seller has commenced preparations for construction of the Facility, and (vi) delivered to Buyer the Construction Start Certification substantially in the form set forth in Exhibit E. Seller shall cause the Construction Start to occur no later than the Guaranteed Construction Start Date.
  - (ii) Seller may extend the Guaranteed Construction Start Date by paying Construction Start Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Construction Start Date, not to exceed a total of one hundred twenty (120) days. At least ten (10) Business Days prior to the Guaranteed Construction Start Date, Seller shall provide notice and payment to Buyer of the Construction Start Delay Damages for the number of days of extension to the Guaranteed Construction Start Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions to such date resulting

from Seller's payment of Commercial Operation Date Delay Damages, but as may be extended pursuant to a Permitted Extension), Buyer shall refund to Seller all Construction Start Delay Damages.

(b) Commercial Operation.

- (i) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date.
- (ii) Seller may extend the Guaranteed Commercial Operation Date by paying COD Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Commercial Operation Date, not to exceed a total of sixty (60) days. At least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall provide notice and payment to Buyer of the COD Delay Damages for the number of days of extension to the Guaranteed Commercial Operation Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions resulting from Seller's payment of COD Delay Damages, but as may be extended pursuant to a Permitted Extension), then Buyer shall refund to Seller all COD Delay Damages.

(c) Permitted Extensions. The following events constitute "Permitted Extensions":

- (i) A Force Majeure event occurs and Seller works diligently to resolve the effect of the Force Majeure event;
- (ii) Seller has used commercially reasonable efforts to obtain Facility interconnection but the Electric System Upgrades are not complete and ready for the Facility to connect and deliver and sell Product at the Delivery Point by the Guaranteed Commercial Operation Date; or
- (iii) Buyer has not made all necessary arrangements to receive Energy from the Facility at the Delivery Point by the Guaranteed Commercial Operation Date.

(d) Notice. If Seller claims a Permitted Extension, Seller shall provide Buyer with sixty (60) days' notice prior to the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date which notice shall clearly identify the grounds for the requested extensions and include information necessary for Buyer to verify the length of and grounds for the extension. If the delay is due to Force Majeure and sixty (60) days' notice is impracticable or impossible, Seller shall provide notice as soon as possible after the occurrence of the Force Majeure event.

(e) Maximum Delay.

- (i) The combined Permitted Extensions under this Section 5.3 (other than the extensions under Section 5.3(c)(iii)) for the Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date combined shall not exceed one hundred twenty (120) days in the aggregate.
- (ii) The cumulative extensions of the Guaranteed Construction Start Date for Permitted Extensions and by payment of Construction Start Delay Damages shall not exceed one hundred and eighty (180) days.
- (iii) The cumulative extensions of the Guaranteed Commercial Operation Date for Permitted Extensions (other than the extensions under Section 5.3(c)(iii)) and by payment of COD Delay Damages shall not exceed one hundred and eighty (180) days.

(f) No Limitation of Damages. The Parties agree that Buyer's receipt of the Construction Start Delay Damages or COD Delay Damages shall (i) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Article 8, and (ii) not limit

Buyer's right to receive a Termination Payment or Damage Payment, as applicable, upon exercise of Buyer's termination right pursuant to Section 5.3(h) or Article 8.

- (g) Development Assurance. If Seller fails to timely pay any Construction Start Delay Damages or COD Delay Damages, Buyer may draw upon the Development Assurance to satisfy Seller's payment obligations under this Section 5.3.
- (h) Termination of Agreement. Buyer may terminate this Agreement by written notice to Seller if:
  - (i) Seller fails to achieve Construction Start on or before the Guaranteed Construction Start Date and the combined extensions to the Guaranteed Construction Start Date exceed the limits under Sections 5.3(a)(ii) and 5.3(e); or
  - (ii) Seller fails to achieve COD on or before the Guaranteed COD Date and the combined extensions to the Guaranteed COD Date exceed the limits under Sections 5.3(b)(ii) and 5.3(c)5.3(e); or
  - (iii) Seller fails to pay, or discontinues paying, any or all of the Construction Delay Damages or COD Delay Damages when due and Buyer cannot obtain such amounts by drawing upon the Development Assurance and/or setting off against any amounts owed to Seller by Buyer under this Agreement.
- (i) Additional Extension. Notwithstanding the foregoing, the Parties may mutually agree in writing to an extension of the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date of up to ninety (90) days beyond the maximum extensions set forth under Section and 5.3(e) with payment of the Construction Start Delay Damages or COD Delay Damages, as applicable, by Seller. Buyer may not terminate this Agreement for failure to achieve the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date during the mutually agreed upon extension period so long as Seller continues to pay the Construction Start Delay Damages or COD Delay Damages.
- (j) Failure to Reach Guaranteed Renewable Installed Capacity or Guaranteed Storage Installed Capacity. If, at Commercial Operation, the Renewable Installed Capacity and the Storage Installed Capacity are less than one hundred percent (100%) of the Guaranteed Renewable Installed Capacity and/or Guaranteed Storage Installed Capacity respectively, within ninety (90) days after the Commercial Operation Date, Seller shall take all necessary actions to cause the Renewable Installed Capacity or Storage Installed Capacity to equal to (but not exceed) the Guaranteed Renewable Installed Capacity or Guaranteed Storage Installed Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as Exhibit G-2 specifying the Installed Capacity. If Seller fails to construct the Guaranteed Renewable Installed Capacity or Guaranteed Storage Installed Capacity by such date, Seller shall pay damages to Buyer, in an amount equal to Two Hundred Fifty Thousand Dollars (\$250,000) for each MW that the Guaranteed Renewable Capacity or Guaranteed Storage Capacity exceeds the Renewable Installed Capacity or Storage Installed Capacity ("Capacity Damages"), and the Guaranteed Renewable Capacity or Guaranteed Storage Capacity and other applicable portions of the Agreement shall be adjusted accordingly. Capacity Damages shall not be offset or reduced by the payment of Development Assurance, Performance Assurance, Construction Start Delay Damages, COD Delay Damages, or any other form of liquidated damages under this Agreement.

#### **5.4 Storage Capacity Tests.**

- (a) Frequency. Seller shall schedule and complete a Storage Capacity Test prior to the Commercial Operation Date and shall perform annual Storage Capacity Tests in accordance with Exhibit K. Seller and Buyer shall have the right to run additional Storage Capacity Tests in accordance with Exhibit K and Seller shall, at times and for durations

reasonably agreed to by Buyer, conduct necessary testing to ensure the Facility is functioning properly and the Facility is able to respond to Dispatch Notices.

- (b) Witnesses. Buyer shall have the right to send one or more representative(s) to witness all Storage Capacity Tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representative(s) witnessing any Storage Capacity Test.
- (c) Buyer and Seller Tests. Any testing of the Facility requested by Buyer after the Commercial Operation Date and all required annual tests pursuant to Exhibit K shall be deemed Buyer-instructed dispatches of the Facility ("Buyer Dispatched Test"). Any test of the Facility that is not a Buyer Dispatched Test including pre-COD SCTs, SCTs required to obtain or maintain CAISO Certification, and re-tests pursuant to Exhibit K shall be deemed a "Seller Initiated Test".
- (d) Notice. Except as otherwise set forth in Exhibit K, for any Seller Initiated Test Seller shall provide Buyer at least twenty-four (24) hours advance notice (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practices). The timing and duration of any Seller Initial Test shall be subject to Buyer's reasonable approval.
- (e) Dispatch Notices. No Dispatch Notices shall be issued during any Seller Initiated Test or Buyer Dispatched Test except as reasonably requested by Seller or Buyer to implement the applicable test.
- (f) Testing Report. Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit K. If the actual capacity or efficiency rate determined pursuant to a Storage Capacity Test varies from the then current Storage Contract Capacity or Efficiency Rate, as applicable, then the actual capacity and/or efficiency rate shall become the new Storage Contract Capacity and/or Efficiency Rate at the beginning of the day following the completion of the Storage Capacity Test.
- (g) Testing Costs and Revenues.
  - (i) Buyer shall be responsible for all Charging Energy and shall be entitled to all CAISO revenues associated with a Buyer Dispatched Test.
  - (ii) Seller shall be responsible for the cost of all Charging Energy for, and shall be entitled to all CAISO revenues associated with, a Seller Initiated Test. In the month following Buyer's receipt of such CAISO revenues, costs, and charges, Buyer shall credit or invoice Seller for all applicable CAISO revenues, costs, and charges received by Buyer and associated with the Seller Initiated Test in the CAISO Charges Invoice.
  - (iii) Except as set forth in Section 5.4(b), all other costs of any testing of the Facility shall be borne by Seller.

## **5.5 Operation and Maintenance.**

- (a) Operation and Maintenance. Seller shall be solely responsible for the ownership, operation, maintenance, and repair of the Facility in compliance with this Agreement, all Applicable Laws, the requirements of the California general safety orders, CAISO, NERC and WECC, all applicable contractual obligations and Permits, and in accordance with Prudent Operating Practice, and shall be solely responsible for all associated costs and expenses.
  - (i) In the event Seller requires any data or information from Buyer in order to comply with any Applicable Law, including the requirements of CAISO, NERC and WECC, relating to the Facility, then Seller shall request in writing such data from Buyer no less than forty-five (45) calendar days prior to Seller's requested date of Buyer's response; provided that if Seller has less than forty-five (45) calendar days prior notice of the need for such data, Seller shall request in writing such data from

Buyer as soon as reasonably practicable. Buyer shall make a good faith effort to provide such data and/or information within the timeframe specified in writing by Seller or as soon thereafter as reasonably practicable.

- (ii) Upon Buyer's request, Seller shall submit the Facility for additional CAISO Certification so that the Facility may provide Ancillary Services that the Facility is, at the relevant time, capable of providing. At Buyer's request, the Parties shall cooperate in good faith to agree on necessary alterations to the Facility equipment or Facility operations in order to allow the Facility to provide additional Ancillary Services.
  - (iii) Seller shall maintain a daily operations log for the Facility which shall include but not be limited to information on Renewable Energy production, Energy charging and discharging, Station Use, availability, outages, changes in operating status, inspections, and any other significant events related to the operation of the Facility. Information maintained pursuant to this Section 5.5(a)(iii) shall be provided to Buyer within fifteen (15) days of Buyer's request.
  - (iv) Seller shall maintain accurate records of all Storage Capacity Tests.
  - (v) Seller shall maintain and make available to Buyer records, including logbooks, demonstrating that the Facility is operated in accordance with Prudent Operating Practices. Seller shall comply with all reporting requirements and permit on-site audits, investigations, tests and inspections permitted or required under any Prudent Operating Practice.
- (b) Maintenance of Health and Safety. Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair, and replacement of the Facility, including maintenance of a safety manual at the Facility addressing all hazard and safety requirements and operating procedures. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt, reasonable action to prevent such damage or injury and shall give Buyer's emergency contact identified in the Cover Sheet notice of such condition. Such action may include disconnecting and removing all or a portion of the Facility, or suspending the supply of Energy to the Delivery Point.
- (c) Start-ups and Shut-downs. Seller shall coordinate all Facility start-ups and shut-downs, in whole or in part, with Buyer in accordance with CAISO scheduling protocols and the reasonable protocols established by Buyer that are not inconsistent with the CAISO Tariff and CAISO procedures.
- (d) Metering.
  - (i) All Energy from the Renewable Facility must be delivered through the Renewable Meter and all Charging and Discharging Energy must be delivered through the Storage Meter, each of which shall be subject to adjustment in accordance with applicable CAISO meter requirements and Prudent Operating Practices, including to account for Electrical Losses. Seller shall separately meter all Station Uses. Each meter shall be kept under seal which may be broken only when the Renewable Meter and Storage Meter are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable.
  - (ii) The meter data will account for transformer losses and will be programmed to reflect Electrical Losses to the Delivery Point, consistent with CAISO requirements. Seller shall bear all costs relating to all metering equipment installed to accommodate the Facility. Seller shall grant Buyer (and Buyer's Scheduling Coordinator) read-only rights to retrieve all data, including the meter reads,



directly from the CAISO meter(s) at the Facility site through both (A) physical access and (B) remote electronic read-only access as necessary for the Scheduling Coordinator to meet its obligations under the CAISO Tariff and other applicable rules. Seller shall maintain an updated record of programmed meter parameters (such as channel configuration and other relevant settings) that is accessible and reasonably acceptable to Buyer. In addition, Seller shall provide all meter data to Buyer in a form reasonably acceptable to Buyer and consents to Buyer obtaining from CAISO the CAISO meter data directly related to the Facility and all inspection, testing, and calibration data and reports.

- (iii) If Seller has reason to believe there may be a malfunction of any meter at the Facility, or upon Buyer's reasonable request, Seller shall test the relevant meter at its sole cost and expense. The tests shall be conducted by independent third-parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a meter is inaccurate, Seller shall promptly repair or replace the meter at its sole cost and submit corrected meter data in compliance with CAISO requirements. Seller shall be responsible for and shall reimburse Buyer for all CAISO costs, penalties, and charges related to the inaccuracy of the meter.
  - (iv) Upon Buyer's request, Seller shall take all commercially reasonable actions to become, as specified by Buyer, either a CAISO Metered Entity or a Scheduling Coordinator Metered Entity (as those terms are defined in the CAISO Tariff).
- (e) Shared Facilities. The Parties acknowledged and agree that the Facility may share the Interconnection Facilities and other assets, including the Interconnection Agreement and transmission service agreements. Seller agrees that such joint ownership or arrangements shall permit Seller to perform or satisfy, and shall not limit, Seller's obligations under this Agreement, including Buyer's ability discharge the Storage Facility and to provide Renewable Product up to the interconnection capacity limit for the Facility and to charge the Storage Facility up to the Storage Contract Capacity, and providing for separate metering of the Facility.
- (f) Refurbishment of the Facility. During the Term, Seller may not refurbish the Facility, alter components of the Facility, or replace major components of the Facility where such action results in a total increased capacity higher than the Guaranteed Installed Renewable Capacity or Guaranteed Annual Storage Capacity, without the prior written consent of Buyer. Buyer shall have the right, in its sole discretion, to accept or decline to permit any such refurbishment or alteration that may increase capacity of the Facility above the Guaranteed Installed Renewable Capacity or Guaranteed Annual Storage Capacity. Nothing in this Section 5.5(f) is intended to limit Seller's ability to refurbish, repair, maintain, or replace any portion of the Facility where such actions will not increase the Facility's total capacity above the Guaranteed Installed Renewable Capacity or the Guaranteed Annual Storage Capacity.

## **5.6 Scheduling.**

- (a) Scheduling Coordinator.
  - (i) Upon Initial Synchronization, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for the delivery and the receipt of Charging Energy, Discharge Energy, and the Product at the Delivery Point. At least thirty (30) days prior to Initial Synchronization, (A) Seller shall take all actions and execute and deliver to Buyer and the CAISO all documents necessary to authorize or designate Buyer or Buyer's designee as Scheduling Coordinator for the Facility effective as of the date of Initial Synchronization and (B) Buyer shall, and shall cause its

designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Buyer or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization. On and after Initial Synchronization, Seller shall not authorize or designate any other party to act as Seller's Scheduling Coordinator, nor shall Seller perform for its own benefit the duties of Scheduling Coordinator, and Seller shall not revoke Buyer's authorization to act as Seller's Scheduling Coordinator unless agreed to by Buyer. Buyer or its designee shall submit Schedules and updates to Schedules consistent with the requirements of the CAISO Tariff and CAISO protocols and scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute, or real time basis, as determined by Buyer in its sole discretion.

- (ii) At any time during the Term of this Agreement, Buyer may elect to require Seller or Seller's designee to become the Scheduling Coordinator for the Facility. Buyer shall provide one hundred twenty (120) days prior notice to Seller and the Parties shall promptly enter into good faith negotiations on necessary amendments to this agreement to reflect the transfer of Scheduling Coordinator responsibilities to Seller. The negotiations shall be limited to necessary amendments that are solely related to the Scheduling Coordinator services for the Facility.
- (iii) Buyer shall provide Seller with access to a web-based system through which Seller shall submit to Buyer and the CAISO all notices and updates required under the CAISO Tariff regarding the Facility's status, including but not limited to, all outage requests, forced outages, forced outage reports, clearance requests, or must offer waiver forms. Seller shall cooperate with Buyer to provide such notices and updates. If the web-based system is not available, Seller shall promptly submit such information to Buyer and the CAISO both telephonically and by electronic mail to the personnel designated to receive such information.
- (iv) At least thirty (30) days prior to the expiration of the Delivery Term or the date that Seller assumes SC services under Section 5.6(a)(ii), or as soon as reasonably practicable upon an early termination of this Agreement, the Parties will take all actions necessary to terminate the designation of Buyer as Scheduling Coordinator for the Facility as of 11:59 p.m. on the designated expiration, termination, or transfer date.
- (v) Prior to the COD, the Parties shall cooperate to develop protocols as necessary to implement scheduling and settlements procedures consistent with this Agreement and the CAISO Tariff.

(b) CAISO Costs and Revenues.

- (i) Except as otherwise set forth in this Section 5.6(b), Buyer (as Scheduling Coordinator for the Facility) shall be responsible for CAISO costs and shall be entitled to all CAISO revenues or credits related to the Product Scheduled or delivered from the Delivery Point.
- (ii) Seller shall be responsible for and reimburse Buyer for all CAISO costs, charges, costs, and penalties which are related to (A) the unavailability of the Facility, (B) Seller's default, breach, or other failure to perform as required by this Agreement, (C) any failure by Seller to comply with the CAISO Tariff, any requirements imposed on it as the Facility owner, or the outage notification requirements set forth in the CAISO Tariff and this Agreement (except to the extent such non-compliance is caused by Buyer's failure to perform its duties as Scheduling Coordinator for the Facility), (D) any failure by Seller to comply with any Buyer Bid Curtailment, CAISO Dispatch, or Dispatch Instruction, or Curtailment Order, and (E) Storage Meter or Renewable Meter inaccuracies, and (F) penalties related

to non-performance with respect to Ancillary Services and Residual Unit Commitment (as defined in the CAISO Tariff) awards due to conditions within Seller's control. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be Seller's responsibility. Notwithstanding the foregoing, Buyer shall be responsible for any non-performance penalties due solely to decreases in solar irradiance.

- (iii) Seller shall be entitled to any Availability Incentive Payments (as defined in the CAISO Tariff) and shall be responsible for any Non-Availability Charges (as defined in the CAISO Tariff).
  - (iv) Seller shall be responsible for all CAISO fees, charges, and penalties imposed as a result of deviations between RTM Scheduled Energy and Delivered Energy during any Settlement Interval, except for those charges due solely to real-time uninstructed Energy caused by decreases in solar irradiance, and for costs associated with deviations from the amounts included in a Discharging Notice and the actual RTM Discharging Energy.
  - (v) Each Party shall use commercially reasonable efforts to cooperate with the other Party to allow that Party to comply with any obligations, and minimize any potential liability, it may have under the CAISO Tariff in relation to Product under this Agreement.
- (c) CAISO Settlements. Buyer (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties ("CAISO Charges Invoice") for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer shall review, validate, and if requested by Seller under paragraph (d) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer's existing settlement processes for charges that are Buyer's responsibilities. Subject to Seller's right to dispute and to have Buyer pursue the dispute of any such invoices, Seller shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller's receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for such CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.
- (d) CAISO Charges Disputes. Seller may require Buyer (as the Facility's SC) to dispute CAISO settlements related to any costs or revenues for which Seller is responsible under this Agreement. Seller agrees to pay Buyer's costs and expenses (including reasonable attorneys' fees) associated with CAISO charges that Seller has directed Buyer to dispute.
- (e) Master File. Seller shall provide the data to the CAISO (and to Buyer) that is required for the CAISO's Master File (or successor data systems) for the Facility consistent with this Agreement. Neither Party shall change such data without the other Party's prior written consent.
- (f) Seller Equipment for Operating Instruction Communications. Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement

such protocols and practices, as necessary to respond to and follow operating instructions from the CAISO and Buyer's SC.

## **5.7 Energy Management.**

- (a) Charging Generally. Upon receipt of a Charging Notice, Seller shall take any and all action necessary to deliver the Charging Energy to the Storage Facility in order to deliver the Storage Product in accordance with the terms of this Agreement.
- (b) Charging and Discharging Notices. Buyer shall have the right to charge and discharge the Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by issuing Charging and Discharging Notices to Seller, subject to the requirements and limitations set forth in this Agreement, including the Operating Parameters. Each Charging or Discharging Notice issued in accordance with this Agreement will be effective unless and until Buyer's SC or CAISO modifies such Charging or Discharging Notice by providing Seller with an updated Charging or Discharging Notice, as the case may be.
- (c) No Unauthorized Charging. Seller shall not charge the Storage Facility during the Delivery Term other than pursuant to a valid Charging Notice. Notwithstanding the foregoing, Seller may adjust a Charging Notice to the extent necessary to comply with the Operating Parameters, in connection with a Storage Capacity Test, or pursuant to a notice from the CAISO, Transmission Provider, or any other applicable Governmental Authority. Seller shall comply with all Charging Notices, subject to the requirements and limitations set forth in this Agreement. If, during the Delivery Term, Seller charges the Storage Facility (i) to a Stored Energy Level greater than the Stored Energy Level provided for in a Charging Notice, or (ii) in violation of the first sentence of this Section 5.7(c), then (i) Seller shall be responsible for all Energy costs associated with such charging of the Storage Facility, (ii) Buyer shall not be required to pay for such Energy, and (iii) Buyer shall be entitled to discharge such Energy and entitled to all of the benefits (including Storage Product) associated with such discharge.
- (d) No Unauthorized Discharging. Seller shall not discharge the Storage Facility during the Delivery Term other than pursuant to a valid Discharging Notice. Notwithstanding the foregoing, Seller may adjust a Discharging Notice to the extent necessary to comply with the Operating Parameters, in connection with a Storage Capacity Test, or pursuant to a notice from the CAISO, Transmission Provider, or any other Governmental Authority.
- (e) Unauthorized Charges and Discharges. Any charges, discharges or use of the Storage Facility that is not in accordance with this Agreement shall be a breach by Seller and Seller shall hold Buyer harmless from, and indemnify Buyer against, all actual costs or losses associated with, and shall be responsible to Buyer for any damages arising from, such unauthorized use. If Seller fails to implement procedures reasonably acceptable to Buyer to prevent any further occurrences of the same, then the failure to implement such procedures shall be an Event of Default under Article 8.
- (f) CAISO Dispatches. During the Delivery Term, CAISO Dispatches shall have priority over any Charging Notice or Discharging Notice issued by Buyer or Buyer's SC, and Seller shall comply with any CAISO Dispatch. If the Storage Facility deviates from a CAISO Dispatch, Seller shall be responsible for all CAISO charges and penalties resulting from such deviation (in addition to any Buyer remedy related to overcharging of the Storage Facility as set forth in Section 5.7(c)).
- (g) Pre-Commercial Operation Date Period. Prior to the Commercial Operation Date, Buyer shall have no right to charge or discharge the Storage Facility and Seller shall only charge and discharge the Storage Facility in connection with installation, commissioning and testing of the Storage Facility.

- (h) Curtailments. Notwithstanding anything in this Agreement to the contrary, during any Settlement Interval, Curtailment Orders shall have priority over any Dispatch Notices, and Seller shall not be in violation of this Section 5.7 or any Dispatch Notice if and to the extent the deviation is caused by Seller's compliance with any Curtailment Order or other instruction or direction from a Governmental Authority or the Transmission Provider. Buyer shall have the right, but not the obligation, to provide Seller with updated Dispatch Notices during any Curtailment Order consistent with the Operating Parameters.
- (i) Grid Charging.
  - (i) The Grid Charging Date shall occur on the first day of the first full month after Seller provides notice to Buyer that the Storage Facility may accept Charging Energy from sources other than the Renewable Facility without a resulting loss of or reduction in ITC benefits related to the Storage Facility ("Grid Charging Date"). Seller shall provide notice to Buyer of the Grid Charging Date as soon as Seller reasonably determines that the condition in this Section 5.7(i)(i) is satisfied.
  - (ii) Seller shall accept up to (A) \_\_\_\_ percent [\_\_\_\_%] of Charging Energy from the CAISO grid at the Storage Facility prior to the Grid Charging Date, and (B) up to 100% of Charging Energy from any combination of the Renewable Facility or the CAISO grid on or after the Grid Charging Date. Buyer shall be responsible for all costs related to delivery of Charging Energy from the CAISO grid.

## 5.8 Dispatch Down/Curtailment of Facility.

- (a) Curtailment.
  - (i) Seller shall reduce Product from the Facility by the amount and for the period required by the Reliability Coordinator, CAISO, Transmission Provider, or any successor thereto pursuant to a Curtailment Order. Buyer shall not be required to pay Seller for the Product that Seller could have delivered to Buyer but for such Curtailment Order.
  - (ii) Seller agrees to reduce generation from the Renewable Facility by the amount and for the period set forth in any CAISO notice related to a Buyer Bid Curtailment.
- (b) Failure to Comply. If Seller fails to comply with a Buyer Bid Curtailment or Curtailment Order, then, for each MWh of Delivered Energy that the Renewable Facility generated in contradiction to the Buyer Bid Curtailment or Curtailment Order, Seller shall pay Buyer for each such MWh at an amount equal to the sum of (A) + (B) + (C), where: (A) is the amount, if any, paid to Seller by Buyer for delivery of such MWh and, (B) is the sum, for all Settlement Intervals with a Negative LMP during the Buyer Bid Curtailment period or Curtailment Period, of the absolute value of the product of such excess MWh in each Settlement Interval and the Negative LMP for such Settlement Interval, and (C) is any penalties or other charges resulting from Seller's failure to comply with the Buyer Bid Curtailment or Curtailment Order.
- (c) Deemed Delivered Energy.
  - (i) If a Buyer Bid Curtailment occurs, Buyer shall pay Seller for Deemed Delivered Energy in excess of the Curtailment Cap at the Contract Price.
  - (ii) In Seller's monthly invoice, Seller will reasonably calculate, consistent with this Agreement and Prudent Utility Practice the amount of Deemed Delivered Energy for the applicable month. The Parties shall share any documentation necessary to create or support such calculation. Seller shall include supporting documentation and calculations for the determination of Deemed Delivered Energy with the monthly invoice.

- (iii) If either Party believes that the Final Output Estimate is an inaccurate estimate of the quantity of Energy the Renewable Facility reasonably could have generated based on Renewable Facility availability, insolation, and other relevant meteorological conditions, the Parties will mutually agree upon the use of (1) the Seller Day-Ahead Forecast, (2) the Day-Ahead forecast of the Facility's output from the CAISO's independent forecast provider, or (3) another mutually agreed upon methodology to determine the Final Output Estimate.
- (iv) In the event of an overlapping Buyer Bid Curtailment and a Curtailment Order, Forced Outage, system emergency, or transmission outage, Seller shall exclude Energy curtailed during such Curtailment Order time period from the calculation of Deemed Delivered Energy.

## 5.9 Forecasts.

- (a) Renewable Facility Forecasts. Seller shall use generally accepted industry standards consistent with the forecasting requirements of the CAISO Tariff to produce the forecasts described in this Section 5.9. All forecasts shall be based on P-90 values. If Seller does not follow Section 4.8.2 of the CAISO Tariff with respect to forecasting, then upon Buyer's written request, Seller shall also retain, at Seller's expense, a third-party forecasting service reasonably acceptable to Buyer to produce such forecasts, in addition to those forecasts produced by Seller. Seller shall provide identical input data to such third-party service provider as are used to produce Seller's own forecast. Such forecast(s) shall be provided to Buyer and Buyer's SC in a manner reasonably acceptable to Buyer. If, during any given calendar month, the forecast error of such third-party service is larger than the forecast error of the forecasts produced by the Seller, determined as the sum of squared errors between the Seller Day-Ahead Forecast, for each respective forecast, and actual hourly production, then Buyer shall reimburse Seller for such third-party forecasting service costs.
  - (i) No later than thirty (30) calendar days prior to the end of each Contract Year, Seller will provide a forecast of available capacity and production ("Annual Forecast") detailing hourly expected available generation and monthly capacity and all proposed Planned Outages for the next Contract Year.
  - (ii) No later than ten (10) calendar days prior to the first day of each month of the Delivery Term, Seller shall provide an electronic update to the Annual Forecast for that calendar month ("Monthly Renewable Forecast"). The Monthly Renewable Forecast shall include hourly available capacity and expected generation and all Planned Outages.
  - (iii) No later than seven (7) calendar days prior to the first day of each week of the Delivery Term, Seller shall provide a weekly forecast of available capacity and production and any changes in Planned Outages ("Weekly Renewable Forecast"). The Weekly Renewable Forecast shall include hourly available capacity and generation and all Planned Outages.
  - (iv) By 5:30 PM Pacific Time on the Business Day immediately preceding the date of delivery, Seller shall provide a forecast of available capacity and production for each hour of the date of delivery ("Seller Day-Ahead Forecast"). The Seller Day-Ahead Forecast shall include hourly available capacity and generation and all Planned Outages.
- (b) Storage Facility Capacity Availability Notice.
  - (i) No less than thirty (30) days before the beginning of Commercial Operation, and thereafter ten (10) Business Days before the beginning of each month during the Delivery Term, Seller shall provide to Buyer and Buyer's SC a non-binding

forecast of the hourly expected Available Capacity of the Storage Facility, for each day of the following month ("Monthly Storage Forecast").

- (ii) No later than two (2) Business Days before each schedule day for the Day-Ahead Market in accordance with WECC scheduling practices, Seller shall provide Buyer and Buyer's SC an hourly schedule of the Available Capacity that the Storage Facility is expected to have for each hour of the day ("Availability Notice"). Seller shall provide Availability Notices (including updated Availability Notices) in a form as reasonably requested by Buyer, by electronic mail to Buyer and Buyer's SC.
- (iii) Seller shall notify Buyer and the SC (if applicable) immediately with an updated Monthly Storage Forecast and Availability Notice, as applicable, if the Available Capacity of the Storage Facility changes or is expected to change after Buyer's receipt of a Monthly Storage Forecast or Availability Notice. Seller shall accommodate Buyer's reasonable requests for changes in the time of delivery of Availability Notices.
- (iv) Daily Operation. Upon Buyer's request, Seller shall, on each day immediately after each operating day, provide Buyer an operating report for the Storage Facility with the actual available capacity for each hour of the operating day.

#### **5.10 Outages.**

(a) Planned Outages.

- (i) No later than January 15, April 15, July 15, and October 15 of each Contract Year, and at least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall submit to Buyer the schedule of proposed Planned Outages ("Outage Schedule") for the following twelve (12) month period in a form reasonably specified by Buyer. Within twenty (20) Business Days after its receipt of an Outage Schedule, Buyer shall give notice to Seller of any request for changes to the Outage Schedule, and Seller shall, consistent with Prudent Operating Practices, accommodate Buyer's requests regarding the timing of any Planned Outage. Seller shall deliver to Buyer the final schedule of Planned Outages no later than five (5) days after receiving Buyer's comments.
- (ii) Seller shall not schedule any Planned Outages during the period of reliability accounting, initially the period between June 1 through October 31 of each year; however, such period shall be subject to changes at Buyer's discretion in order to conform to the CAISO's Availability Assessment procedures. In the event that Seller has a previously Planned Outage that becomes coincident with a System Emergency, Seller shall make all reasonable efforts to reschedule such Planned Outage.
- (iii) If replacement capacity is required by the CAISO for the period of any Planned Outage, Seller shall provide the required replacement capacity in the amount and for the duration specified by the CAISO pursuant to the CAISO Tariff.
- (iv) If reasonably required in accordance with Prudent Operating Practices, Seller shall have the right, on no less than sixty (60) days advance notice to Buyer, to propose changes to the Planned Outage schedule. Buyer may provide comments no later than ten (10) days after receiving Seller's notice of proposed changes to the Outage Schedule and Buyer shall permit any changes if doing so would not have a material adverse impact on Buyer and Seller agrees to reimburse Buyer for any costs and charges associated with such changes.

- (b) Forced Outages. Seller shall notify Buyer by telephoning Buyer's Scheduling Coordinator as soon as reasonably possible but no later than ten (10) minutes following the occurrence of a Forced Outage, or if Seller has knowledge that a Forced Outage will occur, within twenty (20) minutes of determining that such Forced Outage will occur. Seller shall relay outage information to Buyer as required by the CAISO Tariff within twenty (20) minutes of the Forced Outage. Seller shall communicate to Buyer the estimated time of return of the Facility as soon as practical. Seller shall promptly prepare and provide to Buyer, all reports of Forced Outages or Planned Outages that Buyer may reasonably require for the purpose of enabling Buyer to comply with CAISO requirements or any Applicable Laws. Seller shall also report all Forced Outages or Planned Outages in the report specified in Section 5.9(b)(4).

## **ARTICLE 6: DEVELOPMENT AND PERFORMANCE ASSURANCE**

### **6.1 Grant of Security Interests/Remedies.**

- (a) First Priority Security Interest. To secure its obligations under this Agreement hereunder, Seller hereby grants to Buyer, as the secured party, a first priority security interest in, and lien on (and right of setoff against), and assignment of, all such Development Assurance and Performance Assurance posted with Buyer 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, Buyer. Within thirty (30) calendar days of the delivery of the Development Assurance or Performance Assurance, as applicable, Seller agrees to take such action as Buyer reasonably requires in order to perfect a first-priority security interest in, and lien on (and right of setoff against), such Development Assurance or Performance Assurance and any and all proceeds resulting therefrom or from the liquidation thereof, respectively.
- (b) Rights and Remedies. Upon or any time after the occurrence and during the continuation of an Event of Default by Seller or an Early Termination Date or the occurrence of any event under this Agreement where Buyer is entitled to draw upon the Development Assurance or Performance Assurance, Buyer may do any one or more of the following:
- (i) exercise any of the rights and remedies of a secured party with respect to all Development Assurance or Performance Assurance, as applicable, including any such rights and remedies under Applicable Law;
  - (ii) draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Assurance or Performance Assurance; and
  - (iii) liquidate all Development Assurance or Performance Assurance, as applicable, then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.
- (c) Application of Proceeds. Buyer shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller's obligations under the Agreement (Seller remaining liable for any amounts owing to Buyer after such application), subject to the Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

### **6.2 Development Assurance and Performance Assurance.**

- (a) Development Assurance.
- (i) Seller shall post Development Assurance in the amount of sixty dollars per kilowatt (\$60/kW) multiplied by the Guaranteed Installed Renewable Capacity plus ninety dollars per kilowatt (\$90/kW) multiplied by the Guaranteed Installed



Storage Capacity in the form of cash or a Letter of Credit within ten (10) calendar days following the Execution Date and maintain the Development Assurance in full force and effect until such time as Seller posts the Performance Assurance pursuant to Section 6.2(b) below with Buyer. Seller shall replenish the Development Assurance within five (5) Business Days of any draw down of any portion of the Development Assurance for any reason permitted under this Agreement other than to satisfy a Damage Payment.

- (ii) Buyer shall be entitled to draw upon the Development Assurance posted by Seller for any reason permitted under this Agreement. Buyer shall also be entitled to draw upon the Development Assurance for any Damage Payment arising upon Buyer's declaration of an Early Termination Date prior to the Commercial Operation Date.
- (iii) Buyer shall return to Seller the Development Assurance less any amounts drawn in accordance with this Agreement: (A) within thirty (30) days after Seller posts Performance Assurance with Buyer, or (B) within sixty (60) days after the following have occurred: (1) early termination of the Agreement; (2) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Damage Payment, indemnification payments, or other damages (whether directly or indirectly such as through set-off or netting). With Buyer's consent, Seller may elect to apply the Development Assurance (or a portion thereof) toward the Performance Assurance.

(b) Performance Assurance.

- (i) Seller shall post Performance Assurance in an amount equal to the product of sixty dollars per kilowatt (\$60/kW) multiplied by the Guaranteed Installed Renewable Capacity plus one-hundred and five dollars per kilowatt (\$105/kW) multiplied by the Guaranteed Installed Storage Capacity in the form of cash or a Letter of Credit before the COD. Seller shall replenish the Performance Assurance within five (5) Business Days of any draw down of any portion of the Performance Assurance for any reason permitted under this Agreement other than to satisfy a Termination Payment.
- (ii) Buyer shall be entitled to draw upon the Performance Assurance posted by Seller for any reason permitted under this Agreement, including Buyer's declaration of an Early Termination Date after the Commercial Operation Date.
- (iii) Seller shall maintain Performance Assurance from the Commercial Operation Date until the following have occurred: (a) the Delivery Term has expired or terminated early, and; (b) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for penalties, Termination Payment, indemnification payments, or other damages (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security.

(c) No Limitation of Damages. The amount of Development Assurance and Performance Assurance required under this Agreement shall not be deemed a limitation of damages.

**6.3 Letter of Credit.** Development Assurance or Performance Assurance provided in the form of a Letter of Credit shall be substantially in the form set forth in Exhibit H-1, or another form reasonably acceptable to Buyer, subject to the following provisions:

- (a) Renewal of Letter of Credit. If Seller has provided a Letter of Credit pursuant to any of the applicable provisions in this Article 6, then Seller shall renew or cause the renewal of each outstanding Letter of Credit on a timely basis.

- (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 ten (10) 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); or
  - (ii) 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 Agreement, then Seller shall be deemed to have failed to meet the collateral requirements of Section 6.2 and Buyer may declare an Event of Default as set forth in Article 8.
- (d) Letter of Credit Costs. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Seller.

## ARTICLE 7: FORCE MAJEURE

- 7.1 Remedial Action.** Subject to the limitation on extensions of Milestones set forth in Section 5.3(e), 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 Claiming Party shall take all action necessary to remove such inability with all due speed and diligence. The Claiming 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 the Claiming 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 Claiming Party 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. The Claiming Party's failure to give timely notice shall not affect such Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving notice materially prejudices the other Party.
- 7.3 Termination Due to Force Majeure Event.** Subject to the provisions of Section 5.3(e) on extensions of Milestones, if the Claiming Party is prevented in any material respect from performing any material obligations under this Agreement solely due to a Force Majeure Event lasting for a period of twelve (12) consecutive months or longer, either Party may terminate this 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. In such event, Buyer shall promptly return to Seller all Development Assurance or Performance Assurance, as applicable, less any damages due and payable by Seller prior to the date of such termination for reasons unrelated to this Section 7.3. This Section 7.3 shall not affect the rights and remedies associated with any other termination rights set forth in this Agreement.

## ARTICLE 8: DEFAULT, REMEDIES, AND TERMINATION

### 8.1 Events of Default.

- (a) Events of Default. The occurrence of any of the following shall constitute an Event of Default by a Party:
- (i) the breach of any material obligation or covenant of this Agreement and such Party fails to cure such breach within sixty (60) days after written notification of default by the other Party; however, the Parties may mutually agree upon a longer period for cure if the breach cannot reasonably be cured within sixty (60) days, provided that the extended cure period will only continue for so long as the Party in breach is pursuing a cure with reasonable diligence;
  - (ii) subject to Sections 4.1(d) and 4.1(e), failure to make any payment when due under this Agreement within fifteen (15) Business Days after written notice that such payment is due;
  - (iii) 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 neither such circumstance nor the adverse effects of such circumstance are cured or remedied within thirty (30) days after written notice;
  - (iv) such Party becomes Bankrupt;
  - (v) subject to Section 11.1(d), 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 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.
- (b) Seller Events of Default. The following shall constitute additional Events of Default by Seller:
- (i) subject to Section 5.3(i), the occurrence of any of the events set forth in Section 5.3(h);
  - (ii) Seller fails to satisfy any of the credit requirements of Article 6.
  - (iii) notwithstanding any other provision of this Agreement and subject to Section 3.7(c), Seller fails to deliver in any two (2) consecutive Contract Years, at least seventy percent (70%) of the sum of the expected Renewable Contract Quantities for the relevant Contract Years minus Seller Excused Hours;
  - (iv) notwithstanding any other provision of this Agreement and subject to Section 3.7(c), Seller fails to deliver at least fifty percent (50%) of the expected monthly quantities as set forth in the Annual Forecast minus Seller Excused Hours over a consecutive twelve (12) month period; or
  - (v) except for Replacement Product, Seller delivers or attempts to deliver Energy to the Delivery Point that was not generated by the Renewable Facility or discharged by the Storage Facility;
  - (vi) Seller fails to meet at least seventy-five percent (75%) of the applicable Guaranteed Annual Storage Capacity set forth in Exhibit C on a prorated basis over a consecutive twelve (12) month period;
  - (vii) Seller fails to maintain an average RTE Rate of at least seventy percent (70%) over a consecutive twelve (12) month period; or

- (viii) Seller fails to maintain an average Monthly Storage Availability of at least seventy percent (70%) over a consecutive twenty-four (24) month period.

## 8.2 Termination for Default.

- (a) Declaration of 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) send notice, designating a day, no earlier than ten (10) calendar days and no later than sixty (60) days after the day such notice is deemed to be received, as the date on which this Agreement will terminate (the “Early Termination Date”);
  - (ii) accelerate all amounts owing between the Parties, terminate this Agreement and end the Delivery Term effective as of the Early Termination Date;
  - (iii) collect as of the Early Termination Date, (A) the Damage Payment in the case of an Event of Default arising at any time prior to the Commercial Operation Date, including an Event of Default pursuant to Section 8.1, or (B) the Termination Payment in the case of an Event of Default arising after the Commercial Operation Date;
  - (iv) withhold any payments due to the Defaulting Party under this Agreement;
  - (v) suspend performance;
  - (vi) exercise its rights pursuant to Article 6 of this Agreement to draw upon and retain Development Assurance or Performance Assurance, as applicable; and
  - (vii) exercise any other right or remedy available at law or in equity to the extent otherwise permitted under this Agreement.
- (b) Calculation of Damage Payment. If the Early Termination Date occurs prior to the Commercial Operation Date, the Damage Payment shall be calculated by the Non-Defaulting Party as follows:
  - (i) If Seller is the Defaulting Party, the Damage Payment owed to Buyer shall equal the entire Development Assurance amount and any accrued interest. Buyer shall be entitled to retain for its own benefit those funds held as Development Assurance and any accrued interest, accrued thereon and any amount of Development Assurance that Seller has not yet posted with Buyer shall be immediately due and payable by Seller to Buyer. There will be no amounts owed to Seller.
  - (ii) If Buyer is the Defaulting Party, then the Damage Payment shall be owed to Seller and shall equal the sum of the actual, documented, and verifiable costs incurred by Seller between the Effective Date and the Early Termination Date in connection with the Facility, less the fair market value (determined in a commercially reasonable manner) of (A) all Seller’s assets individually, or (B) the entire Facility, whichever is greater on the Early Termination Date, regardless of whether or not any Seller asset or the entire Facility is actually sold or disposed of. There will be no amount owed to Buyer.
- (c) Calculation of Termination Payment. If the Early Termination Date occurs on or after the Commercial Operation Date, the Termination Payment shall be calculated by the Non-Defaulting Party as follows:
  - (i) The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Termination Payment as of the Early Termination Date.
  - (ii) If the Non-Defaulting Party’s aggregate Gains exceed its aggregate Economic Losses and Costs, if any, resulting from such termination of this Agreement, the

amount of the Termination Payment shall be limited to the amounts set forth in clause (b) of the definition of Termination Payment.

- (iii) The Non-Defaulting Party is not required to enter into replacement transactions to establish a Termination Payment.
- (iv) The Termination Payment shall not include consequential, incidental, punitive, exemplary, indirect, or business interruption damages.
- (d) Notice of Damage Payment or Termination Payment. As soon as practicable after declaration of an Early Termination Date, the Non-Defaulting Party shall give notice to the Defaulting Party of the amount of the Damage Payment or Termination Payment due to or from the Defaulting Party to the Non-Defaulting Party, as applicable. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Damage Payment or Termination Payment shall be made to the Non-Defaulting Party fifteen (15) Business Days after such termination payment notice is effective.
- (e) Disputes Regarding Damage Payment or Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Following delivery of such a notice, disputes regarding the Damage Payment or Termination Payment shall be resolved in accordance with Section 11.3.
- (f) Rights and Remedies are Cumulative. Except where this Agreement explicitly states that liquidated damages or another remedy is the exclusive remedy, the rights and remedies in this Agreement, including this Article 8, are cumulative.
- (g) Mitigation. The Non-Defaulting Party shall use commercially reasonable efforts to mitigate its Costs, Economic Losses, and damages resulting from any Event of Default.

### **8.3 Limitation of Liability/Liquidated 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 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, UNLESS THE PROVISION PROVIDES THAT THE EXPRESS REMEDIES ARE IN ADDITION TO OTHER REMEDIES THAT MAY BE AVAILABLE. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, 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 SUCH OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED UNLESS EXPRESSLY HEREIN PROVIDED. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY UNDER THIS AGREEMENT FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS**

OF USE, LOSS OF REVENUES, LOSS OF PROFIT, OR OTHER BUSINESS INTERRUPTION DAMAGES, INTEREST CHARGES, OR COST OF CAPITAL, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION, OR OTHERWISE; PROVIDED HOWEVER, NOTHING IN THIS SECTION SHALL AFFECT THE ENFORCEABILITY OF THE PROVISIONS OF THIS AGREEMENT RELATING TO EXPRESS REMEDIES OR MEASURE OF DAMAGES. THE PARTIES ACKNOWLEDGE AND AGREE THAT TO THE EXTENT THAT ANY DAMAGES SET FORTH IN THIS AGREEMENT ARE LIQUIDATED, INCLUDING DAMAGES SET FORTH IN SECTIONS 3.5, 3.7, 5.3, 5.8, AND 8.2 SUCH DAMAGES ARE EACH REASONABLE AND REPRESENT A FAIR AND GENUINE ESTIMATE OF THE HARM OR LOSS THAT WOULD OCCUR RELATED TO THE EVENTS DESCRIBED THEREIN. THE PARTIES ACKNOWLEDGE AND AGREE THAT THE DAMAGES FOR THE CIRCUMSTANCES SET FORTH ABOVE WOULD BE IMPOSSIBLE OR DIFFICULT TO MEASURE, 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 AND THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

- (c) **BUYER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, THE COMPENSATION PROVIDED FOR IN ARTICLE 3, AND SECTIONS 5.8(c) AND 8.2.**
- (d) **EXCEPT AS OTHERWISE PROVIDED HEREIN, THE RIGHTS AND REMEDIES OF A PARTY PURSUANT TO THIS ARTICLE 8 SHALL BE CUMULATIVE AND IN ADDITION TO THE RIGHTS OF THE PARTIES OTHERWISE PROVIDED IN THIS AGREEMENT.**

## **ARTICLE 9: INDEMNIFICATION**

- 9.1 Seller Indemnification Prior to Commercial Operation Date.** Up to and including the Commercial Operation Date, Seller shall indemnify, defend, and hold harmless Buyer, and its officials, directors, agents and employees ("Buyer Indemnified Party"), from any claim, liability, loss, injury or damage arising out of, or in connection with, the negligence, willful misconduct or violation of Applicable Law by Seller and/or its agents, employees or sub-contractors, excepting only loss, injury or damage caused by the active negligence, willful misconduct or violation of Applicable Law by a Buyer Indemnified Party.
- 9.2 Seller and Buyer Indemnification after Commercial Operation Date.** After the Commercial Operation Date, each Party ("Indemnifying Party") shall defend, indemnify and hold harmless the other Party and its elected officials, officers, directors, employees, agents, affiliates and representatives (each, an "Indemnified Party") from and against any and all losses, including but not limited to losses arising from personal injury or death, or damage to property, but only to the extent such losses result from or arise out of the negligence, willful misconduct or violation of Applicable Law by the Indemnifying Party.
- 9.3 Environmental Indemnity.** Seller shall indemnify, defend, and hold harmless the Buyer Indemnified Parties, from any claim, liability, loss, injury or damage arising out of, or in connection with Environmental Costs and any environmental matters associated with the Facility, including

the disposal and transportation of Hazardous Substances by or on behalf of the Seller or at the Seller's direction or agreement.

- 9.4 Notice.** If an Indemnified Party determines that it is entitled to defense and indemnification under this Article 9, 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 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 the State of \_\_\_\_\_, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this 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 Agreement 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 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 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 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;
- (g) Throughout the Delivery Term of this Agreement that: (i) the Facility qualifies and is pre-certified or certified by the CEC as an Eligible Renewable Energy Resource ("ERR") as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Facility's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law;
- (h) Throughout the Delivery Term of this Agreement the Renewable Energy Credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard, as set forth in California Public Utilities

Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law;

- (i) All necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in the Western Renewable Energy Generation Information System will be taken prior to the first delivery under this Agreement; and
- (j) It will provide and convey all Environmental Attributes associated with all electricity generation from the Project to Buyer as part of the Product being delivered, it holds the rights to all Environmental Attributes from the Facility, and it agrees to convey and hereby conveys all such Environmental Attributes to Buyer as included in the delivery of the Product from the Facility.
- (k) As of the Effective Date, Seller represents and warrants to Buyer that it has not received notice from or been advised by any existing or potential supplier or service provider that the disease designated COVID-19 or the related virus designated SARS-CoV-2 have caused, or are reasonably likely to cause, a delay in the construction of the Facility or the delivery of materials necessary to complete the Facility, in each case that would cause the Commercial Operation Date to be later than the Guaranteed Commercial Operation Date.

**10.2 Buyer's 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 Agreement;
- (b) Buyer has the legal power and authority to make and carry out this Agreement 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 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 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 Agreement; and
- (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.

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

- (a) It shall continue to be duly organized, validly existing and in good standing under the 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 Agreement; and
- (c) It shall perform its obligations under this 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) General Assignment. Except as provided in Sections 11.1(b) and 11.1(c), neither Party shall assign this 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 Agreement, (ii) the assignee agrees in writing to be bound by the terms and conditions of this Agreement, (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 to Financing Providers. Notwithstanding any provision to the contrary in this Section 11.1, Buyer hereby consents to assignment of this Agreement by Seller as collateral for any financing or refinancing of the Facility to a Lender. Seller's obligations under this Agreement shall continue in their entirety in full force and effect. Promptly after granting such interest, Seller shall notify Buyer in writing of the name, physical and electronic addresses, and telephone and facsimile numbers of any Lender to which the Seller's interest under this Agreement has been assigned. The notice shall include the names of the Lender's primary contact(s) to whom all communications may be addressed. Seller shall promptly notify Buyer of any changes to the information contained in the notice. As a condition to Buyer's consent to assignment, the following provisions shall apply to any assignment under this Section 11.1(b):
  - (i) Lender shall have the right, but not the obligation, to perform any act required to be performed by Seller under this Agreement to prevent or cure a default by the Seller and such act performed by Lender shall be as effective to prevent or cure a default as if done by Seller.
  - (ii) Buyer shall cooperate with Seller or a Lender to execute or arrange for the delivery of certificates, consents, opinions, estoppels, amendments, and other documents reasonably requested by Seller or Lender in order to complete any financing or refinancing and shall enter into reasonable agreements as necessary to provide for recognition by Buyer of the Lender's security interest in this Agreement and such other provisions as may be reasonably requested by Seller or any Lender, so long as the terms and conditions of such agreements are consistent with this Agreement and such amendments or agreements are reasonably acceptable to both Parties. All costs and expenses (including reasonable attorney's fees) incurred by Buyer in connection with an assignment of this Agreement to a Lender shall be borne by Seller.
  - (iii) In the event of a Default under this Agreement, Buyer shall provide a copy of the notice of Default to the Lender pursuant to Section 8.2(a) at the same time as the notice is provided to Seller. Buyer shall accept a cure performed by a Lender and shall negotiate in good faith with the Lender as to the cure period(s) allowed for

the Lender to cure any Event of Default. Buyer shall accept a cure by Lender so long as the cure is accomplished within the applicable cure period. Notwithstanding any Lender cure, Seller shall not be released and discharged from, and shall remain liable for, any and all obligations to the Buyer arising or accruing hereunder.

- (iv) If Lender, directly or indirectly, takes possession of, or title to the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), Lender must (i) assume all of Seller's obligations arising under this Agreement, and (ii) shall cure all defaults under this Agreement existing as of the date of change of title or control as required under this Agreement.
- (v) If Lender elects to sell or transfer the Facility after taking possession of, or title to the Facility, or a sale occurs through the actions of Lender, Lender shall cause the transferee or buyer to assume all of Seller's obligations arising under this Agreement and all related agreements as a condition of the sale or transfer. Such transferee or buyer must be made to an entity that: (A) has a tangible net worth of not less than one hundred fifty million dollars (\$150,000,000) and a Credit Rating of at least BBB- from S&P or Baa3 from Moody's, and (B) has at least five (5) years of experience in the ownership and operation of energy storage and renewable energy facilities similar to the Facility, or has retained a third-party with such experience to operate the Facility.
- (c) Assignment in Connection with a Change in Control. Notwithstanding any provision to the contrary in this Section 11.1, any direct or indirect change of control of Seller (whether voluntary or by operation of Law) shall not require the prior written consent of Buyer. Seller shall promptly notify Buyer of any direct or indirect change in control and shall provide any information reasonably requested by Buyer regarding the change in control, provided that this obligation does not apply to any direct or indirect owners of Seller's Parent. Seller acknowledges that its obligations under this Agreement remain in full force and effect notwithstanding such change in control and that Seller is solely responsible for ensuring that all required changes to its vendor certifications are promptly implemented.
- (d) Unauthorized Assignment. Any assignment or purported assignment in violation of this Section 11.1 is void.

## **11.2 Proprietary or Confidential Information.**

- (a) Confidential Information. Each Party understands and agrees that, in the performance of this Agreement or in contemplation thereof, the other Party may have access to private or confidential information and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the Party that owns or controls the Confidential Information. Each Party agrees that all private and confidential information disclosed by one Party to the other Party shall be held in confidence and used only in performance of the Agreement; however, a Party may disclose the Confidential Information of the other Party to its officers, employees, agents, consultants, and contractors as necessary for the performance of its obligations under this Agreement and as necessary to comply with any applicable requirements or orders of a Governmental Authority. Each Party 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 11.2 nothing shall restrict any Party from using or disclosing information related to this 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, or to the auditors, attorneys, advisors, or actual or potential lenders or investors of the non-disclosing Party and/or its Affiliates which are required to keep the information that is disclosed in confidence.
- (e) Nondisclosure of Private Information. If this 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 Agreement and only as necessary in performing this Agreement. Seller is subject to the enforcement and penalty provisions in Chapter 12M.

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

- (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 Agreement by negotiation. The status of any dispute or controversy notwithstanding, each Party shall proceed diligently with the performance of its obligations under this Agreement in accordance with and subject to the terms of this 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) Governing Law; Venue. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. Venue shall be in the County of San Francisco, 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 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 Agreement or until after final audit has been resolved, whichever is later.

## **11.5 General.**

- (a) Entire Agreement. This Agreement, the exhibits, attachments, and any written and fully executed supplements hereto, any designated collateral, credit support, or similar arrangement between the Parties constitute the entire agreement between the Parties relating to the subject matter.
- (b) Construction. This 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 Agreement shall be enforceable unless reduced to writing and executed by both Parties.
- (d) No Third-Party Beneficiaries. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this 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 Agreement is rendered unlawful by action by any Governmental Authority, or any change in Applicable Law including the CAISO Tariff (a "Change in Law") occurring after the Execution Date, the remaining lawful obligations that arise under this 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 so that the performance of this Agreement becomes impossible or impracticable, the Parties shall work in good faith to revise this Agreement so that the Parties may perform their obligations in a manner that maintains to the greatest extent practicable the original intent of the Parties and the benefits, burdens, and obligations under this Agreement. A change in cost shall not in and of itself be deemed to render this Agreement or any provision of this Agreement impossible or impracticable.
- (g) Headings. The headings used herein are for convenience and reference purposes only.
- (h) Assigns. This Agreement shall be binding on each Party's successors and assigns.
- (i) No Dedication. No undertaking by one Party to the other under any provision of the 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. The 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 the Facility or any business related to the Facility.
- (k) Limitations on Contributions. By executing this Agreement, Seller acknowledges its obligations under Section 1.126 of the City's Campaign and Governmental Conduct Code,

which prohibits any person who contracts with, or is seeking a contract with, any department of the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, for a grant, loan or loan guarantee, or for a development agreement, from making any campaign contribution to (i) a City elected official if the contract must be approved by that official, a board on which that official serves, or the board of a state agency on which an appointee of that official serves, (ii) a candidate for that City elective office, or (iii) a committee controlled by such elected official or a candidate for that office, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve months after the date the City approves the contract. The prohibition on contributions applies to each prospective party to the contract; each member of Seller's board of directors; Seller's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Seller; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Seller. Seller certifies that it has informed each such person of the limitation on contributions imposed by Section 1.126 by the time it submitted a proposal for the contract, and has provided the names of the persons required to be informed to the City department with whom it is contracting.

- (l) 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 in the performance of this Agreement. Seller agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the Controller. 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 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.
- (m) Nondiscrimination 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 Agreement, and will not during the term of this 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.
- (n) Consideration of Salary History. Seller shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or "Pay Parity Act." Seller is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant to the extent that such applicant is applying for employment to be performed on this Agreement or in furtherance of this Agreement, and whose application, in whole or part, will be solicited, received, processed or considered, whether or not through an interview, in the City or on City property. Seller is subject to the enforcement and penalty provisions in Chapter 12K.

- (o) Consideration of Criminal History in Hiring and Employment Decisions. Seller agrees to comply fully with and be bound by all of the provisions of Chapter 12T, “City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions,” of the San Francisco Administrative Code, including the remedies provided, and implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to Seller’s operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.
- (p) Submitting False Claims. Pursuant to San Francisco Administrative Code Section 21.35, any contractor or subcontractor who submits a false claim shall be liable to Buyer for the statutory penalties set forth in that section. A contractor or subcontractor will be deemed to have submitted a false claim to Buyer if the contractor or subcontractor: (a) knowingly presents or causes to be presented to an officer or employee of 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 Buyer; (c) conspires to defraud Buyer by getting a false claim allowed or paid by 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 Buyer; or (e) is a beneficiary of an inadvertent submission of a false claim to Buyer, subsequently discovers the falsity of the claim, and fails to disclose the false claim to Buyer within a reasonable time after discovery of the false claim.
- (q) Use of City 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 Buyer.
- (r) Business License Taxes. Seller agrees that it is obligated to pay all amounts due to the City under the San Francisco Business and Tax Regulations Code during the Term of this Agreement. Pursuant to Section 6.10-2 of the San Francisco Business and Tax Regulations Code, Seller further acknowledges and agrees that City may withhold any payments due to Seller under this Agreement if Seller is delinquent in the payment of any amount required to be paid to the City under the San Francisco Business and Tax Regulations Code. Any payments withheld under this Section 12.5(r) shall be made to Seller, without interest, upon full payment of all taxes owed by Seller and reinstatement of Seller’s vendor certification
- (s) Conflict of Interest. Through its execution of this Agreement, Seller acknowledges that it is familiar with the provision of Section 15.103 of the 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 Buyer if it becomes aware of any such fact during the term of this Agreement.
- (t) City Requirements. Seller shall keep itself fully informed of the City’s Charter, codes, ordinances and regulations of City and of all state, and federal laws in any manner affecting the performance of the Agreement, and must at all times materially comply with such local codes, ordinances, and regulations as they may be amended from time to time. Buyer shall use best efforts to provide notice to Seller of any such amendment to the City’s Charter, codes, ordinances and regulations of which it becomes aware; however, Seller’s obligations under this Section shall not be contingent on notice from Buyer

- (u) **Severability.** Should any provision of the Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of the 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.
  - (v) **Survival.** All rights pursuant to Section 3.4 (Environmental Attributes); Section 4.1(e) (Disputes and Adjustment of Invoices); Section 5.6(c) (CAISO Charges Invoices); Article 8 (Default; Remedies; and Termination), Article 9 (Indemnification), Section 11.2 (Proprietary or Confidential Information); Section 11.3 (Dispute Resolution; Choice of Law), Section 11.4 (Audit); Section 11.5(l) (Prohibition on Political Activity with City Funds); and Section 11.5(q) (City Opinion) shall also survive termination of this Agreement.
- 11.6 Mobile Sierra.** Absent the prior written agreement of all Parties, the standard of review for changes to any rate, charge, term, or condition of service of this Agreement, whether proposed by a 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).
- 11.7 Forward Contract.** The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code and Buyer and Seller are “forward merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.
- 11.8 Notices.** Unless otherwise stated in this Agreement, any notice, demand, request, or communication required or authorized by this 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.
- 11.9 Counterparts.** This 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 Agreement by fax or other electronic means shall be deemed as effective as delivery of an originally executed counterpart. Any Party delivering an executed counterpart of this Agreement by facsimile or other electronic means shall also deliver an originally executed counterpart, but the failure of any Party to deliver an originally executed counterpart of this Agreement shall not affect the validity or effectiveness of this Agreement.

*[Signature page follows on next page.]*

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

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

**Seller**

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

General Manager  
San Francisco Public Utilities Commission

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

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

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

Approved as to Form:

City Attorney

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

Deputy City Attorney



## **EXHIBIT A**

### **SELLER DOCUMENTATION OF CONDITIONS PRECEDENT**

#### **Part I:**

Seller shall provide to Buyer all of the following documentation at least five (5) Business Days prior to the Execution Date:

1. A copy of each of (a) the articles of incorporation, certificate of incorporation, operating agreement or similar applicable organizational document of Seller and (b) the by-laws or other similar document of Seller as in effect, or anticipated to be in effect, on the Execution Date.
2. 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.
3. Evidence of Site control (e.g. lease with redacted price terms).
4. Evidence of CEC Certification or pre-certification received, as applicable.
5. A copy of the Interconnection Agreement, if any.
6. Insurance documentation as required in Exhibit D.
7. A copy of the most recent financial statements (which may be unaudited) from Seller's Parent.

#### **Part II:**

Seller shall provide to Buyer all of the following documentation in a timely manner following the Execution Date:

1. Evidence of all Permits received, as applicable, including but not limited to, any copies of all final environmental review documents.
2. A copy of the project labor or similar agreement for the Facility, if any.
3. A copy of the load flow analysis and any deliverability assessment performed by the Transmission Provider or CAISO to show power flow capacity and/or deliverability at the point of interconnection.
4. A copy of all CAISO certification and testing performed for the Storage Facility resource characteristics identified in Exhibit [B], including all Ancillary Services, storage PMAX and PMIN, Qualifying Capacity and Net Qualifying Capacity.

## **EXHIBIT B**

### **FACILITY DESCRIPTION AND SITE DRAWINGS**

#### **I. Facility Description**

Facility name:

Facility physical address:

Technology type (including any applicable model):

Interconnection Point of Facility:

Interconnection Agreement Name/Number:

Assessor's Parcel Nos:

#### **II. Renewable Facility Operational Characteristics**

PMax:

PMin:

#### **III. Storage Facility Operational Characteristics / Limitations**

PMax of the Storage Facility:

PMin of the Storage Facility:

Minimum storage capacity (MWh):

Maximum storage capacity (MWh):

Ramp Rate Up (MW/minute):

Ramp Rate Down (MW/Minute):

Rest time required after reaching Minimum storage capacity (MWh):

Rest time required after reaching Maximum storage capacity (MWh):

#### **III. Site Drawings**

A. Site Map

B. Single Line Diagrams.

## EXHIBIT C

### RENEWABLE CONTRACT QUANTITY AND GUARANTEED ANNUAL CAPACITY

#### I. Renewable Contract Quantity

Contract Year	Contract Quantity (in MWh)
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	

## **II. Storage Facility Guaranteed Annual Capacity [FOR DEGRADING PROJECTS]**

The Guaranteed Annual Capacity for each Contract Year is as follows:

<b>Contract Year</b>	<b>Contract Quantity (in MWh)</b>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	

## EXHIBIT D

### INSURANCE COVERAGES

1. **Liability Coverages.** Without in any way limiting Seller's liability pursuant to the "Indemnification" section of this Agreement, Seller must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages and be responsible for its subcontractors, including Seller's EPC Contractors, maintaining sufficient limits of the appropriate insurance:
  - (a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; and include a blanket waiver of subrogation; and
  - (b) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
  - (c) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence, "Combined Single Limit" for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
  - (d) Employer's Liability Insurance. Employers' Liability insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.
  - (e) Construction All-Risk Insurance. Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming Seller (and Lender if any) as the loss payee.
2. **Additional Coverages**
  - (a) Property insurance, on an all-risk form, including earthquake and flood, for one hundred percent (100%) of the full replacement value of the Site and Facility or 125% of the Loss Limit of the 1/500 year earthquake/flood event as established by a Maximum Foreseeable Loss earthquake and flood study prepared by the applicable insurer in accordance with current industry standard. Such insurance shall, include Business Interruption coverage in an amount equal to twelve months of revenue from this Agreement.
  - (b) Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, Pollution Legal Liability Insurance in the amount of two million dollars (\$2,000,000) per occurrence and I the aggregate, naming the Seller (and Lender if any) as additional named insured.
3. **Endorsements.**
  - (a) Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide include blanket endorsements:
    - (i) Name as Additional Insured, the City and County of San Francisco, its Officers, Agents, and Employees.
    - (ii) The certificate of insurance shall state that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

- (b) All policies shall provide thirty (30) days' advance written notice of cancellation for any reason, intended non-renewal, or reduction in coverages, except ten (10) days' notice for non-payment of premiums.
4. **Length of Coverage.** Should any of the required insurance be provided under a claims-made form, Seller shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three years beyond the expiration of this Agreement, to the effect that, should occurrences during the Term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.
5. **Maintenance of Coverage.** Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Buyer receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, Buyer may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

**Certificates.** Prior to commencement of the Term, Seller shall furnish to Buyer certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A- , VII or higher, that are authorized to do business in the State of California, and that are satisfactory to Buyer, in form evidencing all coverages set forth above. Approval of the insurance by Buyer shall not relieve or decrease Seller's liability hereunder.

**EXHIBIT E**

**CONSTRUCTION START  
CERTIFICATION**

\_\_\_\_\_(Date)\_\_\_\_\_

This certification (“Certification”) of the Construction Start Date is delivered by \_\_\_\_\_ (“Seller”) to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (“Buyer”) in accordance with the terms of that certain Renewable Energy and Energy Storage Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement. Seller hereby certifies and represents to Buyer that Construction Start has occurred and:

- a) the Construction Start Date occurred on \_\_\_\_\_. (“Construction Start Date”);
- b) the Notice to Proceed was issued by Seller to the EPC Contractor, [EPC Contractor Name] on \_\_\_\_\_ (attached), and;
- c) mobilization at the Facility Site commenced on \_\_\_\_\_.

IN WITNESS WHEREOF, the undersigned has executed this certificate on behalf of the Seller as of the \_\_\_\_ day of \_\_\_\_\_.

**Seller:**

**[Licensed Professional Engineer]**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

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

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

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

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

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

License Number and LPE Stamp: \_\_\_\_\_

**EXHIBIT F**  
**PROGRESS REPORT**

Each Progress Report must include the following items:

1. Executive Summary.
  2. Gantt chart schedule showing progress on achieving each of the Milestones.
  3. Description of any material planned changes to the Facility or the Facility Site.
  4. Financing activities. Provide a summary of the status and progress of each major financing activity, including the date of execution of significant documents, and information on the expected timing of future significant activities.
  5. Major equipment procurement activities. For each type of equipment, list the number of each major item to be procured, the manufacturer, model number (if applicable), and rating. List the delivery schedule (expected or actual as applicable), breaking out the number of each item to be procured or delivered in each Calendar Quarter.
  6. Construction Activities. Include information on the status of any construction-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the Facility infrastructure, generating equipment, and major auxiliary equipment. Also include information on the substations, switchyards, gen-ties, telecommunications equipment or other Interconnection Facilities that are the direct responsibility of the Facility.
  7. Interconnection Activities. Include information on interconnection-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the status of interconnection studies, Interconnection Agreements, design and construction of Interconnection Facilities (e.g., substations, switchyards, gen-ties, system protection schemes, telecommunications equipment to the extent not already covered in the Facility construction information), Network Upgrades, and grid outage and/or interconnection schedules.
  8. Startup. Include information on the status of activities related to preparation for Commercial Operation, including progress towards the items set forth in Exhibit H-2, the requirements and notifications of the grid operator and Transmission Provider, and any other activities that must be conducted before the Facility may deliver Energy to the grid and/or declare Commercial Operation.
- For items 4 through 8, include the progress and schedule of all major agreements, contracts, permits, approvals, technical studies, financing agreements, and major equipment purchase orders showing the start dates, completion dates, and completion percentages.
8. Forecast of activities scheduled for the current calendar quarter.
  9. List of issues that are likely to potentially affect Seller's Milestones.
  10. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and startup progress of the Facility, the interconnection into the Transmission System and all other interconnection utility services.
  11. CPUC General Order 156 supplier diversity reporting. Format to be provided by Buyer.
  12. Any other documentation reasonably requested by Buyer.



## EXHIBIT G-1

### FORM OF COMMERCIAL OPERATION CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by [LICENSED PROFESSIONAL ENGINEER] ("Engineer") to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF ("Buyer") in accordance with the terms of that certain Renewable Energy and Energy Storage Agreement dated \_\_\_\_\_ ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined in this Exhibit G-1 shall have the meanings assigned to these terms in the Agreement.

Engineer hereby certifies and represents to Buyer the following:

1. The Renewable Facility and Storage Facility are each fully operational and reliable.
2. The Renewable Facility and Storage Facility are each interconnected, fully integrated, and synchronized with the Transmission System.
3. The Installed Storage Capacity is no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Storage Capacity and the Installed Renewable Capacity is no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Renewable Capacity.
4. The Storage Facility is capable of charging, storing, and discharging Energy,
5. The Facility has met all Interconnection Agreement requirements and is capable of delivering Energy to the CAISO Balancing Authority up to the Guaranteed Installed Renewable Capacity and Guaranteed Installed Storage Capacity.
6. The commissioning of the equipment for the Facility has been completed in accordance with the manufacturers' specifications.
7. The Renewable Facility's testing included a performance test demonstrating peak electrical output of no less than ninety-five (95%) of the Guaranteed Installed Renewable Capacity for the Facility at the Delivery Point, as adjusted for ambient conditions on the date of the Facility testing, and such peak electrical output, as adjusted, was [*peak output in MW*].
8. Authorization to parallel the Facility was obtained by the Transmission Provider on \_\_\_\_[DATE]\_\_\_\_.
9. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Transmission Owner] on \_\_\_\_[DATE]\_\_\_\_.
10. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO tariff on \_\_\_\_[DATE]\_\_\_\_.

EXECUTED by ENGINEER this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Licensed Professional Engineer:**

Signature: \_\_\_\_\_

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

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

**EXHIBIT G-2**  
**FORM OF INSTALLED CAPACITY CERTIFICATION**

This certification of the Installed Capacity is delivered by [licensed professional engineer] to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, in accordance with the terms of the Renewable Energy and Energy Storage Agreement dated \_\_\_\_\_, (“Agreement”) by and between Buyer and Seller. All capitalized terms used in this certification but not otherwise defined herein shall have the meanings set forth in the Agreement.

I hereby certify the following:

The initial Renewable Facility performance test under Seller’s EPC contract for the Facility demonstrated peak Facility electrical output of [ ] MW AC to the Delivery Point, as adjusted for ambient conditions on the date of the performance test (“Installed Renewable Capacity”).

The Storage Capacity Test demonstrated a maximum dependable operating capability that can be sustained for [ ] consecutive hours to discharge electric energy of [ ] MW AC to the Delivery Point, in accordance with the testing procedures, requirements and protocols set forth in Section 5.4 and Exhibit N prior to the Commercial Operation Date (“Installed Storage Capacity”).

EXECUTED BY [LICENSED PROFESSIONAL ENGINEER]

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**[Licensed Professional Engineer]**

Signature: \_\_\_\_\_

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

**EXHIBIT H-1**  
**LETTER OF CREDIT**

**[Issuing Bank Letterhead and Address]**

STANDBY LETTER OF CREDIT NO. XXXXXXXX

**Date:** [Insert issue date]

**Beneficiary:** City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF  
525 Golden Gate Avenue  
San Francisco, CA 94102  
Attn:

**Applicant:** [Insert name and address of Applicant]

**Letter of Credit Amount:** [insert Amount]

**Expiry Date:** [insert expiry date]

Ladies and Gentlemen:

By order of [insert name of Applicant] (“Applicant”), we hereby issue in favor of the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (the “Beneficiary”) our irrevocable standby letter of credit No. [insert number of letter of credit] (“Letter of Credit”), for the account of Applicant, for drawings up to but not to exceed the aggregate sum of U.S. \$ [insert amount in figures followed by (amount in words)] (“Letter of Credit Amount”). This Letter of Credit is available with [insert name of issuing bank, and the city and state in which it is located] by sight payment, at our offices located at the address stated below, effective immediately, and it shall expire at our close of business on [insert expiry date] (the “Expiry Date”).

Funds under this Letter of Credit are available to the Beneficiary against presentation of the following documents:

1. Beneficiary’s signed and dated sight draft in the form of Exhibit J-2 hereto, referencing this Letter of Credit No. [insert number] and stating the amount of the demand; and
2. One of the following statements signed by an authorized representative or officer of Beneficiary:
  - A. Pursuant to the terms of that certain [insert name of the agreement] (the “Agreement”), dated [insert date of the Agreement], between Beneficiary and [insert name of Seller under the Agreement], Beneficiary is entitled to draw under Letter of Credit No. [insert number] amounts owed by [insert name of Seller under the Agreement] under the Agreement; or
  - B. “Letter of Credit No. [insert number] shall expire in thirty (30) days or less and [insert name of Seller under the Agreement] has not provided replacement security acceptable to Beneficiary.

Special Conditions:

1. Partial and multiple drawings under this Letter of Credit are allowed;
2. All banking charges associated with this Letter of Credit are for the account of the Applicant;

3. This Letter of Credit is not transferable; and
4. The Expiry Date of this Letter of Credit shall be automatically extended without a written amendment for a period of one year and on each successive Expiry Date, unless at least sixty (60) days before the then current Expiry Date, we notify you by registered mail or courier that we elect not to extend the Expiry Date of this Letter of Credit for such additional period.

We engage with you that drafts drawn under and in compliance with the terms of this Letter of Credit shall be duly honored upon presentation, on or before the Expiry Date (or after the Expiry Date as provided below), at our offices at **[insert issuing bank's address for drawings]**.

All demands for payment shall be made by presentation of originals or copies of documents; or by facsimile transmission of documents to **[insert fax number]**, Attention: **[insert name of issuing bank's receiving department]**, with originals or copies of documents to follow by overnight mail. If presentation is made by facsimile transmission, you may contact us at **[insert phone number]** to confirm our receipt of the transmission. Your failure to seek such a telephone confirmation does not affect our obligation to honor such a presentation.

Our payments against complying presentations under this Letter of Credit shall be made no later than on the sixth (6th) banking day following a complying presentation.

Except as stated herein, this Letter of Credit is not subject to any condition or qualification. It is our individual obligation, which is not contingent upon reimbursement and is not affected by any agreement, document, or instrument between us and the Applicant or between the Beneficiary and the Applicant or any other party.

Except as otherwise specifically stated herein, this Letter of Credit is subject to and governed by the *Uniform Customs and Practice for Documentary Credits, 2007 Revision*, International Chamber of Commerce (ICC) Publication No. 600 (the "UCP 600"); provided that, if this Letter of Credit expires during an interruption of our business as described in Article 36 of the UCP 600, we shall honor drafts presented in compliance with this Letter of Credit within thirty (30) days after the resumption of our business and effect payment accordingly. The law of the State of New York shall apply to any matters not covered by the UCP 600.

For telephone assistance regarding this Letter of Credit, please contact us at **[insert number and any other necessary details]**.

**EXHIBIT H-2**  
**SIGHT DRAFT**

TO: [INSERT NAME AND ADDRESS OF PAYING BANK]

AMOUNT: \$

DATE:

AT SIGHT OF THIS DEMAND PAY TO THE ORDER OF \_\_\_\_\_ THE AMOUNT  
OF U.S.\$ \_\_\_\_\_ U.S. DOLLARS) DRAWN  
UNDER [INSERT NAME OF ISSUING BANK] LETTER OF CREDIT NO. XXXXXX.

REMIT FUNDS AS FOLLOWS:

[INSERT PAYMENT INSTRUCTIONS]

DRAWER

Name and Title

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

**EXHIBIT I**  
**FORM OF REPLACEMENT RA NOTICE**

This Replacement RA Notice is delivered by [SELLER ENTITY] (“Seller”) to the City and County of San Francisco acting by and through its Public Utilities Commission, CleanPowerSF in accordance with the terms of the Renewable Energy and Energy Storage Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms not otherwise defined in this RA Notice shall have the meaning set forth in the Agreement.

UNIT SPECIFIC INFORMATION	
Resource Name	
Physical Location	
CAISO Resource ID	
SCID of Resource	
Unit NQC by month	
Unit EFC by month	
Resource Type	
Minimum Qualified Flexible Capacity Category	
TAC Area	
Prorated Percentage of Unit Factor	
Prorated Percentage of Unit Flexible Factor	
Local Capacity Area	
Resource Category as defined by the CPUC	

Showing Month and Year	Quantity (MW)
[MM] [YY]	

**EXHIBIT J**  
**STORAGE OPERATING PARAMETERS**

No later than one hundred eighty (180) days prior to the Commercial Operation Date, Buyer and Seller shall finalize the Operating Parameters, provided that, the Operating Parameters shall not be materially more restrictive of the operation of the Facility than set forth below, unless agreed to by Buyer in writing. The Operating Parameters may be reviewed annually (date and time to be mutually agreed) to optimize operations for both Parties. The Parties shall cooperate to integrate the systems and controls necessary to implement the Operating Parameters.

<b>OPERATING PARAMETERS</b>	<b>VALUES</b>
Instantaneous Maximum Charging Capacity [MW]	
Maximum Full Cycles/Year	365 plus the Surplus Cycles available for that Contract Year, subject to the Maximum Daily Discharge limit. Any cycle that is not a Full Cycle is a “Partial Cycle”. Buyer may perform any number of Partial Cycles as long as, in the aggregate across all Partial Cycles, the Maximum Daily Discharge and Maximum Annual Discharge limits in this Operating Parameters table are not violated.
Maximum Annual Discharge	
Maximum Monthly Discharge	
Maximum Daily Discharge	
Maximum SOC during Charging	
Maximum SOC during Discharging	
Maximum Charging Capacity	
Maximum Discharging Capacity	
Maximum Storage Level	
Minimum Storage Level	

**EXHIBIT K**  
**STORAGE CAPACITY TESTS**

**I. Storage Capacity Test Frequency.**

1. Commercial Operation Date Storage Capacity Tests. Upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test prior to the Commercial Operation Date. The initial SCT shall be performed in accordance with this Exhibit N and shall establish the Installed Capacity and Round Trip Efficiency Rate hereunder based on the actual capacity of the Facility determined by the SCT.
2. Subsequent Storage Capacity Tests. Commencing in the second Contract Year and in each subsequent Contract Year, within the first quarter of each calendar year of the Delivery Term and upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test. Buyer shall have the right to require a retest once per Contract Year upon no less than five (5) Business Days prior written notice to Seller, or any shorter period reasonable acceptable to Seller consistent with Prudent Operating Practice. Seller shall have the right to require a retest once per Contract Year of the Storage Delivery Term upon no less than five (5) Business Days prior written notice to Buyer, or any shorter period reasonable acceptable to Buyer consistent with Prudent Operating Practice.
3. Test Results and Re-Setting of Storage Contract Capacity. No later than five (5) days following any SCT, Seller shall submit a testing report detailing results and findings of the test. The report shall include meter readings and plant log sheets verifying the operating conditions and output of the Facility. In accordance with Section 5.4(f) of the Agreement and Part III below, the actual capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the Guaranteed Storage Contract Capacity shall become the new Storage Contract Capacity at the beginning of the day following the completion of the Storage Capacity Test for all purposes under this Agreement.

**II. Storage Capacity Test Procedures.**

1. General. Each SCT (including the initial SCT) shall be conducted in accordance with Prudent Operating Practice, CAISO's testing procedures for energy storage facilities, and the provisions of this Exhibit K. Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment (at Buyer's sole cost).
2. Conditions Prior to Testing.
  - A. Energy Management System (EMS) Functionality. The EMS shall be successfully configured to receive data from the Battery Management System (BMS), exchange DNP3 data with the Buyer SCADA device, and transfer data to the database server for the calculation, recording and archiving of data points.
  - B. Communications. The Remote Terminal Unit (RTU) testing should be successfully completed prior to any testing. The interface between Seller's RTU and the Facility SCADA System should be fully tested and functional prior to starting any testing, including verification of the data transmission pathway between the Seller's RTU and Seller's EMS interface and the ability to record SCADA System data.
  - C. Commissioning Checklist. Commissioning shall be successfully completed per manufacturer guidance on all applicable installed Facility equipment, including verification that all controls, set points, and instruments of the EMS are configured.



3. Requirements Applicable to all Storage Capacity Tests.

A. Purpose of Test. Each SCT shall:

- (1) Determine an updated Storage Contract Capacity;
- (2) Determine the amount of Energy required to fully charge the Facility;
- (3) Determine the Facility charge ramp rate;
- (4) Determine the Facility discharge ramp rate;

B. Parameters. During each SCT, the following parameters shall be measured and recorded simultaneously for the Storage Facility, at a minimum of ten (10) minute intervals:

- (1) Time (minutes);
- (2) Charging Energy (MWh);
- (3) Discharging Energy (MWh);
- (4) Stored Energy Level (MWh);
- (5) Station Uses (MWh).

C. Conditions. During each SCT, the following conditions at the Site shall be measured and recorded simultaneously at thirty (30) minute intervals:

- (1) Relative humidity (%);
- (2) Barometric pressure (inches Hg) near the horizontal centerline of the Storage Facility;
- (3) Ambient air temperature (°F).

D. Test Showing. Each SCT shall record and report the following datapoints:

- (1) That the SCT successfully started;
- (2) The maximum sustained discharging level for XXX (X) consecutive hours pursuant to A(1) above;
- (3) The maximum sustained charging level for XXX (X) consecutive hours pursuant to A(2) above;
- (4) Amount of time between the Facility's electrical output going from 0 to the maximum sustained discharging level registered during the Test (for purposes of calculating the Ramp Rate);
- (5) Amount of time between the Facility's electrical input going from 0 to the maximum sustained charging level registered during the Test (for purposes of calculating the Ramp Rate);
- (6) Amount of Charging Energy and Energy In, registered at the Facility Meter, to go from 0% SOC to 100% SOC;
- (7) Amount of Facility Energy and Energy Out, registered at the Facility Meter, to go from 100% SOC to 0% SOC.

E. Test Conditions.

- (1) General. At all times during a SCT, the Facility shall be operated in compliance with Prudent Operating Practice and all operating protocols recommended, required or established by the manufacturer for operation.
- (2) Abnormal Conditions. If abnormal operating conditions that prevent the recordation of any required parameter occur during a SCT, Seller may postpone or reschedule all or part of such SCT in accordance with Part II.2.F below.

- (3) Instrumentation and Metering. Seller shall provide all instrumentation, metering and data collection equipment required to perform the SCT. The instrumentation, metering and data collection equipment electrical meters shall be calibrated in accordance with Prudent Operating Practice.
- F. Incomplete Test. If any SCT is not completed in accordance with this Exhibit N, Buyer may in its sole discretion: (i) accept the results up to the time the SCT stopped without any modification to the Storage Contract Capacity pursuant to Section III, below; (ii) require that the portion of the SCT not completed, be completed within a reasonable specified time period; or (iii) require that the SCT be entirely repeated. Notwithstanding the above, if Seller is unable to complete a SCT due to a Force Majeure Event or the actions or inactions of Buyer, the CAISO, or the Transmission Provider, Seller shall be permitted to reconduct such SCT on dates and at times reasonably acceptable to the Parties.
- G. Final Report. Within five (5) Business Days after the completion of any SCT, Seller shall prepare and submit to Buyer a written report of the results of the SCT, which report shall include:
- (1) a record of the personnel present during the SCT that served in an operating, testing, monitoring or other such participatory role;
  - (2) the measured data for each parameter set forth in Part II.2.A through C, including copies of the raw data taken during the test;
  - (3) the level of Storage Contract Capacity, Charging Capacity, Discharging Capacity and Stored Energy Level determined by the SCT, including supporting calculations;
  - (4) the Round Trip Efficiency; and
  - (5) Seller's statement of either Seller's acceptance of the SCT or Seller's rejection of the SCT results and reason(s) therefor.

Within ten (10) Business Days after receipt of such report, Buyer shall notify Seller in writing of either Buyer's acceptance of the SCT results or Buyer's rejection of the SCT and reason(s) therefor. If either Party rejects the results of any SCT, such SCT shall be repeated in accordance with Part II.2.F.

3. Supplementary Storage Capacity Test Protocol. No later than sixty (60) days prior to commencing Facility construction, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) a supplement to this Exhibit N with additional and supplementary details, procedures and requirements applicable to SCTs based on the then current design of the Facility ("Supplementary Storage Test Protocol"). Thereafter, from time to time, Seller may deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) any Seller recommended updates to the then current Supplementary Storage Test Protocol. The initial Supplementary Storage Test Protocol (and each update thereto), once approved by Buyer, shall be deemed an amendment to this Exhibit N.

### **III. Storage Capacity Test Results and Re-Setting of Storage Contract Capacity.**

The total amount of Discharging Energy delivered to the Delivery Point (expressed in MWh AC) during each of the first \_\_\_\_ hours of discharge (up to, but not in excess of, the product of (i) the Guaranteed Annual Capacity multiplied by (ii) \_\_\_\_ hours) shall be divided by \_\_\_\_ hours to determine the Storage Contract Capacity, which shall be expressed in MW AC, and shall be the new Storage Contract Capacity commencing at the beginning of the day following the completion of the test for calculating the Contract Price and for all other purposes under this Agreement.

**EXHIBIT L**  
**STORAGE AVAILABILITY CALCULATION**

Calculation of Monthly Storage Availability. Seller shall calculate the “Monthly Storage Availability” for each month of the Delivery Term using the formula set forth below:

$$\text{Monthly Storage Availability (\%)} = \frac{[\text{MONHRS}_m - \text{UNAVAILHRS}_m]}{[\text{MONHRS}_m]}$$

where:

$m$  = the relevant month “m” in which availability is calculated;

$\text{MONHRS}_m$  is the total number of hours for the applicable month;

$\text{UNAVAILHRS}_m$  is the total number of hours, or partial hours, in the month during which the Facility was unavailable to deliver Product for any reason other than the occurrence of any of the following (each, an “Availability Excused Event”): a Force Majeure Event, Buyer Default, System Emergencies, up to one hundred twenty (120) hours of scheduled maintenance (including Planned Outages), or violation of the Operating Parameters.

- Guaranteed Capacity Deficit: During hours in which Storage Contract Capacity is less than the Guaranteed Annual Capacity (“Capacity Deficit Period”), the difference in capacity (“Capacity Deficit”) will be counted as an equivalent amount of  $\text{UNAVAILHRS}_m$ .
- Partial Hours and Partial Availability: If, for any reason other than an Availability Excused Event, the Facility is unavailable for less than a full hour or if a portion of the Facility is unavailable during any hour, the hours in which the Facility is partially available will be adjusted by an equivalent percentage to reflect the reduction in availability and will be included in this calculation of  $\text{UNAVAILHRS}_m$ . Any Availability Excused Event that results in unavailability of the Facility for less than a full hour or unavailability of a portion of the Facility during any hour, the hours in which the Facility is partially available will be adjusted by an equivalent percentage to reflect the reduction in availability for this calculation.
- If the Facility or any component thereof was previously deemed unavailable for an hour or part of an hour, and Seller provides a revised Notice indicating the Facility is available for that hour or part of an hour by 5:00 a.m. of the morning Buyer schedules or bids the Facility in the Day-Ahead Market, the Facility will be deemed to be available to the extent set forth in the revised Notice.
- If the Facility or any component thereof was previously deemed unavailable for an hour or part of an hour and Seller provides a revised Notice indicating the Facility is available for that hour or part of an hour at least sixty (60) minutes prior to the time the Buyer is required to schedule or bid the Facility in the Real-Time Market, and the Facility is dispatched in the Real-Time Market, the Facility will be deemed to be available to the extent set forth in the revised Notice.

### **Availability Adjustment**

The applicable “Availability Adjustment” is calculated as follows:

- (i) If the Monthly Storage Availability is greater than or equal to 98%, then:

$$AA = 100\%$$

- (ii) If the Monthly Storage Availability is less than 98%, but greater than or equal to 70%, then:

$$AA = 100\% - [(98\% - \text{Monthly Storage Availability}) \times 2]$$

- (iii) If the Monthly Storage Availability is less than 70% then:

$$AA = 0$$

**EXHIBIT M**  
**ROUND TRIP EFFICIENCY ADJUSTMENT FACTOR**

Seller shall calculate the “Round Trip Efficiency (or RTE) Adjustment Factor” for each month of the Delivery Term using the following calculation:

- (i) If the RTE Rate is greater than or equal to the GRTE Rate, then:

$$\text{RTE Adjustment Factor} = 100\%$$

- (ii) If the RTE Rate is less than the GRTE Rate, then:

$$\text{RTE Adjustment Factor} = [100\% - [(\text{GRTE Rate} - \text{RTE Rate})]]$$

Where:

- “GRTE Rate” = The applicable Guaranteed Round Trip Efficiency Rate
- “RTE Rate” = Round Trip Efficiency Rate shall be the actual measured round trip efficiency of the Facility based on the total amount of Discharging Energy divided by the total amount of Charging Energy during each month of the Delivery Term (in %).

**GUARANTEED ROUND TRIP EFFICIENCY**

<b>Contract Year</b>	<b>Guaranteed Round Trip Efficiency Rate %</b>
<b>1</b>	
<b>2</b>	
<b>3</b>	
<b>4</b>	
<b>5</b>	
<b>6</b>	
<b>7</b>	
<b>8</b>	
<b>9</b>	
<b>10</b>	
<b>11</b>	
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<b>19</b>	
<b>20</b>	

## ENERGY STORAGE AGREEMENT

### COVER SHEET

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

**Seller:**

**Description of Facility:**

#### A. Transaction

Product: Storage Capacity, Capacity Attributes, Discharging Energy, Ancillary Services

Guaranteed Installed Capacity: \_\_\_ MW at \_\_\_( ) hours of continuous discharge [degrading]  
[nondegrading]

Contract Price: XX/kW-mo. (flat) with no escalation

Delivery Term:

Anticipated Flexible Capacity: Amount: \_\_\_\_\_ (MW) Category: \_\_\_\_\_

Guaranteed Storage Availability: 98%

Guaranteed Round Trip Efficiency Rate: As set forth in Exhibit M

Deliverability: Full Capacity Deliverability Status

RA Guarantee Date: Commercial Operation Date

Maximum Storage Facility Cycles Per Year: 365 + 90 carry forward/year

#### B. Milestones:

Site Control:

Permitting:

Phase I and II Interconnection study results:

Executed Interconnection Agreement:

Financial Close:

Construction Start:

Mechanical Completion:

Initial Synchronization:

Network Upgrades completed:

Commercial Operation Date:

**C. Seller Collateral:**

Development Assurance: \$90/kW multiplied by the Guaranteed Storage Capacity.

Performance Assurance: \$105/kW multiplied by the Guaranteed Storage Capacity.

**D. Notices**

<b>Buyer:</b> City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF	<b>Seller:</b>
<b>All Notices:</b> 525 Golden Gate Ave, 7th Floor San Francisco, CA, 94102 Attn: Power Contract Administration Phone: Email:	<b>All Notices:</b>  Attn: Phone: Email:
<b>Federal Tax ID Number:</b>	<b>Federal Tax ID Number:</b> <b>DUNS Number:</b>
<b>Invoices:</b> Attn: Phone: Email:	<b>Invoices:</b> Attn: Phone: Email:
<b>Scheduling:</b> Attn: Phone: Email:	<b>Scheduling:</b> Attn: Phone: Email:
<b>Payments:</b> Attn: Phone: Email:	<b>Payments:</b> Attn: Phone: Email:
<b>Wire Transfer:</b> BNK: ABA (ACH): ACCT:	<b>Wire Transfer:</b> BNK: ABA: ACCT:
<b>Credit and Collections:</b> Attn: Phone: Email:  <b>With additional Notices of an Event of Default or Potential Event of Default to:</b> Attn: Phone: Email:	<b>Credit and Collections:</b> Attn: Phone: Email:  <b>With additional Notices of an Event of Default or Potential Event of Default to:</b> Attn: Phone: Email:



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## **EXHIBITS**

The following Exhibits constitute a part of this Agreement and are incorporated into the Agreement by reference.

<b>EXHIBIT A</b>	SELLER DOCUMENTATION OF CONDITIONS PRECEDENT
<b>EXHIBIT B</b>	FACILITY DESCRIPTION AND SITE DRAWINGS
<b>EXHIBIT C</b>	GUARANTEED ANNUAL CAPACITY
<b>EXHIBIT D</b>	INSURANCE COVERAGES
<b>EXHIBIT E</b>	CONSTRUCTION START CERTIFICATION
<b>EXHIBIT F</b>	PROGRESS REPORT
<b>EXHIBIT G-1</b>	COMMERCIAL OPERATION CERTIFICATION
<b>EXHIBIT G-2</b>	INSTALLED CAPACITY CERTIFICATION
<b>EXHIBIT H-1</b>	FORM OF LETTER OF CREDIT
<b>EXHIBIT H-2</b>	FORM OF SIGHT DRAFT
<b>EXHIBIT I</b>	FORM OF REPLACEMENT RA NOTICE
<b>EXHIBIT J</b>	OPERATING PARAMETERS
<b>EXHIBIT K</b>	STORAGE CAPACITY TESTS
<b>EXHIBIT L</b>	AVAILABILITY GUARANTEE
<b>EXHIBIT M</b>	ROUND TRIP EFFICIENCY GUARANTEE

## ENERGY STORAGE AGREEMENT

This Energy Storage (“Agreement”) is entered into between the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF (“Buyer”) and \_\_\_\_\_, a \_\_\_\_\_ (“Seller”), as of \_\_\_\_\_ (the “Execution Date”). The Agreement shall include the exhibits, attachments, any written and fully executed supplements hereto, and any designated collateral, credit support, or similar arrangement between the Parties.

### RECITALS

1. Seller intends to develop, finance, build, own, and operate a [technology type] storage facility, located in \_\_\_\_\_, California; and,
2. Buyer operates CleanPowerSF, a community choice aggregator that serves retail customers in the City and County of San Francisco; and,
3. Buyer is willing to purchase, and Seller is willing to sell, the Product of the Facility, on the terms and conditions and at the prices set forth in this Agreement.

**NOW THEREFORE**, in consideration of the recitals above and the following covenants, terms and conditions, the Parties agree as follows:

### ARTICLE 1: DEFINITIONS

**AC:** Alternating current.

**Affiliate:** 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 preamble.

**Ancillary Services:** Means frequency regulation, spinning reserve, non-spinning reserve, regulation up, regulation down, black start, voltage support, and any other ancillary services that the Facility is capable of providing consistent with the Operating Parameters, as each is defined in the CAISO Tariff.

**Applicable Laws:** 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, 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.

**Availability Adjustment:** Has the meaning set forth in Exhibit L.

**Availability Excused Event:** Has the meaning set forth in Exhibit L.

**Availability Notice:** Has the meaning set forth in Section 5.8(b).

**Availability Standards:** Has the meaning set forth in the CAISO Tariff.

**Available Capacity:** Means the capacity of the Facility, expressed in whole MWs, that is mechanically available to charge and discharge Energy and provide Ancillary Services.

**Bankrupt:** With respect to any entity, such entity (a) 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, (b) has any such petition filed or commenced against it and such case filed against it is not dismissed within sixty (60) calendar days, (c) makes an assignment or any general

arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) 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 (f) is generally unable to pay its debts as they fall due.

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

**Business Day:** Any day except a Saturday, Sunday, a Federal Reserve Bank holiday, or a City and County of San Francisco holiday, between the hours of 8:00 a.m. and 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:** The City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF.

**Buyer Dispatched Test:** Has the meaning set forth in Section 5.4(c).

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

**CAISO:** The California Independent System Operator Corporation, or its functional successor.

**CAISO Certification:** Means the certification and testing requirements for an energy storage unit set forth in the CAISO Tariff that are applicable to the Facility, including certification and testing for all Ancillary Services, PMAX, and PMIN associated with such storage units, that are applicable to the Facility.

**CAISO Charges Invoice:** Has the meaning set forth in Section 5.6(c).

**CAISO Dispatch:** Any Charging Notice or Discharging Notice given by the CAISO to the Facility, whether through Automated Dispatch System, Automatic Generation Control (as those terms are defined in the CAISO Tariff) or any successor communication protocol, communicating an Ancillary Service Award (as defined in the CAISO Tariff) or directing the Facility to charge or discharge at a specific MW rate for a specified period of time or amount of MWh.

**CAISO Tariff:** The California Independent System Operator Corporation, Fifth Replacement FERC Electric Tariff, Business Practice Manuals (BPMs), and Operating Procedures, as may be amended, supplemented or replaced (in whole or in part) from time to time.

**Capacity Attributes:** Any current or future defined characteristic (including the ability to store, charge, or discharge energy at a given capacity level, provide Ancillary Services, and ramp up or ramp down at a given rate), certificate, tag, credit, flexibility, locational, or dispatchability attribute, whether general in nature or specific as to the location or any other attribute of the Facility, intended to value any aspect of the capacity of the Facility to store, charge, or discharge energy, including Resource Adequacy Benefits, any accounting construct, or any other measure by the CPUC, the CAISO, the FERC, or any other Governmental Authority with jurisdiction, including Resource Adequacy Benefits.

**Capacity Damages:** Has the meaning set forth in Section 5.3(j).

**Capacity Procurement Mechanism (CPM) Soft Offer Cap:** Has the meaning set forth in the CAISO Tariff.

**CEQA:** The California Environmental Quality Act, California Public Resources Code Sections 21000, et. seq., as it may be amended from time to time.

**Change in Law:** Has the meaning set forth in Section 11.5(f).

**Charging Energy:** The Energy delivered to the Facility pursuant to a Charging Notice as measured by the Facility Meter, as adjusted by the CAISO for any applicable Electrical Losses or Station Use. All Charging Energy shall be used solely to charge the Facility.

**Charging Notice:** The operating instruction and any subsequent updates given by Buyer, Buyer's SC, or the CAISO to Seller, directing the Facility to charge at a specific MW rate for a specified period of time or amount of MWh.

**City:** The City and County of San Francisco.

**CleanPowerSF:** Buyer's community choice aggregation program.

**Commercial Operation:** The condition of the Facility existing when Seller has fulfilled all of the conditions set forth in Section 2.2(b)(ii) and Seller has provided notice to Buyer in the form of the Commercial Operation Certification set forth in Exhibit G-1.

**Commercial Operation Certification:** Seller's certification of Commercial Operation for the Facility in the form set forth as Exhibit G-1, executed by a Licensed Professional Engineer.

**Commercial Operation Date or COD:** The date upon which Commercial Operation is achieved as specified in the Commercial Operation Certification.

**Commercial Operation Date or COD Delay Damages:** An amount equal to the Development Assurance divided by sixty (60).

**Compliance Cost Cap:** Has the meaning set forth in Section 3.8.

**Compliance Costs:** Has the meaning set forth in Section 3.8(a).

**Confidential Information:** Has the meaning set forth in Section 11.2(b).

**Construction Start:** Has the meaning set forth in Section 5.3(a)(i).

**Construction Start Date:** Has the meaning set forth in Exhibit E.

**Construction Start Delay Damages:** An amount equal to the total amount of Development Assurance divided by one hundred twenty (120).

**Contract Price:** Has the meaning set forth in Section 3.2.

**Contract Year:** A period of twelve (12) consecutive months, commencing at 12:00 a.m. on the COD, and each subsequent Contract Year commencing on the twelve (12) month anniversary of the COD.

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

**Costs:** With respect to a 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 entered into pursuant to this Agreement or entering into new arrangements which replace this Agreement, and (b) all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of this Agreement.

**Cover Sheet:** The cover sheet to this Agreement.

**CPUC:** The California Public Utilities Commission or any successor entity.

**CPUC System RA Penalty:** The CPUC-adopted penalty imposed on load serving entities for system RA deficiencies as that penalty may be updated or revised from time to time.

**Credit Rating:** 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 unsecured senior long-term debt, then the rating assigned to such entity as an issuer rating by Standard & Poor's Financial Services and/or Moody's Investors Service. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

**Curtailment Order:** An order, direction, alert, or notice of the CAISO, the Transmission Provider (whether directly or through a Scheduling Coordinator or the Transmission Provider) to curtail deliveries of Discharging Energy, for any reason, including, but not limited to, any System Emergency, any warning of an anticipated System Emergency, or any warning of an imminent condition or situation which could

jeopardize the CAISO's or Transmission Provider's electric system integrity or the integrity of other systems to which the CAISO or the PTO is connected, including curtailment in accordance with Seller's obligations under its Interconnection Agreement with the Transmission Provider.

**Damage Payment:** The amount to be paid by the Defaulting Party to the Non-defaulting Party in the event of a termination of this Agreement prior to the COD and as calculated pursuant to Section 8.2(b).

**Day-Ahead Market or DAM:** Has the meaning set forth in the CAISO Tariff.

**Defaulting Party:** The Party that has caused an Event of Default.

**Delivery Point:** \_\_\_\_\_

**Delivery Term:** Has the meaning set forth in Section 2.2(b)(i).

**Development Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(a)(i) of this Agreement.

**Discharging Energy:** All Energy discharged from the Facility to the Delivery Point as measured by the Facility Meter, as adjusted by the CAISO for Electrical Losses and Station Uses.

**Discharging Notice:** An operating instruction, and any subsequent updates, given by Buyer, Buyer's SC, or the CAISO to the Facility, directing the Facility discharge Discharging Energy at a specific MW rate for a specified period of time or to an amount of MWh.

**Dispatch Notice:** Any Charging Notice, Discharging Notice and any subsequent updates, given by the CAISO, Buyer, or Buyer's SC, to Seller directing the Facility to charge Charging Energy or to discharge Discharging Energy at a specific MWh rate to a specified Stored Energy Level; provided, any such operating instruction or updates shall be in accordance with the Operating Parameters.

**Dispatch Instruction:** Has the meaning set forth in the CAISO Tariff.

**Early Termination Date:** Has the meaning set forth in Section 8.2(a)(i).

**Economic Losses:** With respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from the termination of this Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c) and 8.3. Factors used in determining the loss of economic benefit may include reference to information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including Environmental Attributes and Capacity Attributes. The Non-Defaulting Party shall not be required to enter into replacement transactions to establish Economic Losses. Economic Losses shall exclude any (1) associated loss of investment tax credits and other lost tax benefits and (2) any costs, penalties, fees, or charges associated with the termination of related financing agreements or similar obligations, and (3) consequential, incidental, punitive, exemplary, indirect, or business interruption damages.

**Effective Date:** The date on which all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties.

**Effective Flexible Capacity or EFC:** The effective flexible capacity (in MWs) of the Facility pursuant to the counting conventions set forth in the Resource Adequacy Rulings and the CAISO Tariff.

**Effective FCDS Date:** The date identified in Seller's notice to Buyer (along with a Full Capacity Deliverability Status Finding from CAISO) as the date that the Facility has attained Full Capacity Deliverability Status.

**Electric System Upgrades:** Any Network Upgrades, distribution upgrades, or Interconnection Facilities that are determined to be necessary by the CAISO or Transmission Provider, as applicable, to physically and electrically interconnect the Facility to the Transmission Provider's electric system for receipt of Energy at the Point of Interconnection.

**Electrical Losses:** All transmission or transformation losses between the Facility and the Delivery Point associated with delivery of Charging Energy and Discharging Energy.

**Eligible LC Bank:** 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 with an outlook designation of "stable" from Moody's or A- with an outlook designation of "stable" from S&P.

**Energy:** Three-phase, 60 cycle alternating current electric energy measured in kilowatt hours or megawatt hours. Energy shall include without limitation, reactive power and any other electrical energy products that may be developed or evolve from time to time during the Term.

**Environmental Attributes:** Any and all credits, benefits, offsets, emissions reductions, certificates, allowances, or any other attribute applicable to the Facility and related to the generation of electricity that is created by a Governmental Authority with jurisdiction during the Term.

**Environmental Costs:** Means all costs, taxes, charges, and fees pertaining to, or incurred in connection with: acquiring and maintaining all environmental permits and licenses for the Facility and the Product; the Product's and Facility's compliance with all applicable environmental laws, rules, and regulations, including capital costs for pollution mitigation or installation of emissions control equipment required to permit or license the Facility; all operating and maintenance costs for operation of pollution mitigation or control equipment; all costs of permit maintenance fees and emission fees as applicable; the costs of all emission reduction credits or marketable emission trading credits; any costs related to greenhouse gas emissions, required by any applicable environmental laws, rules, regulations, and Permits to operate; costs associated with the storage, use, disposal, transportation, and clean-up of Hazardous Substances introduced to the Site, and; the decontamination or remediation, on or off the Site, necessitated by the introduction of such hazardous substances on the Site.

**EPC Contractor:** An engineering, procurement, and construction contractor, or if not utilizing an engineering, procurement, and construction contractor, the entity having lead responsibility for the management of overall construction activities, selected by Seller, with substantial experience in the engineering, procurement, and construction of energy storage projects.

**Event of Default:** Has the meaning set forth in Section 8.1.

**Excess Storage Capacity:** Has the meaning set forth in Section 3.2(c).

**Execution Date:** Has the meaning set forth in the preamble.

**Extended Delivery Term:** Has the meaning set forth in Section 2.3.

**Facility:** The energy storage facility, interconnection facilities, and associated facilities and equipment for the storage and delivery of Energy, to be constructed, owned, and operated by Seller on the Site and as described in the Cover Sheet and Exhibit B.

**Facility Meter:** The CAISO-approved bi-directional revenue quality meter or meters dedicated solely to the Facility, along with a CAISO-approved compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Charging Energy delivered to the Facility and the amount of Discharging Energy delivered to the Delivery Point. The Facility may contain multiple measurement devices that will make up the Facility Meter, and, unless otherwise indicated, references to the Facility Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

**FERC:** The Federal Energy Regulatory Commission and any successor organization.

**Fifteen Minute Market or FMM:** Has the meaning set forth in the CAISO Tariff.



**Financial Close:** Seller and/or one of its Affiliates has obtained debt and/or equity financial commitments from one or more Lenders or Seller's owners sufficient to construct the Facility.

**Fiscal Year:** The period commencing on July 1 and ending on June 30 in the following calendar year.

**Flexible Capacity:** Means, with respect to any particular Showing Month, the number of MWs of Product which are eligible to satisfy Flexible RAR.

**Flexible RAR:** Means the flexible capacity requirements for load-serving entities as set forth in the CAISO Tariff and the Resource Adequacy Rulings.

**Force Majeure Event:** An event or circumstance, including without limitation, a natural disaster, war, riot, act of terrorism, sabotage, destruction by a third party, or civil disturbance, which prevents one Party ("Claiming Party") from performing all or a portion of 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 (whether direct or indirect), 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 Transmission Provider and/or the CAISO in entering into, or performing under, any agreements with Seller contemplated by this Agreement, including a failure to complete, or a delay in completing, interconnection or Electric System Upgrades by the Commercial Operation Date except to the extent that such delay is solely caused by a Force Majeure Event;
- (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 Agreement;
- (d) Seller's inability to obtain Permits of any type, except where such failure is solely caused by a Force Majeure Event;
- (e) Seller's inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, except to the extent such inability is caused by a Force Majeure Event;
- (f) any equipment failure, except to the extent such failure is caused by a Force Majeure Event;
- (g) a Forced Outage except to the extent such Forced Outage is caused by a Force Majeure Event;
- (h) a Curtailment Order, except to the extent that such Curtailment Order is caused by a Force Majeure Event; or
- (i) economic conditions that render a Party's performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs), including Buyer's ability to buy Product at a lower price, or Seller's ability to sell Product at a higher price.

**Forced Labor:** Has the meaning set forth in Section 5.1(g).

**Forced Outage:** Any unplanned reduction or suspension of the operation of the Facility or unavailability of the Product in whole or in part in response to a mechanical, electrical, or equipment malfunction and any other unavailability of the Facility, in whole or in part, for maintenance or repair that is not a Planned Outage and not the result of Force Majeure.

**Full Capacity Deliverability Status or FCDS:** Has the meaning set forth in the CAISO Tariff.

**Full Capacity Deliverability Status or FCDS Finding:** A written or electronic confirmation from the CAISO that the Facility has received FCDS.

**Full Cycle:** The quantity of Discharging Energy equal to the then effective Storage Contract Capacity multiplied by XXX (X) hours and expressed in MWh.

**Gains:** With respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of the Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c) and 8.3. Factors used in determining economic benefit may include information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including the value of Environmental Attributes and Capacity Attributes.

**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.

**Guaranteed Annual Capacity:** For each Contract Year of the Delivery Term, the capacity of the Facility as set forth in Exhibit C.

**Guaranteed Commercial Operation Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Construction Start Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Installed Capacity:** Has the meaning set forth in the Cover Sheet.

**Guaranteed Round Trip Efficiency or GRTE Rate:** Has the meaning set forth in Exhibit M.

**Guaranteed Storage Availability:** Has the meaning set forth in Section 3.6(a)(i).

**Hazardous Substance:** (a) any chemical, material or substance that is listed or regulated under Applicable Laws as a “hazardous” or “toxic” substance or waste, or as a “contaminant” or “pollutant” or words of similar import, (b) any petroleum or petroleum products, flammable materials, explosives, radioactive materials, asbestos, urea formaldehyde foam insulation, and transformers or other equipment that contain polychlorinated biphenyls, and (c) any other chemical or other material or substance for which exposure to or release of such substance is prohibited, limited, or regulated by Applicable Laws.

**Indemnified Party:** Has the meaning set forth in Section 9.2.

**Indemnifying Party:** Has the meaning set forth in Section 9.2.

**Initial Synchronization:** The initial delivery of Discharging Energy to the Delivery Point.

**Installed Capacity:** The maximum dependable operating capability to discharge Energy that can be sustained for XX (X) consecutive hours that achieves Commercial Operation as measured by the Facility Meter and adjusted for Electrical Losses to the Delivery Point, as determined by a Storage Capacity Test and as set forth in the Installed Capacity Certificate substantially in the form set forth in Exhibit G-2.

**Interconnection Agreement:** The agreement and associated documents (or any successor agreement and associated documentation) by and among Seller, the Transmission Provider, and the CAISO governing the terms and conditions of the Facility’s interconnection with the CAISO grid, including any description of the plan for interconnection of the Facility to the Transmission Provider’s system.

**Interconnection Facilities:** The interconnection facilities, control and protective devices and metering facilities required to connect the Facility to the transmission system as set forth in the Interconnection Agreement.

**Investment Grade:** A Credit Rating of “Baa3” or better from Moody’s or “BBB-” or better from S&P.

**ITC:** The investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.

**kW:** Kilowatt.

**LAR Attributes:** Means any and all resource adequacy attributes (or other location attributes related to system reliability) of the Facility, as may be identified from time to time by the CPUC, CAISO, or other Governmental Authority having jurisdiction, that can be counted toward a load serving entity's LAR.

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

**Lender(s):** Any Person(s) providing money or extending credit (including any capital lease) to Seller, including in the form of debt or tax equity, for (a) the construction of the Facility, (b) the term or permanent financing of the Facility, or (c) working capital or other ordinary business requirements for the Facility. "Lender(s)" shall not include any trade creditor(s) of Seller.

**Letter of Credit or LC:** An irrevocable, non-transferable standby letter of credit issued by an Eligible LC Bank in a form that is substantially similar to the form contained in Exhibit J. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.

**Licensed Professional Engineer:** A third-party acceptable to Buyer in its reasonable judgment who (a) is licensed to practice engineering in California, (b) has training and experience in the power industry specific to the technology of the Facility, (c) has no economic relationship, association, or nexus with Seller or Buyer, other than to meet the obligations of Seller pursuant to this Agreement, (d) is not a representative of a consultant, engineer, contractor, designer or other individual involved in the development of the Facility or of a manufacturer or supplier of any equipment installed at the Facility, and (e) is licensed in an appropriate engineering discipline for the required certification being made.

**Local Area Requirements or LAR:** Means the local area reliability requirements established for load serving entities by the CPUC pursuant to the Resource Adequacy Rulings, by CAISO pursuant to the Tariff, or by other Governmental Authority having jurisdiction. LAR may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirement in other regulatory proceedings or legislative actions.

**Market Results Interface-Settlements:** Has the meaning set forth in the CAISO Business Practice Manual for Definitions and Acronyms.

**Master File:** Has the meaning set forth in the CAISO Tariff.

**Mechanical Completion:** The condition of the Facility existing when (i) all components and systems of the Facility have been properly constructed, installed and functionally tested according to Seller's EPC contract requirements in a safe and prudent manner that does not void any equipment or system warranties or violate any permits, approvals or Applicable Laws; (ii) the Facility is ready for startup testing and commissioning; (iii) Seller has provided written acceptance to the EPC Contractor of mechanical completion as that term is specifically defined in the EPC contract.

**Milestones:** The key development activities required for the construction and operation of the Facility, as set forth more particularly in Section 5.2(a).

**Monthly Payment:** Has the meaning set forth in Section 4.1(a)(i).

**Monthly Storage Availability:** Has the meaning set forth in Exhibit L.

**Monthly Forecast:** Has the meaning set forth in Section 5.8(a).

**Moody's:** Moody's Investors Service, Inc.

**MW:** Megawatt.

**MWh:** Megawatt hour.

**NERC:** The North American Electric Reliability Corporation or a successor organization.

**Net Qualifying Capacity or NQC:** Has the meaning set forth in the CAISO Tariff.

**Network Upgrades:** Has the meaning set forth in the CAISO Tariff.

**Non-Defaulting Party:** Has the meaning set forth in Section 8.2(a).

**Non-Operating Periods:** Has the meaning set forth in Exhibit J.

**Notice to Proceed:** The full notice to proceed provided by Seller to the EPC Contractor following execution of the EPC contract between Seller and such EPC Contractor and satisfaction of all conditions to performance of such contract, by which Seller authorizes such EPC Contractor to begin construction of the Facility without any delay or waiting periods.

**Operating Parameters:** Means the criteria for operating the Storage Facility set forth in Exhibit J.

**Outage Schedule:** Has the meaning set forth in Section 5.9(a)(i).

**Partial Cycle:** Has the meaning set forth in Exhibit J.

**Parties:** Buyer and Seller, and their respective successors and permitted assignees.

**Party:** Buyer or Seller, and each such Party's respective successors and permitted assignees.

**Performance Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(b) of this Agreement.

**Permits:** All material federal, state or local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, ownership, operation and maintenance of the Facility, including any such permits or approvals required under CEQA or the National Environmental Policy Act, 42 U.S.C. Sections 4321 et. seq.

**Permitted Extensions:** Has the meaning set forth in Section 5.3(c).

**Person:** An individual, partnership, corporation, business trust, limited liability company, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity.

**Planned Outage:** The removal of equipment from service availability for inspection and/or general overhaul of one or more major equipment groups. To qualify as a Planned Outage, the maintenance (a) must actually be conducted during the Planned Outage, and in Seller's sole discretion must be of the type that is necessary to reliably maintain the Facility, (b) cannot be reasonably conducted during Facility operations, and (c) causes the production level of the Facility to be reduced by at least ten percent (10%) of the Storage Contract Capacity.

**PMax:** Means the applicable CAISO-certified maximum operating level of the Facility.

**PMin:** Means the applicable CAISO-certified minimum operating level of the Facility.

**PNode:** Has the meaning set forth in the CAISO Tariff.

**Point of Interconnection or POI:** The point on the electrical system where the Facility is physically interconnected with the Transmission Provider's system as further described in the Interconnection Agreement.

**Product:** Means Installed Capacity, Capacity Attributes, Ancillary Services, Discharging Energy, and any and all other reliability, power, environmental, or other products which may be produced by or are related to the Facility.

**Progress Report:** A report containing the information set forth in Exhibit F.

**Prudent Operating Practice:** Means (a) the applicable practices, methods and acts required by or consistent with Applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric utility industry during the relevant time period with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States, or (b) any of the practices, methods and acts which, in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather

to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States. Prudent Operating Practice includes compliance with Applicable Laws, applicable reliability criteria, and the criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules and standards of any successor organizations.

**Public Records Laws:** The California Public Records Act, California Government Code Sections 6250 et seq., and the San Francisco Sunshine Ordinance, San Francisco Administrative Code, Chapter 67, the Ralph M. Brown Act, California Government Code Sections 54950, et seq., and any other Applicable Law regarding public records as may be amended from time to time.

**Qualifying Capacity:** Has the meaning set forth in the CAISO Tariff.

**RA Compliance Showing:** Means the (a) Local RAR compliance or advisory showings (or similar or successor showings), (b) RAR compliance or advisory showings (or similar or successor showings), and (c) Flexible RAR compliance or advisory showings (or similar successor showings), in each case, an entity is required to make to the CAISO pursuant to the CAISO Tariff, to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings, or to any Governmental Authority.

**RA Deficiency Amount:** The liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month as calculated in accordance with Section 3.3(d)(i).

**RA Guarantee Date:** The date by which the Facility is expected to achieve Full Capacity Deliverability Status, which is the Commercial Operation Date.

**RA Shortfall Month:** Any month, commencing on the RA Guarantee Date, during which (a) the Facility has not achieved FCDS or IDS, or (b) the Net Qualifying Capacity of the Facility for such month was either (i) not published by the Notification Deadline, or (ii) was less than the Qualifying Capacity of the Facility for such month.

**RA Shortfall:** Has the meaning set forth in Section 3.3(d)(i).

**Real-Time Market or RTM:** Has the meaning set forth in the CAISO Tariff.

**Reliability Coordinator:** Has the meaning set forth in the CAISO Tariff.

**Replacement RA:** Resource Adequacy provided by Seller to Buyer from a facility other than the Facility pursuant to Section 3.3(d)(ii) which has the same flexible attributes and local, zonal, or other locational attributes associated with the Facility.

**Resource Adequacy Benefits:** The rights and privileges attached to the Facility that satisfy any entity's resource adequacy obligations, as those obligations are set forth in any Resource Adequacy Rulings and shall include Flexible Capacity, and any local, zonal or otherwise locational attributes associated with the Facility.

**Resource Adequacy Requirements or RAR:** The resource adequacy capacity requirements for load serving entities, including LAR and Flexible RAR, established by the Resource Adequacy Rulings.

**Resource Adequacy Rulings:** The CPUC's existing or subsequent decisions, resolutions, or rulings addressing resource adequacy issues, or any other resource adequacy laws, rules, or regulations enacted, adopted or promulgated by any other Governmental Authority with jurisdiction, as those decisions, resolutions, rulings, laws, rules, or regulations may be amended or modified from time-to-time.

**Round Trip Efficiency or RTE Rate:** Means the ratio of the amount of Energy that is discharged from the Facility compared to the amount of Energy that is used to charge the Facility as calculated in accordance with Exhibit M.

**Round Trip Efficiency or RTE Adjustment Factor:** Has the meaning set forth in Exhibit M.

**Schedule:** Has the meaning set forth in the CAISO Tariff.

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

**Self-Schedule:** Has the meaning set forth in the CAISO Tariff.

**Seller:** Has the meaning in the Preamble, and any successor or permitted assignee.

**Seller Initiated Test:** Has the meaning set forth in Section 5.4(c).

**Settlement Interval:** Has the meaning set forth in the CAISO Tariff.

**SFPUC:** The San Francisco Public Utilities Commission.

**Showing Month:** The calendar month of the Delivery Term that is the subject of the RA Compliance Showing, as set forth in the Resource Adequacy Rulings and outlined in the CAISO Tariff.

**Site:** The location of the Facility as described on Exhibit B.

**Standard & Poor's or S&P:** Standard & Poor's Financial Services, LLC (a subsidiary of S&P Global, limited liability company).

**State of Charge or SOC:** The ratio of the (a) amount of Energy stored in the Facility and available for discharging relative to (b) the Storage Contract Capacity multiplied by [XX (X)] hours, expressed as a percentage.

**Station Uses:** The Energy used within the Facility to power the lights, motors, control systems, temperature control systems, and other electrical loads that are necessary for the operation of the Facility. Station Uses shall not be served from the Facility, Charging Energy, or Discharging Energy.

**Storage Capacity Test or SCT:** Any test or retest of the capacity of the Facility conducted in accordance with the testing procedures, requirements, and protocols set forth in Section 5.4 and Exhibit K.

**Storage Contract Capacity:** The maximum dependable operating capacity of the Facility as measured in MW at the Delivery Point, initially equal to the Guaranteed Installed Capacity, as adjusted from time to time pursuant to Section 5.4 and Exhibit K to reflect the results of the most recently performed Storage Capacity Test.

**Stored Energy Level:** The amount of Energy in the Facility that is available for discharge as Discharged Energy.

**Supplementary Storage Test Protocol:** Has the meaning set forth in Exhibit K.

**System Emergency:** Has the meaning set forth in the CAISO Tariff.

**Tax Credit:** Any state, local, and/or federal production tax credit, depreciation benefit, tax deduction, and/or investment tax credit, including the ITC, specific to investments in renewable energy facilities and/or energy storage facilities.

**Taxes:** All federal, state, local, or foreign taxes, levies, assessments, surcharges, duties, and other fees and charges of any nature imposed by a Governmental Authority whether currently in effect or adopted during the Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any related items of withholding, deficiency, penalty, additions, interests, or assessments.

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

**Termination Payment:** With respect to the Non-Defaulting Party, the sum of (a) the Economic Losses and Costs, minus the Gains, which the Non-Defaulting Party incurs as a result of the termination of this Agreement, subject to Sections 8.2(c) and 8.3, provided that if such amount is negative, then the amount determined pursuant to this clause (a) of the definition of Termination Payment will be deemed to be zero dollars (\$0), plus (b) the net of all amounts then owed to the Non-Defaulting Party by the Defaulting Party, or to the Defaulting Party by the Non-Defaulting Party, determined as of the Early Termination Date.

**Transmission Provider:** Any entity or entities that owns, operates and maintains transmission or distribution lines and associated facilities used for the purpose of transmitting Energy from the Facility to or from the Delivery Point.

**WECC:** The Western Electricity Coordinating Council or successor agency.

## **ARTICLE 2: CONDITIONS PRECEDENT AND TERM**

### **2.1 Conditions Precedent to Term of Agreement**

- (a) Conditions Precedent. The Term of this Agreement shall not commence until the occurrence of all of the following:
  - (i) Buyer receives from Seller the conditions precedent documentation listed in Part I of Exhibit A; and
  - (ii) Buyer receives from Seller the Development Assurance;
  - (iii) Buyer receives all necessary approvals from the SFPUC and/or Board of Supervisors; and
  - (iv) The Controller has certified in accordance with the City's Charter that sufficient unencumbered balances are available in the proper fund.
- (b) Effective Date. The Effective Date of this Agreement shall be the date that all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties. Buyer will notify Seller promptly in writing when the condition in Section 2.1(a)(i) has been met.
- (c) Failure to Meet All Conditions Precedent. If the Conditions Precedent set forth in Section 2.1(a) are not satisfied or waived in writing by both Parties within ninety (90) days of full execution of this Agreement, then either Party may terminate this 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 and Buyer shall return all Development Assurance to Seller.

### **2.2 Term, Delivery Term, and Extension**

- (a) Term. The term of this Agreement shall commence, and this Agreement shall be effective, upon the Effective Date and, unless earlier terminated pursuant to an express provision of this Agreement, shall continue until the conclusion of the Delivery Term subject to Section 11.5(w). unless earlier terminated pursuant to an express provision of this Agreement ("Term").
- (b) Delivery Term.
  - (i) The delivery term shall commence on the Commercial Operation Date and continue for \_\_\_\_\_ years ("Delivery Term"), unless terminated as provided by the terms of this Agreement.
  - (ii) The Delivery Term shall not commence until Seller completed to Buyer's reasonable satisfaction each of the following conditions:
    - (A) Seller has delivered to Buyer the Commercial Operation Certification in substantially the form set forth at Exhibit G-1, the Installed Capacity Certification in substantially the form set forth in Exhibit G-2, and a SCT test report for the pre-COD Storage Capacity Test as specified in Exhibit K;

- (B) equipment for the Facility with a capacity of no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Capacity has been installed;
  - (C) the Facility has successfully completed all testing required by Prudent Operating Practice and any applicable requirement to operate the Facility;
  - (D) Seller has secured and maintained in full force and effect all necessary approvals, authorizations, and permits from CAISO and any other Governmental Authority with jurisdiction to enable Seller to operate the Facility and deliver Product to Buyer and satisfied all conditions thereof that are capable of being satisfied on the COD;
  - (E) Seller has obtained CAISO Certification for the Facility;
  - (F) Seller has delivered to Buyer a fully executed Interconnection Agreement between Seller and the Transmission Provider for the Facility, which agreement shall be in full force and effect;
  - (G) Seller has delivered to Buyer a fully executed Participating Generator Agreement and Meter Services Agreement between Seller and the CAISO for the Facility, which agreements shall be in full force and effect;
  - (H) Seller has taken all actions and executed all documents required to authorize Buyer or its designee to act as Scheduling Coordinator for the Facility and Buyer or its designee is authorized to act as SC;
  - (I) Seller has demonstrated satisfaction of all requirements under this Agreement that commence prior to or as of the Delivery Term, including payment of all amounts owed to Buyer under this Agreement, if any; and
  - (J) Seller has delivered Performance Assurance to Buyer.
- (c) The Parties agree that, in order for Buyer to dispatch the Facility as of the Commercial Operation Date, the Parties must perform certain of their Delivery Term obligations in advance of the Commercial Operation Date. The Parties shall cooperate with each other in order for Buyer to be able to dispatch the Facility as of the Commercial Operation Date.

**2.3 Extended Delivery Term and Purchase Option.** At its sole discretion, Buyer may provide notice to Seller no later than twenty-four (24) months prior to the end of the Delivery Term of its intent to (i) extend the Delivery Term (“Extended Delivery Term”), or (ii) purchase the Facility. Buyer and Seller shall promptly enter into good faith negotiations on the price and other terms that will apply to any Extended Delivery Term or Facility purchase and sale. If the Parties have not reached agreement on such price and other terms within ninety (90) days after delivery of Buyer’s notice under this Section 2.3 in the case of an Extended Delivery Term, or one-hundred and twenty (120) days in the case of a purchase and sale of the Facility, then neither Party shall have any further obligation to negotiate for an Extended Delivery Term or purchase and sale. Upon termination of the negotiations under this Section 2.3, Seller may enter into negotiations and definitive agreements with one or more third parties for the sale of the Product, the Facility, or any component thereof with respect to the period occurring after the end of the Delivery Term.

### **ARTICLE 3: PURCHASE AND SALE OF PRODUCT**

**3.1 Purchase and Sale.** During the Delivery Term, subject to the terms and conditions of this Agreement, Buyer will purchase all of the Product produced by or associated with the Facility and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility.



- (a) Exclusive Right. Buyer shall have the exclusive right to all Product associated with the Facility, except for Discharging Energy associated with a Seller Initiated Test. Buyer shall have the exclusive right to use, market, or resell the Product and the right to all revenues generated from the use, resale, or remarketing of the Product. Seller shall take all commercially reasonable actions and execute all documents or instruments reasonably necessary to facilitate a resale of Product by Buyer and to allow subsequent purchasers to use such resold Product. If Buyer incurs any liability to a subsequent purchaser due to the failure of Seller to comply with this Section 3.1, Seller shall be liable to Buyer for the amounts Seller would have owed Buyer under this Agreement if Buyer had not resold the Product.
- (b) No Substitution. Except as otherwise set forth in this Agreement, Seller shall not substitute or purchase any Product from any other resource, nor shall Seller sell, assign or otherwise transfer any Product to any third party.
- (c) Title to Product. Commencing on the Commercial Operation Date through the end of the Delivery Term, Seller shall supply and deliver the Product to Buyer at the Delivery Point, and Buyer shall take delivery of and title to the Product at the Delivery Point in accordance with the terms of this Agreement. Seller represents and warrants that it will deliver the Product to Buyer free and clear of all liens, security interests, claims and encumbrances or any other interest created by any Person other than Buyer. Subject to Section 5.6(b) Seller shall be responsible for paying or satisfying when due any costs, fees, Taxes, assessments, or charges imposed on or associated with the Product or the delivery of Discharging Energy to the Delivery Point and Buyer shall be responsible for all costs, fees, Taxes, assessments, or charges imposed on or associated with the purchase and delivery of Charging Energy, purchase of Product, and delivery of Discharging Energy at and after the Delivery Point (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees). If a Party is required to remit or pay Taxes that are the other Party's responsibility, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other Party for such Taxes.

**3.2 Contract Price.** Buyer shall pay Seller \_\_\_\_\_ per kw-month (\$---/kW-mo) multiplied by the Storage Contract Capacity, as adjusted pursuant to Sections 3.2 and 3.6, for the Product ("Contract Price"). The Contract Price shall be the total compensation owed by Buyer for the Product, adjusted as follows:

- (a) Storage ITC. If, prior to the commencement of Commercial Operation, federal investment tax credit legislation is enacted that either (i) applies the ITC in its current form to the Facility, or (ii) extends federal Tax Credits associated with capital investment in the construction of energy storage facilities or equipment used to store energy for which Seller, as the owner of the Facility, is eligible, Seller shall provide notice to Buyer of the effective date of such legislation and the Contract Price shall be reduced by a percentage reduction that is equal to or commensurate with the value of the Tax Credit that is applicable to the owner of the Facility.
- (b) Non-availability of Product. Notwithstanding any other provision of this Agreement, Buyer's obligation to make payment for Product shall be excused during the pendency of (i) a Force Majeure event, (ii) a Curtailment Period, or (iii) a period of Buyer suspension due to a Seller Default pursuant to Article 8. In addition, Buyer has no obligation to purchase from Seller any Product for which the associated Discharging Energy is not or cannot be delivered to the Delivery Point as a result of a total or partial outage of the Facility.
- (c) Excess Storage Capacity. **[FOR DEGRADING CAPACITY FACILITIES ONLY]** Buyer has the right, but not the obligation, to purchase Storage Contract Capacity in excess of one hundred ten percent (110%) of the Guaranteed Annual Capacity set forth in Exhibit C for the then-current Contract Year ("Excess Storage Capacity"). Buyer shall pay Seller

seventy-five percent (75%) of the Contract Price for Excess Storage Capacity. If an annual Storage Capacity Test demonstrates Excess Storage Capacity, Buyer shall notify Seller within thirty (30) days after the completion of the Storage Capacity Test of its intent to purchase or not to purchase the Excess Storage Capacity. Such Buyer election shall only apply in the then-current Contract Year.

**3.3 Capacity Attributes and Resource Adequacy.** Throughout the Delivery Term, Seller grants, pledges, assigns, and otherwise commits to Buyer all of the Installed Capacity, including the Capacity Attributes, from the Facility for any purpose, including to enable Buyer to meet its Resource Adequacy Requirements or successor program requirements as the CPUC, CAISO, and/or other Governmental Authority may prescribe.

- (a) Full Capacity Deliverability Status. Seller shall be solely responsible for and take all necessary actions to obtain Full Capacity Deliverability Status for the Facility by the RA Guarantee Date and to maintain FCDS throughout the Delivery Term.
- (b) Resource Adequacy. From the Execution Date and throughout the Delivery Term, Seller shall perform all actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits to Buyer. Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing any and all documents or instruments necessary to enable Buyer to use or resell all of the Resource Adequacy Benefits committed to Buyer under this Agreement.
- (c) NQC. Seller shall take all commercially reasonable actions as necessary for Buyer to obtain and maintain an NQC value that is equal to the Qualifying Capacity for the Facility.
- (d) Resource Adequacy Guarantee. For each RA Shortfall Month Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages and/or provide Replacement RA as the sole remedy for the Capacity Attributes that Seller failed to convey to Buyer.
  - (i) For any RA Shortfall Month, Seller shall pay liquidated damages to Buyer in an amount equal to the product of (A) the Qualifying Capacity minus the NQC, as the NQC may be adjusted by the CAISO to reflect the CAISO's capacity evaluations of the Facility (including for Forced Outages), for the RA Shortfall Month ("RA Shortfall"), multiplied by (B) the sum of (1) the CPM Soft Offer Cap, or any successor value adopted or implemented by the CAISO for procurement of backstop capacity resources and (2) the applicable CPUC System RA Penalty, or any successor value adopted or implemented by the CPUC and imposed on load-serving entities for RA deficiencies ("RA Deficiency Amount"). If a RA Shortfall Month occurs during the period between the COD and the Effective FCDS Date, for the purpose of this Section 3.3(d)(i), the Qualifying Capacity shall be the amount of Qualifying Capacity the Facility would reasonably be estimated to qualify for, based on the CPUC-adopted qualifying capacity methodologies then in effect, provided, the amount shall be deemed to be zero (0) if the NQC has not been published by the CAISO by the Notification Deadline for the RA Shortfall Month.
  - (ii) Seller may offer to provide Replacement RA to Buyer in the amount of the Qualifying Capacity of the Facility minus the Net Qualifying Capacity for the applicable RA Shortfall Month. Seller shall provide notice to Buyer of the offer of Replacement RA substantially in the form of Exhibit J at least ninety (90) days prior to the applicable Showing Month for the purpose of monthly RAR reporting. Buyer may elect to accept some or all of the Replacement RA by providing notice to Seller of its election within fifteen (15) days of Seller's offer. If Buyer does not elect to accept all or some of the Replacement RA, Seller shall pay the RA Deficiency Amount for the RA Shortfall minus the Replacement RA provided to Buyer, if any, for the RA Shortfall Month.

- (iii) If within ten (10) Business Days of the end of a RA Shortfall Month, Seller does not either provide an offer to Buyer to provide Replacement RA or deliver payment of the RA Deficiency Amount to Buyer, Buyer shall be entitled to collect the RA Deficiency Amount by electing, in its sole discretion, one or more of the following, (1) to draw upon the Performance Assurance; and/or (2) netting under Section 4.1(c).

**3.4 Ancillary Services.** Buyer shall have the exclusive rights to all Ancillary Services from, or associated with, the Facility.

**3.5 Environmental Attributes.** Buyer shall have the exclusive right to any Environmental Attributes associated with the Facility that may be created during the Term of this Agreement. At Buyer's request and subject to Section 3.8, Seller shall use commercially reasonable efforts to take necessary actions to enable Buyer to register for, claim, receive, use, or otherwise realize the benefits of Environmental Attributes.

**3.6 Performance Guarantees.**

(a) Guaranteed Storage Availability.

- (i) During the Delivery Term, the Facility shall maintain a Monthly Storage Availability of no less than ninety-eight percent (98%) (the "Guaranteed Storage Availability"). The Monthly Storage Availability shall be calculated in accordance with Exhibit L.
- (ii) If the Monthly Storage Availability during any month is less than the Guaranteed Storage Availability, Buyer's payment for the Product shall be adjusted by the Availability Adjustment set forth in Exhibit L.
- (iii) Failure to maintain an average Monthly Storage Availability of at least seventy percent (70%) over a consecutive twenty-four (24) month period shall constitute a Seller Event of Default as set forth in Section 8.1(b).

(b) Round Trip Efficiency Guarantee.

- (i) During the Delivery Term, the Facility shall maintain a Round Trip Efficiency Rate of no less than the GRTE Rate set forth in Exhibit M.
- (ii) If the Round Trip Efficiency Rate during any month is less than the applicable GRTE Rate, Buyer's monthly payment for the Product shall be adjusted by the RTE Adjustment Factor set forth in Exhibit M.
- (iii) Failure to maintain an average RTE Rate of at least seventy percent (70%) over a consecutive twelve (12) month period shall constitute a Seller Event of Default as set forth in Section 8.1(b).

(c) Storage Capacity

- (i) During the Delivery Term, Seller shall maintain the Guaranteed Annual Capacity as set forth in Exhibit C. Seller's failure to maintain at least seventy-five percent (75%) of the Guaranteed Annual Capacity on a prorated basis over a consecutive twelve (12) month period shall constitute a Seller Event of Default pursuant to Section 8.1(b).
- (ii) Without limiting Seller's rights or obligations to maintain the Facility as set forth in this Agreement, if as a result of any Storage Capacity Test after the initial Storage Capacity Test, the Storage Contract Capacity is lower than the Guaranteed Annual Capacity for that Contract Year as set forth in Exhibit C, Seller may, at its sole discretion, add facilities and equipment to the Facility to increase the Storage Capacity up to, but not in excess of, the applicable level of the Guaranteed Annual Capacity. Seller shall conduct a subsequent Storage Capacity Test to determine the

Storage Contract Capacity. Seller shall provide Buyer with thirty (30) days advance written notice of Seller's intent to add facilities or equipment pursuant to this Section 3.6(c).

- 3.7 Surplus Cycles Carry-over.** If the Facility is dispatched for less than the equivalent of three hundred sixty-five (365) Full Cycles during any Contract Year, Buyer shall be entitled to carry forward up to the equivalent of ninety (90) Full Cycles to the following Contract Year at no additional cost.
- 3.8 Compliance Cost Cap.** If Seller establishes to Buyer's reasonable satisfaction that a change in Applicable Laws has occurred after the Effective Date that results in Compliance Costs as defined in Section 3.8(a), then Seller's Compliance Costs during the Delivery Term shall be capped at twenty-five thousand dollars (\$25,000.00) per MW of Installed Capacity ("Compliance Cost Cap").
- (a) Compliance Costs. This Section shall apply to Seller's additional, reasonable out-of-pocket costs paid to applicable Governmental Authorities for obtaining, maintaining, or conveying Capacity Attributes and Environmental Attributes for Buyer's use ("Compliance Costs"). Compliance Costs includes only those new costs actually incurred by Seller associated with the change in Applicable Laws after the Execution Date that are in excess of the reasonably anticipated compliance costs as of the Execution Date.
  - (b) Reimbursement. In the event that the Compliance Costs exceed the Compliance Cost Cap, Buyer shall either reimburse Seller for such Compliance Costs that exceed the Compliance Cost Cap, or excuse Seller from performing those obligations that cause the Compliance Costs to exceed the Compliance Cost Cap. If Buyer agrees to reimburse Seller, Seller shall perform the additional compliance actions and shall include the Compliance Costs in the monthly invoice.
  - (c) Notice. Seller shall notify Buyer within sixty (60) calendar days after the change in Applicable Law if it anticipates that its Compliance Costs will exceed the Compliance Cost Cap and provide an estimate of the Compliance Costs. Buyer shall notify Seller within ninety (90) calendar days of receipt of the notice whether Buyer (i) agrees to reimburse Seller for the additional costs, or (ii) waives Seller's performance of such obligations.

#### ARTICLE 4: BILLING, PAYMENT, AND CERTIFICATION

##### 4.1 Billing and Payment.

- (a) Monthly Invoices. Seller shall provide to Buyer no sooner than the tenth (10th) calendar day of each month an invoice for the Product for the prior month, and for other amounts due to or from Seller hereunder. Each invoice shall be in a format reasonably specified by Buyer shall include data as is reasonably necessary to verify each element of the calculation of the Monthly Payment and other charges or credits as set forth in this Agreement.
  - (i) The "Monthly Payment" for each month will be an amount equal to the summation of the following:
    - (A) the product of the Contract Price, multiplied by the Storage Contract Capacity for that month, multiplied by the Availability Adjustment, multiplied by the Round Trip Efficiency Factor; plus
    - (B) credits for any amounts owed from Seller to Buyer under section 5.7; plus
    - (C) any other amounts netted against the monthly invoice under Section 4.1(c).
  - (ii) The Invoice shall include:

- (A) CAISO metering and transaction data sufficient to document and verify the amounts of Charging Energy and Discharging Energy as measured by the Facility Meter;
  - (B) the amount of Replacement RA delivered to Buyer (if any);
  - (C) any adjustments to the Monthly Payment as set forth in Sections 3.2 and 3.6; and
  - (D) the calculation of any other amounts due to or from Seller hereunder.
- (iii) Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.
- (b) Payment. Unless otherwise specified under this Agreement, all payments shall be due and payable on or before the thirtieth (30th) calendar day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Any amount not paid by when due shall be considered late and the Party owing the payment shall pay a Late Payment Fee equal to a daily rate of five dollars and fifty cents (\$5.50) per one hundred thousand dollars (\$100,000) on the unpaid balance for a maximum period of ninety (90) days after the due date of the payment ("Late Payment Fee") shall be added to the outstanding amount.
- (c) Netting. Except as otherwise set forth in this Agreement, the Parties shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement or otherwise arising out of this Agreement, including any damages set forth in this Agreement, CAISO Charges Invoices, Late Payment Fees, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.
- (d) City Vendor Requirements. Notwithstanding any other provision of this Agreement, Buyer shall not be deemed to be in default of this Agreement and no Late Payment Fee shall be assessed if an invoice under this Agreement cannot be processed by Buyer due to Seller's failure to comply with all applicable City requirements for City 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, insurance requirements, registration in the City's vendor payment processing system, or any other current or future City 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.
- (e) 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 Agreement or adjust any invoice for any arithmetic, metering, 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 Fee from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Buyer from subsequent payments. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 4.1(d) 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 delivery of Product occurred, the right to payment for such delivery is waived.

- (f) CAISO Adjustments. If the CAISO makes any adjustment to any CAISO meter data or applicable market prices for a given time period, the Parties shall share information necessary to revise the monthly invoices pursuant to Section 4.1 and Seller agrees that it shall submit revised monthly invoices 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 Seller receives such binding adjustment to the meter data.

#### **4.2 Designated Fund/Limited Obligations.**

- (a) Auto-Appropriating Designated Fund. Buyer's payment obligations under this 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 obligations under this Agreement. Buyer agrees to establish CleanPowerSF rates and charges that are sufficient to maintain revenues necessary to pay its obligations under this Agreement 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 upon request during the Delivery Term.
- (b) Limited Obligations. Buyer's payment obligations are special limited obligations of the Buyer payable solely from the revenues of CleanPowerSF. Buyer's payment obligations under this Agreement are not a charge upon the revenues or general fund of the SFPUC or the City and County of San Francisco or upon any non-CleanPowerSF moneys or other property of the SFPUC or the City.

#### **4.3 Guaranteed Maximum Costs.**

- (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 Buyer are not authorized to request, and Buyer is not required to reimburse Seller for, commodities or services beyond the agreed upon Agreement scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of Buyer are not authorized to offer or promise, nor is 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) Biennial Budget Process. For each City biennial budget cycle during the term of this Agreement, Buyer agrees to take all necessary action to include the Buyer's payment obligations under this Agreement in its budget submitted to the Board of Supervisors for that budget cycle.

### **ARTICLE 5:**

#### **FACILITY DEVELOPMENT, OPERATION, AND MAINTENANCE**

- 5.1 General Obligations.** Seller covenants that at its sole cost and expense, unless otherwise specifically stated in this Agreement, it shall:

- (a) Records. Keep complete and accurate design, operating, and other records and all other data for the purposes of proper administration of this Agreement, including such records as may be required by any Governmental Authority or Prudent Operating Practice;
- (b) Further Development Information. Provide to Buyer such other information regarding the permitting, engineering, testing, construction or operations of the Facility as Buyer may from time to time reasonably request, subject to licensing or other restrictions of Seller or a third party with respect to confidentiality, disclosure or use; provided, nothing herein shall limit Buyer's right to obtain such information upon agreeing to confidentiality or signing a confidentiality agreement with regard to such information;
- (c) Insurance. Obtain and maintain the policies of insurance in the amounts and with the coverages as set forth on Exhibit D;
- (d) Vendor Certification. Obtain, renew, and maintain, all City required vendor certifications and requirements during the Term of this Agreement;
- (e) Construction. Design, develop, finance, and construct the Facility;
- (f) Prevailing Wages. Pay any person performing labor in the construction of the Facility not less than the prevailing wage rate for the county in which the Facility will be located, as determined by the California Department of Industrial Relations. Seller shall require in any contract related to the construction of the Facility the payment of the prevailing wage rate for the work to be performed. Seller shall provide to Buyer upon request, certified payroll reports with respect to all persons performing labor in the construction of the Facility;
- (g) Forced Labor. Not knowingly utilize equipment or resources for the construction, operation or maintenance of the Facility that rely on work or services exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily ("Forced Labor"). Consistent with the business advisory jointly issued by the U.S. Departments of State, Treasury, Commerce and Homeland Security on July 1, 2020, equipment or resources sourced from the Xinjiang region of China are presumed to involve Forced Labor.
- (h) Interconnection and Transmission. Take all necessary actions, including arranging and paying for any and all necessary Electric System Upgrades, obtaining all required regulatory approvals, and executing and maintaining in full force and effect all necessary agreements to allow Seller to interconnect the Facility to the CAISO grid, maintain interconnection capacity and FCDS for the Facility that is no less than the Storage Contract Capacity throughout the Delivery Term, and deliver the Product to the Delivery Point in accordance with this Agreement. Seller shall comply with all applicable requirements, rules, contractual obligations, and Prudent Operating Practice to maintain any Interconnection Facilities and to cause delivery of the Product to Buyer;
- (i) Environmental Costs. Be solely responsible for all Environmental Costs;
- (j) Compliance with Laws. Seek, obtain, maintain, and comply with all Applicable Laws, Permits, certificates, agreements, or other authorizations or approvals, which are required for the ownership, construction, operation, and maintenance of the Facility and the delivery and sale of the Product pursuant to this Agreement.

## 5.2 Facility Construction and Milestones.

- (a) Time is of the Essence. The Parties agree that time is of the essence in the performance of this Agreement. Seller shall diligently pursue to completion each of the following Milestones:
  - (i) Site control: [\_\_\_\_\_];

- (ii) Final and non-appealable discretionary authorizations, Permits, and approvals: [\_\_\_\_\_];
  - (iii) Phase I and II Interconnection study results: [\_\_\_\_\_];
  - (iv) Executed Interconnection Agreement: [\_\_\_\_\_];
  - (v) Financial Close: [\_\_\_\_\_];
  - (vi) Construction Start: [\_\_\_\_\_] (“Guaranteed Construction Start Date”);
  - (vii) Mechanical Completion: [\_\_\_\_\_] ;
  - (viii) Initial Synchronization: [\_\_\_\_\_];
  - (ix) Network Upgrades completed (evidenced by a permission to parallel letter from the Transmission Provider): [\_\_\_\_\_]; and,
  - (x) Commercial Operation: [\_\_\_\_\_] (“Guaranteed Commercial Operation Date”).
- (b) Progress Report. Seller shall provide to Buyer a Progress Report concerning the progress towards construction and completion of the each of the Milestones (including whether Seller has met or is on target to meet each of the Milestones), which shall be substantially similar in form and substance to that attached as Exhibit F, and include such additional information as reasonably required by Buyer. Commencing on the Effective Date, Seller shall provide Progress Reports every three (3) month prior to the Guaranteed Construction Start Date and monthly Progress Reports thereafter. Seller agrees to meetings between representatives of Buyer and Seller to review such Progress Reports and discuss Seller’s construction progress, as Buyer may request from time to time.
- (c) Certification of Completion of Milestones. Within five (5) Business Days of the completion of each Milestone, Seller shall provide a certification to Buyer (along with any relevant supporting documentation), stating Seller’s achievement or satisfaction of each such Milestone.
- (d) Notice of Failure to Achieve Milestone. Upon becoming aware that it shall, or is reasonably likely to, fail to achieve any Milestone by the required date for any reason, Seller shall notify Buyer in writing as soon as is reasonably practical but no later than thirty (30) days prior to the Milestone date. If the delay is caused by a Force Majeure event and thirty (30) days’ notice is not feasible, Seller shall notify Buyer in writing as soon as reasonably practical. The notice shall provide information regarding the cause of the delay, provide a revised estimated date for achievement of the Milestone(s), and describe Seller’s plan for meeting the Milestone(s) in sufficient detail to enable Buyer to reasonably assess the sufficiency of the plan to remedy the delay and achieve the Milestone. Seller’s notice shall also explain any impact such delay may or shall have on any other Milestone, and measures to be taken to mitigate such impact. Subject to the provisions of Section 5.3, Seller shall not be considered in default of this Agreement for failure to meet a Milestone if Seller complies with its obligations under this Section 5.2(d).

### **5.3 Guaranteed Construction Start Date and Guaranteed Commercial Operation Date.**

- (a) Construction Start.
- (i) “Construction Start” will occur when Seller has (i) obtained all necessary approvals, Permits, and authorizations for the construction of the Facility, (ii) executed an EPC contract and engaged all necessary contractors, (iii) ordered all essential equipment and supplies that are necessary to commence physical construction of the Facility and to proceed to completion without a foreseeable interruption of material duration, (iv) issued a final Notice to Proceed to the EPC Contractor, and (v) commenced mobilization at the Site by Seller or its agents,



including site preparation at a sufficient level to reasonably demonstrate that Seller has commenced preparations for construction of the Facility, and (vi) delivered to Buyer the Construction Start Certification substantially in the form set forth in Exhibit E. Seller shall cause the Construction Start to occur no later than the Guaranteed Construction Start Date.

- (ii) Seller may extend the Guaranteed Construction Start Date by paying Construction Start Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Construction Start Date, not to exceed a total of one hundred twenty (120) days. At least ten (10) Business Days prior to the Guaranteed Construction Start Date, Seller shall provide notice and payment to Buyer of the Construction Start Delay Damages for the number of days of extension to the Guaranteed Construction Start Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions to such date resulting from Seller's payment of Construction Delay Damages, but as may be extended pursuant to a Permitted Extension), Buyer shall refund to Seller all Construction Start Delay Damages.

(b) Commercial Operation.

- (i) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date.
- (ii) Seller may extend the Guaranteed Commercial Operation Date by paying COD Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Commercial Operation Date, not to exceed a total of sixty (60) days. At least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall provide notice and payment to Buyer of the COD Delay Damages for the number of days of extension to the Guaranteed Commercial Operation Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions to such date resulting from Seller's payment of for delays in the Guaranteed Commercial Operation Date, but as may be extended pursuant to a Permitted Extension), then Buyer shall refund to Seller all COD Delay Damages.

(c) Permitted Extensions. The following events constitute "Permitted Extensions":

- (i) A Force Majeure event occurs and Seller works diligently to resolve the effect of the Force Majeure event;
- (ii) Seller has used commercially reasonable efforts to obtain Facility interconnection but the Electric System Upgrades are not complete and ready for the Facility to connect and deliver and sell Product at the Delivery Point by the Guaranteed Commercial Operation Date; or
- (iii) Buyer has not made all necessary arrangements to receive the Discharging Energy at the Delivery Point by the Guaranteed Commercial Operation Date.

- (d) Notice. If Seller claims a Permitted Extension, Seller shall provide Buyer with sixty (60) days' notice prior to the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date, which notice shall clearly identify the grounds for the requested extensions and include information necessary for Buyer to verify the length of and grounds for the extension. If the delay is due to Force Majeure and sixty (60) days' notice is impracticable or impossible, Seller shall provide notice as soon as possible after the occurrence of the Force Majeure event.

(e) Maximum Delay.

- (i) The combined Permitted Extensions under this Section 5.3 (other than the extensions under Section 5.3(c)(iii)) for the Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date combined shall not exceed one hundred twenty (120) days in the aggregate.
  - (ii) The cumulative extensions of the Guaranteed Construction Start Date for Permitted Extensions and by payment of Construction Start Delay Damages shall not exceed one hundred and eighty (180) days.
  - (iii) The cumulative extensions of the Guaranteed Commercial Operation Date for Permitted Extensions (other than the extensions under Section 5.3(c)(iii)) and by payment of COD Delay Damages shall not exceed one hundred and eighty (180) days.
- (f) No Limitation of Damages. The Parties agree that Buyer's receipt of the Construction Start Delay Damages or COD Delay Damages shall (i) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Article 8, and (ii) not limit Buyer's right to receive a Termination Payment or Damage Payment, as applicable, upon exercise of Buyer's termination right pursuant to Section 5.3(h) or Article 8.
- (g) Development Assurance. If Seller fails to timely pay any Construction Start Delay Damages or COD Delay Damages, Buyer may draw upon the Development Assurance to satisfy Seller's payment obligations under this Section 5.3.
- (h) Termination of Agreement. Buyer may terminate this Agreement by written notice to Seller if:
- (i) Seller fails to achieve Construction Start on or before the Guaranteed Construction Start Date and the combined extensions to the Guaranteed Construction Start Date exceed the limits under Sections 5.3(a)(ii) and 5.3(e); or
  - (ii) Seller fails to achieve COD on or before the Guaranteed COD Date and the combined extensions to the Guaranteed COD Date exceed the limits under Sections 5.3(b)(ii) and 5.3(e); or
  - (iii) Seller fails to pay, or discontinues paying, any or all of the Construction Start Delay Damages or Commercial Operation Delay Damages when due and Buyer cannot obtain such amounts by drawing upon the Development Assurance and/or setting off against any amounts owed to Seller by Buyer under this Agreement.
- (i) Additional Extension. Notwithstanding the foregoing, the Parties may mutually agree in writing to an extension of the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date of up to ninety (90) days beyond the maximum extensions set forth in Section 5.3(e) with payment of Construction Start Delay Damages or COD Delay Damages, as applicable, by Seller. Buyer may not terminate this Agreement for failure to achieve the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date during the mutually agreed upon extension period so long as Seller continues to pay the Construction Start Delay Damages or COD Delay Damages.
- (j) Failure to Reach Guaranteed Installed Capacity. If, at Commercial Operation, the Installed Capacity is less than one hundred percent (100%) of the Guaranteed Installed Capacity, within ninety (90) days after the Commercial Operation Date, Seller shall take all necessary actions to cause the Installed Capacity to equal to (but not exceed) the Guaranteed Installed Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as Exhibit G-2 specifying the Installed Capacity. If Seller fails to construct the Guaranteed Installed Capacity by such date, Seller shall pay damages to Buyer, in an amount equal to Two Hundred Fifty Thousand Dollars (\$250,000) for each MW that the Guaranteed Installed Capacity exceeds the Installed Capacity ("Capacity Damages"), and the Guaranteed Installed Capacity and other applicable portions of the Agreement shall be

adjusted accordingly. Capacity Damages shall not be offset or reduced by the payment of Development Assurance, Performance Assurance, Construction Start Delay Damages, COD Delay Damages, or any other form of liquidated damages under this Agreement.

#### **5.4 Storage Capacity Tests.**

- (a) Frequency. Seller shall schedule and complete a Storage Capacity Test prior to the Commercial Operation Date and shall perform annual Storage Capacity Tests in accordance with Exhibit K. Seller and Buyer shall have the right to run additional Storage Capacity Tests in accordance with Exhibit K and Seller shall, at times and for durations reasonably agreed to by Buyer, conduct necessary testing to ensure the Facility is functioning properly and the Facility is able to respond to Dispatch Notices.
- (b) Witnesses. Buyer shall have the right to send one or more representative(s) to witness all Storage Capacity Tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representative(s) witnessing any Storage Capacity Test.
- (c) Buyer and Seller Tests. Any testing of the Facility requested by Buyer after the Commercial Operation Date and all required annual tests pursuant to Exhibit K shall be deemed Buyer-instructed dispatches of the Facility (“Buyer Dispatched Test”). Any test of the Facility that is not a Buyer Dispatched Test including pre-COD SCTs, SCTs required to obtain or maintain CAISO Certification, and re-tests pursuant to Exhibit K shall be deemed a “Seller Initiated Test”.
- (d) Notice. Except as otherwise set forth in Exhibit K, for any Seller Initiated Test Seller shall provide Buyer at least twenty-four (24) hours advance notice (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practices). The timing and duration of any Seller Initial Test shall be subject to Buyer’s reasonable approval.
- (e) Dispatch Notices. No Dispatch Notices shall be issued during any Seller Initiated Test or Buyer Dispatched Test except as reasonably requested by Seller or Buyer to implement the applicable test.
- (f) Testing Report. Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit K. If the actual capacity or efficiency rate determined pursuant to a Storage Capacity Test varies from the then current Storage Contract Capacity or Efficiency Rate, as applicable, then the actual capacity and/or efficiency rate shall become the new Storage Contract Capacity and/or Efficiency Rate at the beginning of the day following the completion of the Storage Capacity Test.
- (g) Testing Costs and Revenues.
  - (i) Buyer shall be responsible for all Charging Energy and shall be entitled to all CAISO revenues associated with a Buyer Dispatched Test.
  - (ii) Seller shall be responsible for the cost of all Charging Energy for, and shall be entitled to all CAISO revenues associated with, a Seller Initiated Test. In the month following Buyer’s receipt of such CAISO revenues, costs, and charges, Buyer shall credit or invoice Seller for all applicable CAISO revenues, costs, and charges received by Buyer and associated with the Seller Initiated Test in the CAISO Charges Invoice.
  - (iii) Except as set forth in Section 5.4(b), all other costs of any testing of the Facility shall be borne by Seller.

#### **5.5 Operation and Maintenance.**

- (a) Operation and Maintenance. Seller shall be solely responsible for the ownership, operation, maintenance, and repair of the Facility in accordance with this Agreement, all Applicable Laws, the requirements of the CAISO, NERC and WECC, all applicable

contractual obligations and Permits, and in accordance with Prudent Operating Practice, and shall be solely responsible for all associated costs and expenses.

- (i) In the event Seller requires any data or information from Buyer in order to comply with any Applicable Law, including the requirements of CAISO, NERC and WECC, relating to the Facility, then Seller shall request in writing such data from Buyer no less than forty-five (45) days prior to Seller's requested date of Buyer's response; provided that if Seller has less than forty-five (45) calendar days prior notice of the need for such data, Seller shall request in writing such data from Buyer as soon as reasonably practicable. Buyer shall make a good faith effort to provide such data and/or information within the timeframe specified in writing by Seller or as soon thereafter as reasonably practicable.
- (ii) Upon Buyer's request, Seller shall submit the Facility for additional CAISO Certification so that the Facility may provide Ancillary Services that the Facility is, at the relevant time, capable of providing. At Buyer's request, the Parties shall cooperate in good faith to agree on necessary alterations to the Facility equipment or Facility operations in order to allow the Facility to provide additional Ancillary Services.
- (iii) Seller shall maintain a daily operations log for the Facility which shall include but not be limited to information on Energy charging and discharging, Station Use, availability, outages, changes in operating status, inspections, and any other significant events related to the operation of the Facility. Information maintained pursuant to this Section 5.5(a)(iii) shall be provided to Buyer within fifteen (15) days of Buyer's request.
- (iv) Seller shall maintain accurate records of all Storage Capacity Tests.
- (v) Seller shall maintain and make available to Buyer records, including logbooks, demonstrating that the Facility is operated in accordance with Prudent Operating Practices. Seller shall comply with all reporting requirements and permit on-site audits, investigations, tests and inspections permitted or required under any Prudent Operating Practice.
- (b) Maintenance of Health and Safety. Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair and replacement of the Facility, including maintenance of a safety manual at the Facility addressing all hazard and safety requirements and operating procedures. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt, reasonable action to prevent such damage or injury and shall give Buyer's emergency contact identified in the Cover Sheet notice of such condition. Such action may include disconnecting and removing all or a portion of the Facility, or suspending the supply of Discharging Energy to the Delivery Point.
- (c) Start-ups and Shut-downs. Seller shall coordinate all Facility start-ups and shut-downs, in whole or in part, with Buyer in accordance with CAISO scheduling protocols and the reasonable protocols established by Buyer that are not inconsistent with the CAISO Tariff and CAISO procedures.
- (d) Metering.
  - (i) All Charging and Discharging Energy must be delivered through the Facility Meter, which shall be subject to adjustment in accordance with applicable CAISO meter requirements and Prudent Operating Practices, including to account for Electrical Losses. Seller shall separately meter all Station Uses. Each meter shall be kept under seal, such seals to be broken only when the Facility Meter is to be tested,

adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable.

- (ii) The meter data will account for transformer losses and will be programmed to reflect Electrical Losses to the Delivery Point, consistent with CAISO requirements. Seller shall bear all costs relating to all metering equipment installed to accommodate the Facility. Seller shall grant Buyer (and Buyer's Scheduling Coordinator) read-only rights to retrieve all data, including the meter reads, via website and direct download and directly from the CAISO meter(s) at the Facility through both (A) physical access and (B) remote electronic read-only access. Seller shall maintain an updated record of programmed meter parameters (such as channel configuration and other relevant settings) that is accessible and reasonably acceptable to Buyer. In addition, Seller shall provide all meter data to Buyer in a form reasonably acceptable to Buyer, and consents to Buyer obtaining from CAISO the CAISO meter data directly relating to the Facility and all inspection, testing and calibration data and reports.
- (iii) If Seller has reason to believe there may be a Facility Meter malfunction, or upon Buyer's reasonable request, Seller shall test the Facility Meter at its sole cost and expense. The tests shall be conducted by independent third parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a Facility Meter is inaccurate, Seller shall promptly repair or replace the meter and submit corrected meter data in compliance with CAISO requirements. Seller shall be responsible for and shall reimburse Buyer for all CAISO costs, penalties, and charges related to the inaccuracy of the Facility Meter.
- (iv) Upon Buyer's request, Seller shall take all commercially reasonable actions to become, as specified by Buyer, either a CAISO Metered Entity or a Scheduling Coordinator Metered Entity (as those terms are defined in the CAISO Tariff).
- (e) Shared Facilities. The Parties acknowledged and agree that the Facility may share the Interconnection Facilities and other assets, including the Interconnection Agreement and transmission service agreements. Seller agrees that such joint ownership or arrangements shall permit Seller to perform or satisfy, and shall not limit, Seller's obligations under this Agreement, including Buyer's ability to discharge the Facility up to the interconnection capacity limit for the Facility and to charge the Facility up to the Storage Contract Capacity, and providing for separate metering of the Facility. At the request of Buyer, the Facility shall have an unique Scheduling Coordinator ID as that term is defined in the CAISO Tariff.
- (f) Refurbishment of the Facility. During the Term, Seller may not refurbish the Facility, alter components of the Facility, or replace major components of the Facility where such action results in a total increased capacity higher than the Guaranteed Annual Capacity, without the prior written consent of Buyer. Buyer shall have the right, in its sole discretion, to accept or decline to permit any such refurbishment or alteration that may increase capacity of the Facility above the Guaranteed Annual Capacity. Nothing in this Section 5.5(f) is intended to limit Seller's ability to refurbish, repair, maintain, or replace any portion of the Facility where such actions will not increase the Facility's total capacity above the Guaranteed Annual Capacity.

## **5.6 Scheduling.**

- (a) Scheduling Coordinator.
  - (i) Upon Initial Synchronization, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for the delivery and the receipt of Charging Energy,

Discharging Energy, and the Product at the Delivery Point. At least thirty (30) days prior to Initial Synchronization, (A) Seller shall take all actions and execute and deliver to Buyer and the CAISO all documents necessary to authorize or designate Buyer (or Buyer's designee) as the Scheduling Coordinator for the Facility effective as of Initial Synchronization, and (B) Buyer shall, and shall cause its designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Buyer or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization. On and after Initial Synchronization, Seller shall not authorize or designate any other party to act as the Facility's Scheduling Coordinator, nor shall Seller perform for its own benefit the duties of Scheduling Coordinator, and Seller shall not revoke Buyer's authorization to act as the Facility's Scheduling Coordinator unless agreed to or directed by Buyer. Buyer or Buyer's designee shall submit Schedules to the CAISO in accordance with this Agreement and the CAISO Tariff and protocols.

- (ii) At any time during the Term of this Agreement, Buyer may elect to require Seller or Seller's designee to become the Scheduling Coordinator for the Facility. Buyer shall provide one hundred twenty (120) days prior notice to Seller and the Parties shall promptly enter into good faith negotiations on necessary amendments to this Agreement to reflect the transfer of Scheduling Coordinator responsibilities to Seller. The negotiations shall be limited to necessary amendments that are solely related to the Scheduling Coordinator services for the Facility.
- (iii) Buyer shall provide Seller with access to a web-based system through which Seller shall submit to Buyer and the CAISO all notices and updates required under the CAISO Tariff regarding the Facility's status, including, but not limited to, all outage requests, forced outages, forced outage reports, clearance requests, or must offer waiver forms. Seller shall cooperate with Buyer to provide such notices and updates. If the web-based system is not available, Seller shall promptly submit such information to Buyer and the CAISO both telephonically and by electronic mail to the personnel designated to receive such information.
- (iv) At least thirty (30) days prior to the expiration of the Delivery Term or the date that Seller assumes SC services under Section 5.6(a)(ii), or as soon as reasonably practicable upon an early termination of this Agreement, the Parties will take all actions necessary to terminate the designation of Buyer as Scheduling Coordinator for the Facility as of 11:59 p.m. on the designated expiration, termination, or transfer date.
- (v) Prior to the COD, the Parties shall cooperate to develop protocols as necessary to implement scheduling and settlements procedures consistent with this Agreement and the CAISO Tariff.

(b) CAISO Costs and Revenues.

- (i) Except as otherwise set forth in this Section 5.6(b), Buyer (as Scheduling Coordinator for the Facility) shall be responsible for CAISO costs and shall be entitled to all CAISO revenues or other credits related to the Product Scheduled or delivered from the Delivery Point.
- (i) Seller shall be responsible for and reimburse Buyer for all CAISO costs, charges, and penalties which are related to (A) the unavailability of the Facility, (B) Seller's default, breach, or other failure to perform as required by this Agreement, (C) any failure by Seller to abide by the CAISO Tariff, any requirements imposed on it as Facility owner, or the outage notification requirements set forth in this Agreement (except to the extent such non-compliance is caused by Buyer's failure to perform

its duties as Scheduling Coordinator for the Facility), (D) any failure by Seller to comply with a Curtailment Order, CAISO Dispatch, or Dispatch Instruction, (E) Facility Meter inaccuracies, (F) penalties related to non-performance with respect to Ancillary Services and Residual Unit Commitment (as defined in the CAISO Tariff) awards due to conditions within Seller's control, and (G) costs associated with deviations from the amounts included in a Discharging Notice and the actual RTM Discharging Energy. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be Seller's responsibility.

- (ii) Seller shall be entitled to any Availability Incentive Payments (as defined in the CAISO Tariff) and shall be responsible for any Non-Availability Charges (as defined in the CAISO Tariff).
  - (iii) Each Party shall use commercially reasonable efforts to cooperate with the other Party to allow that Party to comply with any obligations, and minimize any potential liability, it may have under the CAISO Tariff in relation to Product under this Agreement.
- (c) CAISO Settlements. Buyer (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties ("CAISO Charges Invoice") for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer shall review, validate, and if requested by Seller under paragraph (e) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer's existing settlement processes for charges that are Buyer's responsibilities. Subject to Seller's right to dispute and to have Buyer pursue the dispute of any such invoices, Seller shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller's receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for such CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.
- (d) CAISO Charges Disputes. Seller may require Buyer (as the Facility's SC) to dispute CAISO settlements related to any costs or revenues for which Seller is responsible under this Agreement. Seller agrees to pay Buyer's costs and expenses (including reasonable attorneys' fees) associated with CAISO charges that Seller has directed Buyer to dispute.
- (e) Master File. Seller shall provide the data to the CAISO (and to Buyer) that is required for the CAISO's Master File (or successor data systems) for the Facility consistent with this Agreement. Neither Party shall change such data without the other Party's prior written consent.
- (f) Seller Equipment for Operating Instruction Communications. Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement such protocols and practices, as necessary to respond to and follow operating instructions from the CAISO and Buyer's SC.

## 5.7 Energy Management.

- (a) Charging Generally. Upon receipt of a Charging Notice, Seller shall take any and all action necessary to deliver the Charging Energy to the Facility in order to deliver the Storage Product in accordance with the terms of this Agreement. Except as otherwise expressly set forth in this Agreement, Buyer shall be responsible for paying all CAISO costs and charges associated with Charging Energy.
- (b) Charging and Discharging Notices. Buyer shall have the right to charge and discharge the Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by issuing Charging and Discharging Notices to Seller, subject to the requirements and limitations set forth in this Agreement, including the Operating Parameters. Each Charging or Discharging Notice issued in accordance with this Agreement will be effective unless and until Buyer's SC or CAISO modifies such Charging or Discharging Notice by providing Seller with an updated Charging or Discharging Notice, as the case may be.
- (c) No Unauthorized Charging. Seller shall not charge the Facility during the Delivery Term other than pursuant to a valid Charging Notice. Notwithstanding the foregoing, Seller may adjust a Charging Notice to the extent necessary to comply with the Operating Parameters, in connection with a Storage Capacity Test, or pursuant to a notice from the CAISO, Transmission Provider, or any other applicable Governmental Authority. Seller shall comply with all Charging Notices, subject to the requirements and limitations set forth in this Agreement. If, during the Delivery Term, Seller charges the Facility (i) to a Stored Energy Level greater than the Stored Energy Level provided for in a Charging Notice, or (ii) in violation of the first sentence of this Section 5.7(c), then (i) Seller shall be responsible for all Energy costs associated with such charging of the Facility, (ii) Buyer shall not be required to pay for such Energy, and (iii) Buyer shall be entitled to discharge such Energy and entitled to all of the benefits (including Product) associated with such discharge.
- (d) No Unauthorized Discharging. Seller shall not discharge the Facility during the Delivery Term other than pursuant to a valid Discharging Notice. Notwithstanding the foregoing, Seller may adjust a Discharging Notice to the extent necessary to comply with the Operating Parameters, in connection with a Storage Capacity Test, or pursuant to a notice from the CAISO, Transmission Provider, or any other Governmental Authority.
- (e) Unauthorized Charges and Discharges. Any charges, discharges or use of the Facility that is not in accordance with this Agreement shall be a breach by Seller and Seller shall hold Buyer harmless from, and indemnify Buyer against, all actual costs or losses associated with, and shall be responsible to Buyer for any damages arising from, such unauthorized use. If Seller fails to implement procedures reasonably acceptable to Buyer to prevent any further occurrences of the same, then the failure to implement such procedures shall be an Event of Default under Article 8.
- (f) CAISO Dispatches. During the Delivery Term, CAISO Dispatches shall have priority over any Charging Notice or Discharging Notice issued by Buyer or Buyer's SC, and Seller shall comply with any CAISO Dispatch. If the Storage Facility deviates from a CAISO Dispatch, Seller shall be responsible for all CAISO charges and penalties resulting from such deviation (in addition to any Buyer remedy related to overcharging of the Facility as set forth in Section 5.7(c)).
- (g) Pre-Commercial Operation Date Period. Prior to the Commercial Operation Date, Buyer shall have no right to charge or discharge the Facility and Seller shall only charge and discharge the Facility in connection with installation, commissioning and testing of the Facility.
- (h) Curtailments. Seller shall reduce delivery amounts as directed by the Reliability Coordinator, CAISO, Transmission Provider, or any successor thereto pursuant to a Curtailment Order. Notwithstanding anything in this Agreement to the contrary, during



any Settlement Interval, Curtailment Orders applicable to such Settlement Interval shall have priority over any Dispatch Notices applicable to such Settlement Interval, and Seller shall not be in violation of this Section 5.7 or any Dispatch Notice if and to the extent the deviation is caused by Seller's compliance with any Curtailment Order or other instruction or direction from a Governmental Authority or the Transmission Provider. Buyer shall have the right, but not the obligation, to provide Seller with updated Dispatch Notices during any Curtailment Order consistent with the Operating Parameters.

## **5.8 Capacity Availability Notice.**

- (a) Monthly Forecast. No less than thirty (30) days before the beginning of Commercial Operation, and thereafter ten (10) Business Days before the beginning of each month during the Delivery Term, Seller shall provide to Buyer and Buyer's SC a non-binding forecast of the hourly expected Available Capacity, for each day of the following month ("Monthly Forecast").
- (b) Availability Notice. During the Delivery Term, no later than two (2) Business Days before each schedule day for the Day-Ahead Market in accordance with WECC scheduling practices, Seller shall provide Buyer and Buyer's SC an hourly schedule of the Available Capacity that the Facility is expected to have for each hour of the day ("Availability Notice"). Seller shall provide Availability Notices (including updated Availability Notices) in a form as reasonably requested by Buyer, by electronic mail to Buyer and Buyer's SC.
- (c) Updates. Seller shall notify Buyer and the SC (if applicable) immediately with an updated Monthly Forecast and Availability Notice, as applicable, if the Available Capacity of the Facility changes or is expected to change after Buyer's receipt of a Monthly Forecast or Availability Notice. Seller shall accommodate Buyer's reasonable requests for changes in the time of delivery of Availability Notices.
- (d) Daily Operation. Upon Buyer's request, Seller shall, on each day immediately after each operating day, provide Buyer an operating report for the Facility with the actual available capacity for each hour of the operating day.

## **5.9 Outages.**

- (a) Planned Outages.
  - (i) No later than January 15, April 15, July 15, and October 15 of each Contract Year, and at least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall submit to Buyer the schedule of proposed Planned Outages ("Outage Schedule") for the following twelve (12) month period in a form reasonably specified by Buyer. Within twenty (20) Business Days after its receipt of an Outage Schedule, Buyer shall give notice to Seller of any request for changes to the Outage Schedule, and Seller shall, consistent with Prudent Operating Practices, accommodate Buyer's requests regarding the timing of any Planned Outage. Seller shall deliver to Buyer the final Outage Schedule no later than five (5) days after receiving Buyer's comments.
  - (ii) Seller shall not schedule Planned Outages during the period of reliability accounting, initially the period between June 1st and October 31 of each year; however, such period shall be subject to changes at Buyer's discretion in order to conform to the CAISO's Availability Assessment procedures. In the event that Seller has a previously Planned Outage that becomes coincident with a System Emergency, Seller shall make all reasonable efforts to reschedule such Planned Outage.
  - (iii) If replacement capacity is required by the CAISO for the period of any Planned Outage, Seller shall provide the required replacement capacity in the amount and for the duration specified by the CAISO pursuant to the CAISO Tariff.

- (iv) If reasonably required in accordance with Prudent Operating Practices, Seller shall have the right, on no less than sixty (60) days advance notice to Buyer, to propose changes to the Outage Schedule. Buyer may provide comments no later than ten (10) days after receiving Seller's notice of proposed changes to the Outage Schedule and Buyer shall permit any changes if doing so would not have a material adverse impact on Buyer and Seller agrees to reimburse Buyer for any costs and charges associated with such changes.
- (b) Forced Outages. Seller shall notify Buyer by telephoning Buyer's Scheduling Coordinator as soon as reasonably possible but no later than ten (10) minutes following the occurrence of a Forced Outage, or if Seller has knowledge that a Forced Outage will occur, within twenty (20) minutes of determining that such Forced Outage will occur. Seller shall relay outage information to Buyer as required by the CAISO Tariff within twenty (20) minutes of the Forced Outage. Seller shall communicate to Buyer the estimated time of return of the Facility as soon as practical. Seller shall promptly prepare and provide to Buyer, all reports of Forced Outages or Planned Outages that Buyer may reasonably require for the purpose of enabling Buyer to comply with CAISO requirements or any Applicable Laws. Seller shall also report all Forced Outages or Planned Outages in the report specified in Section 5.8(d).

## **ARTICLE 6: DEVELOPMENT AND PERFORMANCE ASSURANCE**

### **6.1 Grant of Security Interests/Remedies.**

- (a) First Priority Security Interest. To secure its obligations under this Agreement hereunder, Seller hereby grants to Buyer, as the secured party, a first priority security interest in, and lien on (and right of setoff against), and assignment of, all such Development Assurance and Performance Assurance posted with Buyer 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, Buyer. Within thirty (30) calendar days of the delivery of the Development Assurance or Performance Assurance, as applicable, Seller agrees to take such action as Buyer reasonably requires in order to perfect a first-priority security interest in, and lien on (and right of setoff against), such Development Assurance or Performance Assurance and any and all proceeds resulting therefrom or from the liquidation thereof, respectively.
- (b) Rights and Remedies. Upon or any time after the occurrence and during the continuation of an Event of Default by Seller or an Early Termination Date or the occurrence of any event under this Agreement where Buyer is entitled to draw upon the Development Assurance or Performance Assurance, Buyer may do any one or more of the following:
  - (i) exercise any of the rights and remedies of a secured party with respect to all Development Assurance or Performance Assurance, as applicable, including any such rights and remedies under Applicable Law;
  - (ii) draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Assurance or Performance Assurance; and
  - (iii) liquidate all Development Assurance or Performance Assurance, as applicable, then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.
- (c) Application of Proceeds. Buyer shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller's obligations under the Agreement (Seller remaining liable for any amounts owing to Buyer after such application), subject to

the Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

## **6.2 Development Assurance and Performance Assurance.**

### **(a) Development Assurance.**

- (i) Seller shall post Development Assurance the amount of ninety dollars per kilowatt (\$90/kW) multiplied by the Guaranteed Installed Capacity in the form of cash or a Letter of Credit within ten (10) calendar days following the Execution Date and maintain the Development Assurance in full force and effect until such time as Seller posts the Performance Assurance pursuant to Section 6.2(b)(i) below with Buyer. Seller shall replenish the Development Assurance within five (5) Business Days of any draw down of any portion of the Development Assurance for any reason permitted under this Agreement other than to satisfy a Damage Payment.
- (ii) Buyer shall be entitled to draw upon the Development Assurance posted by Seller for any reason permitted under this Agreement. Buyer shall also be entitled to draw upon the Development Assurance for any Damage Payment arising upon Buyer's declaration of an Early Termination Date prior to the Commercial Operation Date.
- (iii) Buyer shall return the Development Assurance to Seller less any amounts drawn in accordance with this Agreement: (A) within thirty (30) days after Seller posts Performance Assurance with Buyer, or (B) within sixty (60) days after the following have occurred: (1) early termination of the Agreement; and (2) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Damage Payment, indemnification payments, or other damages (whether directly or indirectly such as through set-off or netting). With Buyer's consent, Seller may elect to apply the Development Assurance (or a portion thereof) toward the Performance Assurance.

### **(b) Performance Assurance.**

- (i) Seller shall post Performance Assurance in an amount equal to the product of one hundred five dollars per kilowatt (\$105/kW) multiplied by the Guaranteed Installed Capacity in the form of cash or a Letter of Credit before the COD. The amount of the Performance Assurance shall be adjusted on the first day of each Contract Year to reflect the Guaranteed Storage Capacity for that Contract Year. Seller shall replenish the Performance Assurance within five (5) Business Days of any draw down of any portion of the Performance Assurance for any reason permitted under this Agreement other than to satisfy a Termination Payment.
- (ii) Buyer shall be entitled to draw upon the Performance Assurance posted by Seller for any reason permitted under this Agreement, including Buyer's declaration of an Early Termination Date after the Commercial Operation Date.
- (iii) Seller shall maintain Performance Assurance from the Commercial Operation Date until the following have occurred: (a) the Delivery Term has expired or terminated early, and; (b) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Termination Payment, indemnification payments, or other damages (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security.

### **(c) No Limitation of Damages.** The amount of Development Assurance and Performance Assurance required under this Agreement shall not be deemed a limitation of damages.

- 6.3 Letter of Credit.** Development Assurance or Performance Assurance provided in the form of a Letter of Credit shall be substantially in the form set forth in Exhibit I-1, or another form reasonably acceptable to Buyer, subject to the following provisions:
- (a) Renewal of Letter of Credit. If Seller has provided a Letter of Credit pursuant to any of the applicable provisions in this Article 6, then Seller shall renew or cause the renewal of each outstanding Letter of Credit on a timely basis.
  - (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 ten (10) 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); or
    - (ii) 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 Agreement, then Seller shall be deemed to have failed to meet the collateral requirements of Section 6.2 and Buyer may declare an Event of Default as set forth in Article 8.
  - (d) Letter of Credit Costs. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Seller.

## **ARTICLE 7: FORCE MAJEURE**

- 7.1 Remedial Action.** Subject to the limitation on extensions of Milestones set forth in Sections 5.3(e), a Claiming Party shall not be liable to the other Party if the Claiming Party is delayed or prevented from performing its obligations hereunder due to a Force Majeure Event. The Claiming Party shall take all action necessary to remove such inability with all due speed and diligence. The Claiming 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 the Claiming 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 Claiming Party 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. The Claiming Party's failure to give timely notice shall not affect the Claiming Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving notice materially prejudices the other Party.
- 7.3 Termination Due to Force Majeure Event.** Subject to the provisions of Section 5.3(e) on extensions of Milestones, if the Claiming Party is prevented in any material respect from performing any material obligations under this Agreement solely due to a Force Majeure Event lasting for a period of twelve (12) consecutive months or longer, either Party may terminate this 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. In such event, Buyer shall promptly return to Seller all Development Assurance or Performance Assurance, as applicable, less any damages due and payable by Seller prior to the date of such termination for reasons unrelated to this Section 7.3. This Section 7.3 shall not affect the rights and remedies associated with any other termination rights set forth in this Agreement.

## **ARTICLE 8: DEFAULT, REMEDIES, AND TERMINATION**

### **8.1 Events of Default.**

- (a) Events of Default. The occurrence of any of the following shall constitute an Event of Default by a Party:
  - (i) the breach of any material obligation or covenant of this Agreement and such Party fails to cure such breach within sixty (60) days after written notification of default by the other Party; however, the Parties may mutually agree upon a longer period for cure if the breach cannot reasonably be cured within sixty (60) days, provided that the extended cure period will only continue for so long as the Party in breach is pursuing a cure with reasonable diligence;
  - (ii) subject to Sections 4.1(d) and 4.1(e), failure to make any payment when due under this Agreement within fifteen (15) Business Days after written notice that such payment is due;
  - (iii) 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 neither such circumstance nor the adverse effects of such circumstance are cured or remedied within thirty (30) days after written notice;
  - (iv) such Party becomes Bankrupt;
  - (v) subject to Section 11.1(d), 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 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.
- (b) Seller Events of Default. The following shall constitute additional Events of Default by Seller:
  - (i) The occurrence of any of the events set forth in Section 5.3(h);
  - (ii) Seller fails to satisfy any of the credit requirements of Article 6;
  - (iii) Seller delivers or attempts to deliver Energy to the Delivery Point that was not discharged by the Facility under this Agreement;
  - (iv) Seller fails to meet at least seventy-five percent (75%) of the applicable Guaranteed Annual Capacity set forth in Exhibit C on a prorated basis over a consecutive twelve (12) month period;
  - (v) Seller fails to maintain an average RTE Rate of at least seventy percent (70%) over a consecutive twelve (12) month period; or
  - (vi) Seller fails to maintain an average Monthly Storage Availability of at least seventy percent (70%) over a consecutive twenty-four (24) month period.

## 8.2 Termination for Default.

- (a) Declaration of Early Termination Date. If an Event of Default has occurred, is continuing and has not been cured, the non-defaulting Party (the “Non-Defaulting Party”) shall have the right to:
- (i) send notice, designating a day, no earlier than ten (10) calendar days and no later than sixty (60) days after the day such notice is deemed to be received, as the date on which this Agreement will terminate (the “Early Termination Date”);
  - (ii) accelerate all amounts owing between the Parties, terminate this Agreement and end the Delivery Term effective as of the Early Termination Date;
  - (iii) collect as of the Early Termination Date, (A) the Damage Payment in the case of an Event of Default arising at any time prior to the Commercial Operation Date, including an Event of Default pursuant to Section 8.1, or (B) the Termination Payment in the case of an Event of Default arising after the Commercial Operation Date;
  - (iv) withhold any payments due to the Defaulting Party under this Agreement;
  - (v) suspend performance;
  - (vi) exercise its rights pursuant to Article 6 of this Agreement to draw upon and retain Development Assurance or Performance Assurance, as applicable; and
  - (vii) exercise any other right or remedy available at law or in equity to the extent otherwise permitted under this Agreement.
- (b) Calculation of Damage Payment. If the Early Termination Date occurs prior to the Commercial Operation Date, then the Damage Payment shall be calculated in accordance with this Section 8.2(b).
- (i) If Seller is the Defaulting Party, the Damage Payment owed to Buyer shall equal the entire Development Assurance amount and any accrued interest. Buyer shall be entitled to retain for its own benefit those funds held as Development Assurance and any accrued interest, and any amount of Development Assurance that Seller has not yet posted with Buyer shall be immediately due and payable by Seller to Buyer. There will be no amounts owed to Seller. The Parties agree that Buyer’s damages in the event of an Early Termination Date prior to the Commercial Operation Date caused by Seller’s default would be difficult or impossible to determine with certainty and that the damages set forth in this Section 8.2(b)(i) are a reasonable approximation of Buyer’s harm or loss.
  - (ii) If Buyer is the Defaulting Party, then the Damage Payment shall be owed to Seller and shall equal the sum of all actual, documented, and verifiable costs incurred by Seller between the Effective Date and the Early Termination Date in connection with the Facility less the fair market value (determined in a commercially reasonable manner) of (A) all Seller’s assets individually, or (B) the entire Facility, whichever is greater on the Early Termination Date, regardless of whether or not any Seller asset or the entire Facility is actually sold or disposed of. There will be no amount owed to Buyer.
- (c) Calculation of Termination Payment. If the Early Termination Date occurs on or after to the Commercial Operation Date, the Termination Payment shall be calculated by the Non-Defaulting Party as follows:
- (i) The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Termination Payment as of the Early Termination Date.

- (ii) If the Non-Defaulting Party's aggregate Gains exceed its aggregate Economic Losses and Costs, if any, resulting from such termination of this Agreement, the amount of the Termination Payment shall be limited to the amounts set forth in clause (b) of the definition of Termination Payment.
- (iii) The Non-Defaulting Party is not required to enter into replacement transactions to establish a Termination Payment.
- (iv) The Termination Payment shall not include consequential, incidental, punitive, exemplary, indirect, or business interruption damages.
- (d) Notice of Damage Payment or Termination Payment. As soon as practicable after declaration of an Early Termination Date, the Non-Defaulting Party shall give notice to the Defaulting Party of the amount of the Damage Payment or Termination Payment due to or from the Defaulting Party to the Non-Defaulting Party, as applicable. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Damage Payment or Termination Payment shall be made to the Non-Defaulting Party fifteen (15) Business Days after such termination payment notice is effective.
- (e) Disputes Regarding Damage Payment or Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Following delivery of such a notice, disputes regarding the Damage Payment or Termination Payment shall be resolved in accordance with Section 11.3.
- (f) Rights and Remedies are Cumulative. Except where this Agreement explicitly states that liquidated damages or another remedy is the exclusive remedy, the rights and remedies in this Agreement, including this Article 8, are cumulative.
- (g) Mitigation. The Non-Defaulting Party shall use commercially reasonable efforts to mitigate its Costs, Economic Losses, and damages resulting from any Event of Default.

### 8.3 Limitation of Liability/Liquidated 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 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, UNLESS THE PROVISION PROVIDES THAT THE EXPRESS REMEDIES ARE IN ADDITION TO OTHER REMEDIES THAT MAY BE AVAILABLE. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, 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 SUCH OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED UNLESS EXPRESSLY HEREIN PROVIDED. NEITHER PARTY**

**SHALL BE LIABLE TO THE OTHER PARTY UNDER THIS AGREEMENT FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF USE, LOSS OF REVENUES, LOSS OF PROFIT, OR OTHER BUSINESS INTERRUPTION DAMAGES, INTEREST CHARGES, OR COST OF CAPITAL, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION, OR OTHERWISE; PROVIDED HOWEVER, NOTHING IN THIS SECTION SHALL AFFECT THE ENFORCEABILITY OF THE PROVISIONS OF THIS AGREEMENT RELATING TO EXPRESS REMEDIES OR MEASURE OF DAMAGES. THE PARTIES ACKNOWLEDGE AND AGREE THAT TO THE EXTENT THAT ANY DAMAGES SET FORTH IN THIS AGREEMENT ARE LIQUIDATED, INCLUDING PAYMENTS SET FORTH IN SECTIONS 3.3, 3.6, 5.3, 5.6, and 8.2, SUCH DAMAGES ARE EACH REASONABLE AND REPRESENT A FAIR AND GENUINE ESTIMATE OF THE HARM OR LOSS THAT WOULD OCCUR RELATED TO THE EVENTS DESCRIBED THEREIN. THE PARTIES ACKNOWLEDGE AND AGREE THAT THE DAMAGES FOR THE CIRCUMSTANCES SET FORTH ABOVE WOULD BE IMPOSSIBLE OR DIFFICULT TO MEASURE, 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 AND THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.**

- (c) BUYER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, THE COMPENSATION PROVIDED FOR IN ARTICLE 3 AND SECTIONS 5.6 AND 8.2.**
- (d) EXCEPT AS OTHERWISE PROVIDED HEREIN, THE RIGHTS AND REMEDIES OF A PARTY PURSUANT TO THIS ARTICLE 9 SHALL BE CUMULATIVE AND IN ADDITION TO THE RIGHTS OF THE PARTIES OTHERWISE PROVIDED IN THIS AGREEMENT.**

#### **ARTICLE 9: INDEMNIFICATION**

- 9.1 Seller Indemnification Prior to Commercial Operation Date.** Up to and including the Commercial Operation Date, Seller shall indemnify, defend, and hold harmless Buyer, and its officials, directors, agents and employees ("Buyer Indemnified Party"), from and against all third party claims, liabilities, losses, penalties, arising out of, or in connection with, the negligence, willful misconduct or violation of Applicable Laws by Seller and/or its agents, employees or sub-contractors, excepting only loss, injury or damage caused by the active negligence, willful misconduct or violation of Applicable Laws by a Buyer Indemnified Party.
- 9.2 Seller and Buyer Indemnification after Commercial Operation Date.** After the Commercial Operation Date, each Party ("Indemnifying Party") shall defend, indemnify and hold harmless the other Party and its elected officials, officers, directors, employees, agents, affiliates and representatives (each, an "Indemnified Party") from and against any and all losses, including but not limited to losses arising from personal injury or death, or damage to property, but only to the extent such losses result from or arise out of the negligence, willful misconduct or violation of Applicable Laws by the Indemnifying Party.



- 9.3 Environmental Indemnity.** Seller shall indemnify, defend, and hold harmless the Buyer Indemnified Parties, from any claim, liability, loss, injury or damage arising out of, or in connection with Environmental Costs and any environmental matters associated with the Facility, including the disposal and transportation of Hazardous Substances by or on behalf of the Seller or at the Seller's direction or agreement.
- 9.4 Notice.** If an Indemnified Party or Buyer Indemnified Party determines that it is entitled to defense and indemnification under this Section 10.1, 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 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 the State of [ ], and has the lawful power to engage in the business it presently conducts and contemplates conducting in this 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 Agreement 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 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 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 Agreement; and
  - (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.
  - (g) As of the Effective Date, Seller represents and warrants to Buyer that it has not received notice from or been advised by any existing or potential supplier or service provider that the disease designated COVID-19 or the related virus designated SARS-CoV-2 have caused, or are reasonably likely to cause, a delay in the construction of the Facility or the delivery of materials necessary to complete the Facility, in each case that would cause the Commercial Operation Date to be later than the Guaranteed Commercial Operation Date.
- 10.2 Buyer's 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 Agreement;
- (b) Buyer has the legal power and authority to make and carry out this Agreement 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 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 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 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.

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

- (a) It shall continue to be duly organized, validly existing and in good standing under the 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 Agreement; and
- (c) It shall perform its obligations under this 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) General Assignment. Except as provided in Sections 11.1(b) and (c), neither Party shall assign this 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 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 to Financing Providers. Notwithstanding any provision to the contrary in this Section 11.1, Buyer hereby consents to assignment of this Agreement by Seller as collateral

for any financing or refinancing of the Facility to a Lender. Seller's obligations under this Agreement shall continue in their entirety in full force and effect. Promptly after granting such interest, Seller shall notify Buyer in writing of the name, physical and electronic addresses, and telephone and facsimile numbers of any Lender to which the Seller's interest under this Agreement has been assigned. The notice shall include the names of the Lender's primary contact(s) to whom all communications may be addressed. Seller shall promptly notify Buyer of any changes to the information contained in the notice. As a condition to Buyer's consent to assignment, the following provisions shall apply to any assignment under this Section 11.1(b):

- (i) Lender shall have the right, but not the obligation, to perform any act required to be performed by Seller under this Agreement to prevent or cure a default by the Seller and such act performed by Lender shall be as effective to prevent or cure a default as if done by Seller.
  - (ii) Buyer shall cooperate with Seller or a Lender to execute or arrange for the delivery of certificates, consents, opinions, estoppels, amendments, and other documents reasonably requested by Seller or Lender in order to complete any financing or refinancing and shall enter into reasonable agreements as necessary to provide for recognition by Buyer of the Lender's security interest in this Agreement and such other provisions as may be reasonably requested by Seller or any Lender, so long as the terms and conditions of such agreements are consistent with this Agreement and such amendments or agreements are reasonably acceptable to both Parties. All costs and expenses (including reasonable attorney's fees) incurred by Buyer in connection with an assignment of this Agreement to a Lender shall be borne by Seller.
  - (iii) In the event of a Default under this Agreement, Buyer shall provide a copy of the notice of Default to the Lender pursuant to Section 8.2(a) at the same time as the notice is provided to Seller. Buyer shall accept a cure performed by a Lender and shall negotiate in good faith with the Lender as to the cure period(s) allowed for the Lender to cure any Event of Default. Buyer shall accept a cure by Lender so long as the cure is accomplished within the applicable cure period. Notwithstanding any Lender cure, Seller shall not be released and discharged from, and shall remain liable for, any and all obligations to the Buyer arising or accruing hereunder.
  - (iv) If Lender, directly or indirectly, takes possession of, or title to the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), Lender must (i) assume all of Seller's obligations arising under this Agreement, and (ii) shall cure all defaults under this Agreement existing as of the date of change of title or control as required under this Agreement.
  - (v) If Lender elects to sell or transfer the Facility after taking possession of, or title to the Facility, or a sale occurs through the actions of Lender, Lender must cause the transferee or buyer to assume all of Seller's obligations arising under this Agreement and all related agreements as a condition of the sale or transfer. Such transferee or buyer must be made to an entity that: (A) has a tangible net worth of not less than one hundred fifty million dollars (\$150,000,000) or a Credit Rating of at least BBB- from S&P or Baa3 from Moody's, and (B) has at least two (2) years of experience in the ownership and operation of energy storage facilities similar to the Facility, or has retained a third-party with such experience to operate the Facility.
- (c) Assignment in Connection with a Change in Control. Notwithstanding any provision to the contrary in this Section 11.1, any direct or indirect change of control of Seller (whether voluntary or by operation of Law) shall not require the prior written consent of Buyer.

Seller shall promptly notify Buyer of any direct or indirect change in control and shall provide any information reasonably requested by Buyer regarding the change in control, provided that this obligation does not apply to any direct or indirect owners of Seller's Parent. Seller acknowledges that its obligations under this Agreement remain in full force and effect notwithstanding such change in control and that Seller is solely responsible for ensuring that all required changes to its vendor certifications are promptly implemented.

- (d) Unauthorized Assignment. Any assignment or purported assignment in violation of this Section 11.1 is void.

## **11.2 Proprietary or Confidential Information.**

- (a) Confidential Information. Each Party understands and agrees that, in the performance of this Agreement or in contemplation thereof, the other Party may have access to private or confidential information and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the Party that owns or controls the Confidential Information. Each Party agrees that all private and confidential information disclosed by one Party to the other Party shall be held in confidence and used only in performance of the Agreement; however, a Party may disclose the Confidential Information of the other Party to its officers, employees, agents, consultants, and contractors as necessary for the performance of its obligations under this Agreement and as necessary to comply with any applicable requirements or orders of a Governmental Authority. Each Party 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 Laws).
- (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 11.2 nothing shall restrict any Party from using or disclosing information related to this 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, or to the auditors, attorneys, advisors, or actual or potential lenders or investors of the non-disclosing Party and/or its Affiliates which are required to keep the information that is disclosed in confidence.

- (e) Nondisclosure of Private Information. If this 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 Agreement and only as necessary in performing this Agreement. Seller is subject to the enforcement and penalty provisions in Chapter 12M.

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

- (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 Agreement by negotiation. The status of any dispute or controversy notwithstanding, each Party shall proceed diligently with the performance of its obligations under this Agreement in accordance with and subject to the terms of this 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) Governing Law; Venue. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. Venue shall be in the County of San Francisco, 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 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 Agreement or until after final audit has been resolved, whichever is later.

### **11.5 General.**

- (a) Entire Agreement. This Agreement, the exhibits, attachments, and any written and fully executed supplements hereto, any designated collateral, credit support, or similar arrangement between the Parties constitute the entire agreement between the Parties relating to the subject matter.
- (b) Construction. This 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.
- (c) Amendments. Except to the extent set forth in this Agreement, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by both Parties.
- (d) No Third-Party Beneficiaries. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this 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 Agreement is rendered unlawful by action by any Governmental Authority, or any change in Applicable Law, including the CAISO Tariff (a "Change in Law") occurring after the Execution Date, the remaining lawful obligations

that arise under this 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 so that the performance of this Agreement becomes impossible or impracticable, the Parties shall work in good faith to revise this Agreement so that the Parties may perform their obligations in a manner that maintains to the greatest extent practicable the original intent of the Parties and the benefits, burdens, and obligations under this Agreement. A change in cost shall not in and of itself be deemed to render this Agreement or any provision of this Agreement impossible or impracticable.

- (g) Headings. The headings used herein are for convenience and reference purposes only.
- (h) Assigns. This Agreement shall be binding on each Party's successors and assigns.
- (i) No Dedication. No undertaking by one Party to the other under any provision of the 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. The 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 do not intend to act as, or to be treated as, partners in, co-venturers in, or lessor/lessee with respect to the Facility or any business related to the Facility.
- (k) Limitations on Contributions. By executing this Agreement, Seller acknowledges its obligations under Section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with, or is seeking a contract with, any department of the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, for a grant, loan or loan guarantee, or for a development agreement, from making any campaign contribution to (i) a City elected official if the contract must be approved by that official, a board on which that official serves, or the board of a state agency on which an appointee of that official serves, (ii) a candidate for that City elective office, or (iii) a committee controlled by such elected official or a candidate for that office, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve months after the date the City approves the contract. The prohibition on contributions applies to each prospective party to the contract; each member of Seller's board of directors; Seller's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than 10% in Seller; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Seller. Seller certifies that it has informed each such person of the limitation on contributions imposed by Section 1.126 by the time it submitted a proposal for the contract, and has provided the names of the persons required to be informed to the City department with whom it is contracting.
- (l) 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 in the performance of this 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 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.

(m) Nondiscrimination 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 Agreement, and will not during the term of this 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.

(n) Consideration of Salary History. Seller shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or "Pay Parity Act." Seller is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant to the extent that such applicant is applying for employment to be performed on this Agreement or in furtherance of this Agreement, and whose application, in whole or part, will be solicited, received, processed or considered, whether or not through an interview, in the City or on City property. Seller is subject to the enforcement and penalty provisions in Chapter 12K.

(o) Consideration of Criminal History in Hiring and Employment Decisions. Seller agrees to comply fully with and be bound by all of the provisions of Chapter 12T, "City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code, including the remedies provided, and implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to Seller's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

(p) Submitting False Claims. Pursuant to San Francisco Administrative Code Section 21.35, any contractor or subcontractor who submits a false claim shall be liable to Buyer for the statutory penalties set forth in that section. A contractor or subcontractor will be deemed to have submitted a false claim to Buyer if the contractor or subcontractor: (a) knowingly presents or causes to be presented to an officer or employee of 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 Buyer; (c) conspires to defraud Buyer by getting a false claim allowed or paid by 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 Buyer; or (e) is a beneficiary of an inadvertent submission of a false claim to Buyer, subsequently discovers the falsity of the claim, and fails to disclose the false claim to Buyer within a reasonable time after discovery of the false claim.

- (q) Use of City 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 Buyer.
- (r) Business License Taxes. Seller agrees that it is obligated to pay all amounts due to the City under the San Francisco Business and Tax Regulations Code during the Term of this Agreement. Pursuant to Section 6.10-2 of the San Francisco Business and Tax Regulations Code, Seller further acknowledges and agrees that City may withhold any payments due to Seller under this Agreement if Seller is delinquent in the payment of any amount required to be paid to the City under the San Francisco Business and Tax Regulations Code. Any payments withheld under this Section 11.5(r) shall be made to Seller, without interest, upon full payment of all taxes owed by Seller and reinstatement of Seller's vendor certification.
- (s) Minimum Compensation Ordinance. If Administrative Code Chapter 12P applies to this contract, Seller shall pay covered employees no less than the minimum compensation required by San Francisco Administrative Code Chapter 12P, including a minimum hourly gross compensation, compensated time off, and uncompensated time off.
- (t) Health Care Accountability. If Administrative Code Chapter 12Q applies to this contract, Contractor shall comply with the requirements of Chapter 12Q. For each Covered Employee, Contractor shall provide the appropriate health benefit set forth in Section 12Q.3. If Contractor chooses to offer the health plan option, such health plan shall meet the minimum standards set forth by the San Francisco Health Commission.
- (u) Conflict of Interest. Through its execution of this Agreement, Seller acknowledges that it is familiar with the provision of Section 15.103 of the 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 Buyer if it becomes aware of any such fact during the term of this Agreement.
- (v) City Requirements. Seller shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of City and of all state, and federal laws in any manner affecting the performance of the Agreement, and must at all times materially comply with such local codes, ordinances, and regulations as they may be amended from time to time. Buyer shall use best efforts to provide notice to Seller of any such amendment to the City's Charter, codes, ordinances and regulations of which it becomes aware; however, Seller's obligations under this Section shall not be contingent on notice from Buyer.
- (w) Severability. Should any provision of the Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of the 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.
- (x) Survival. All rights pursuant to: Section 4.1(e) (Disputes and Adjustment of Invoices); Section 5.6(c) (CAISO Charges Invoices); Article 8 (Default; Remedies; and Termination), Article 9 (Indemnification), Section 11.2 (Proprietary or Confidential Information); Section 11.3 (Dispute Resolution; Choice of Law), Section 11.4 (Audit); Section 11.5(l) (Prohibition on Political Activity with City Funds); and Section 11.5(q) (City Opinion) shall also survive termination of this Agreement.

**11.6 Mobile Sierra.** Absent the prior written agreement of all Parties, the standard of review for changes to any rate, charge, term, or condition of service of this Agreement, whether proposed by a 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).

- 11.7 Forward Contract.** The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code and Buyer and Seller are “forward merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.
- 11.8 Notices.** Unless otherwise stated in this Agreement, any notice, demand, request, or communication required or authorized by this Agreement shall be delivered either by hand, 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 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.
- 11.9 Counterparts.** This 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 Agreement by fax or other electronic means shall be deemed as effective as delivery of an originally executed counterpart. Any Party delivering an executed counterpart of this 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 Agreement shall not affect the validity or effectiveness of this Agreement.

*[Signature page follows on next page.]*

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

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

**Seller**

By: \_\_\_\_\_  
General Manager  
San Francisco Public Utilities Commission

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

Approved as to Form:

Dennis J. Herrera  
City Attorney

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

## **EXHIBIT A**

### **SELLER DOCUMENTATION OF CONDITIONS PRECEDENT**

#### **Part I:**

Seller shall provide to Buyer all of the following documentation at least five (5) Business Days prior to the Execution Date:

1. A copy of each of (a) the articles of incorporation, certificate of incorporation, operating agreement or similar applicable organizational document of Seller and (b) the by-laws or other similar document of Seller as in effect, or anticipated to be in effect, on the Execution Date.
2. 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.
3. Evidence of Site control (e.g. lease with redacted price terms).
4. Evidence of CEC Certification or pre-certification received, as applicable.
5. A copy of the Interconnection Agreement, if any.
6. Insurance documentation as required in Exhibit D.
7. A copy of the most recent financial statements (which may be unaudited) from Seller's Parent.

#### **Part II:**

Seller shall provide to Buyer all of the following documentation in a timely manner following the Execution Date:

1. Evidence of all Permits received, as applicable, including but not limited to, any copies of all final environmental review documents.
2. A copy of the Project Labor Agreement, if any, for the Facility.
3. A copy of the load flow analysis and any deliverability assessment performed by the PTO or CAISO to show power flow capacity and/or deliverability at the point of interconnection.
4. A copy of all CAISO certification and testing performed for the Facility resource characteristics identified in Exhibit [B], including all Ancillary Services, storage Pmax and Pmin, Qualifying Capacity and Net Qualifying Capacity.

## **EXHIBIT B**

### **FACILITY DESCRIPTION AND SITE DRAWINGS**

#### **I. Facility Description**

Facility name:

Facility physical address:

Facility Coordinates:

Technology type (including any applicable model):

Interconnection Point of Facility:

Interconnection Agreement Name/Number:

Assessor's Parcel Nos:

#### **II. Operational Characteristics**

PMax of the Facility:

PMin of the Facility:

Minimum storage capacity (MWh):

Maximum storage capacity (MWh):

Ramp Rate Up (MW/minute):

Ramp Rate Down (MW/Minute):

Rest time required after reaching Minimum storage capacity (MWh):

Rest time required after reaching Maximum storage capacity (MWh):

#### **III. Site Drawings**

A. Site Map

B. Single Line Diagram.

**EXHIBIT C**  
**[FOR DEGRADING PROJECTS]**  
**GUARANTEED ANNUAL CAPACITY**

The Guaranteed Annual Capacity for each Contract Year is as follows:

<b>Contract Year</b>	<b>Guaranteed Annual Capacity (MW)</b>
Year 1	
Year 2	
Year 3	
Year 4	
Year 5	
Year 6	
Year 7	
Year 8	
Year 9	
Year 10	
Year 11	
Year 12	
Year 13	
Year 14	
Year 15	

## EXHIBIT D

### INSURANCE COVERAGES

1. **Liability Coverages.** Without in any way limiting Seller's liability pursuant to the "Indemnification" section of this Agreement, Seller must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages and be responsible for its subcontractors, including Seller's EPC Contractors, maintaining sufficient limits of the appropriate insurance:
  - (a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; and include a blanket waiver of subrogation; and
  - (b) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
  - (c) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence, "Combined Single Limit" for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
  - (d) Employer's Liability Insurance. Employers' Liability insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.
  - (e) Construction All-Risk Insurance. Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming Seller (and Lender if any) as the loss payee.
2. **Additional Coverages**
  - (a) Property insurance, on an all-risk form, including earthquake and flood, for one hundred percent (100%) of the full replacement value of the Site and Facility or 125% of the Loss Limit of the 1/500 year earthquake/flood event as established by a Maximum Foreseeable Loss earthquake and flood study prepared by the applicable insurer in accordance with current industry standard. Such insurance shall, include Business Interruption coverage in an amount equal to twelve months of revenue from this Agreement.
  - (b) Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, Pollution Legal Liability Insurance in the amount of two million dollars (\$2,000,000) per occurrence and I the aggregate, naming the Seller (and Lender if any) as additional named insured.
3. **Endorsements.**
  - (a) Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide include blanket endorsements:
    - (i) Name as Additional Insured, the City and County of San Francisco, its Officers, Agents, and Employees.
    - (ii) The certificate of insurance shall state that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

- (b) All policies shall provide thirty (30) days' advance written notice of cancellation for any reason, intended non-renewal, or reduction in coverages, except ten (10) days' notice for non-payment of premiums.
4. **Length of Coverage.** Should any of the required insurance be provided under a claims-made form, Seller shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three years beyond the expiration of this Agreement, to the effect that, should occurrences during the Term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.
5. **Maintenance of Coverage.** Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Buyer receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, Buyer may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

**Certificates.** Prior to commencement of the Term, Seller shall furnish to Buyer certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A- , VII or higher, that are authorized to do business in the State of California, and that are satisfactory to Buyer, in form evidencing all coverages set forth above. Approval of the insurance by Buyer shall not relieve or decrease Seller's liability hereunder.

**EXHIBIT E**  
**CONSTRUCTION START**  
**CERTIFICATION**

\_\_\_\_\_(Date)\_\_\_\_\_

This certification (“Certification”) of the Construction Start Date is delivered by \_\_\_\_\_ (“Seller”) to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (“Buyer”) in accordance with the terms of that certain Energy Storage Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement. Seller hereby certifies and represents to Buyer that Construction Start has occurred and :

- a) The Construction Start Date occurred on \_\_\_\_\_. (“Construction Start Date”);in
- b) the Notice to Proceed was issued by Seller to the EPC contractor, [EPS Contractor name]on \_\_\_\_\_ (attached), and;
- c) mobilization at the Facility Site commenced on \_\_\_\_\_.

IN WITNESS WHEREOF, the undersigned has executed this certificate on behalf of the Seller as of the \_\_\_\_ day of \_\_\_\_\_.

**Seller:**

**[Licensed Professional Engineer]**

Signature:\_\_\_\_\_

Signature:\_\_\_\_\_

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

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

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

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

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

License Number and LPE Stamp:\_\_\_\_\_



## **EXHIBIT F**

### **PROGRESS REPORTING FORM**

Each Progress Report shall include the following items:

1. Executive Summary.
2. Gantt chart schedule showing progress on achieving each of the Milestones.
3. Description of any material planned changes to the Facility or the Facility Site.
4. Financing activities. Provide a summary of the status and progress of each major financing activity, including the date of execution of significant documents, and information on the expected timing of future significant activities.
5. Major equipment procurement activities. For each type of equipment, list the number of each major item to be procured, the manufacturer, model number (if applicable), and rating. List the delivery schedule (expected or actual as applicable), breaking out the number of each item to be procured or delivered in each Calendar Quarter.
6. Construction Activities. Include information on the status of any construction-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the Facility infrastructure, generating equipment, and major auxiliary equipment. Also include information on the substations, switchyards, gen-ties, telecommunications equipment or other Interconnection Facilities that are the direct responsibility of the Facility.
7. Interconnection Activities. Include information on interconnection-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the status of interconnection studies, Interconnection Agreements, design and construction of Interconnection Facilities (e.g., substations, switchyards, gen-ties, system protection schemes, telecommunications equipment to the extent not already covered in the Facility construction information), Network Upgrades, and grid outage and/or interconnection schedules.
8. Startup. Include information on the status of activities related to preparation for Commercial Operation, including progress towards the items set forth in Exhibit H-2, the requirements and notifications of the grid operator and Transmission Provider, and any other activities that must be conducted before the Facility may deliver Energy to the grid and/or declare Commercial Operation.  
  
For items 4 through 8, include the progress and schedule of all major agreements, contracts, permits, approvals, technical studies, financing agreements, and major equipment purchase orders showing the start dates, completion dates, and completion percentages. 8. Forecast of activities scheduled for the current calendar quarter.
9. List of issues that are likely to potentially affect Seller's Milestones.
10. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and startup progress of the Facility, the interconnection into the Transmission System and all other interconnection utility services.
11. CPUC General Order 156 supplier diversity reporting. Format to be provided by Buyer.
12. Any other documentation reasonably requested by Buyer.

## EXHIBIT G-1

### FORM OF COMMERCIAL OPERATION CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by [LICENSED PROFESSIONAL ENGINEER] ("Engineer") to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF ("Buyer") in accordance with the terms of that certain Energy Storage Agreement dated \_\_\_\_\_ ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined in this Exhibit G-1 shall have the meanings assigned to these terms in the Agreement.

Engineer hereby certifies and represents to Buyer the following:

1. The Facility is fully operational and reliable.
2. The Facility is interconnected, fully integrated, and synchronized with the Transmission System.
3. The Facility's Installed Capacity is no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Capacity and the Facility is capable of charging, storing, and discharging Energy, subject to the applicable Operating Parameters.
4. The Facility has met all Interconnection Agreement requirements and is capable of receiving Charging Energy from, and delivering Discharging Energy to, the CAISO Balancing Authority up to the Guaranteed Installed Capacity.
5. The commissioning of all equipment for the Facility has been completed in accordance with the manufacturers' specifications.
6. Authorization to parallel the Facility was obtained by the Transmission Provider on \_\_\_\_[DATE]\_\_\_\_.
7. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Transmission Provider ] on \_\_\_\_[DATE]\_\_\_\_.
8. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO tariff on \_\_\_\_[DATE]\_\_\_\_.

EXECUTED by ENGINEER this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Licensed Professional Engineer:**

Signature: \_\_\_\_\_

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

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

**EXHIBIT G-2**  
**FORM OF INSTALLED CAPACITY CERTIFICATION**

This certification of the Installed Capacity is delivered by [licensed professional engineer] to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, in accordance with the terms of the Energy Storage Agreement dated \_\_\_\_\_, (“Agreement”) by and between Buyer and Seller. All capitalized terms used in this certification but not otherwise defined herein shall have the meanings set forth in the Agreement.

I hereby certify the following:

The Storage Capacity Test demonstrated a maximum dependable operating capability that can be sustained for [ ] consecutive hours to discharge electric energy of [ ] MW AC to the Delivery Point, in accordance with the testing procedures, requirements and protocols set forth in Section 5.4 and Exhibit K prior to the Commercial Operation Date (“Installed Capacity”).

EXECUTED BY [LICENSED PROFESSIONAL ENGINEER]

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**[Licensed Professional Engineer]**

Signature: \_\_\_\_\_

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

**EXHIBIT H-1**  
**LETTER OF CREDIT**

**[Issuing Bank Letterhead and Address]**

STANDBY LETTER OF CREDIT NO. XXXXXXXX

**Date:** **[Insert issue date]**

**Beneficiary:** City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF  
525 Golden Gate Avenue  
San Francisco, CA 94102  
Attn:

**Applicant:** **[Insert name and address of Applicant]**

**Letter of Credit Amount:** **[insert Amount]**

**Expiry Date:** **[insert expiry date]**

Ladies and Gentlemen:

By order of **[insert name of Applicant]** (“Applicant”), we hereby issue in favor of the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (the “Beneficiary”) our irrevocable standby letter of credit No. **[insert number of letter of credit]** (“Letter of Credit”), for the account of Applicant, for drawings up to but not to exceed the aggregate sum of U.S. \$ **[insert amount in figures followed by (amount in words)]** (“Letter of Credit Amount”). This Letter of Credit is available with **[insert name of issuing bank, and the city and state in which it is located]** by sight payment, at our offices located at the address stated below, effective immediately, and it shall expire at our close of business on **[insert expiry date]** (the “Expiry Date”).

Funds under this Letter of Credit are available to the Beneficiary against presentation of the following documents:

1. Beneficiary’s signed and dated sight draft in the form of Exhibit J-2 hereto, referencing this Letter of Credit No. **[insert number]** and stating the amount of the demand; and
2. One of the following statements signed by an authorized representative or officer of Beneficiary:
  - A. **Pursuant to the terms of that certain [insert name of the agreement] (the “Agreement”), dated [insert date of the Agreement], between Beneficiary and [insert name of Seller under the Agreement], Beneficiary is entitled to draw under Letter of Credit No. [insert number] amounts owed by [insert name of Seller under the Agreement] under the Agreement; or**
  - B. **“Letter of Credit No. [insert number] shall expire in thirty (30) days or less and [insert name of Seller under the Agreement] has not provided replacement security acceptable to Beneficiary.**

Special Conditions:

1. Partial and multiple drawings under this Letter of Credit are allowed;

2. All banking charges associated with this Letter of Credit are for the account of the Applicant;
3. This Letter of Credit is not transferable; and
4. The Expiry Date of this Letter of Credit shall be automatically extended without a written amendment for a period of one year and on each successive Expiry Date, unless at least sixty (60) days before the then current Expiry Date, we notify you by registered mail or courier that we elect not to extend the Expiry Date of this Letter of Credit for such additional period.

We engage with you that drafts drawn under and in compliance with the terms of this Letter of Credit shall be duly honored upon presentation, on or before the Expiry Date (or after the Expiry Date as provided below), at our offices at **[insert issuing bank's address for drawings]**.

All demands for payment shall be made by presentation of originals or copies of documents; or by facsimile transmission of documents to **[insert fax number]**, Attention: **[insert name of issuing bank's receiving department]**, with originals or copies of documents to follow by overnight mail. If presentation is made by facsimile transmission, you may contact us at **[insert phone number]** to confirm our receipt of the transmission. Your failure to seek such a telephone confirmation does not affect our obligation to honor such a presentation.

Our payments against complying presentations under this Letter of Credit shall be made no later than on the sixth (6th) banking day following a complying presentation.

Except as stated herein, this Letter of Credit is not subject to any condition or qualification. It is our individual obligation, which is not contingent upon reimbursement and is not affected by any agreement, document, or instrument between us and the Applicant or between the Beneficiary and the Applicant or any other party.

Except as otherwise specifically stated herein, this Letter of Credit is subject to and governed by the *Uniform Customs and Practice for Documentary Credits, 2007 Revision*, International Chamber of Commerce (ICC) Publication No. 600 (the "UCP 600"); provided that, if this Letter of Credit expires during an interruption of our business as described in Article 36 of the UCP 600, we shall honor drafts presented in compliance with this Letter of Credit within thirty (30) days after the resumption of our business and effect payment accordingly. The law of the State of New York shall apply to any matters not covered by the UCP 600.

For telephone assistance regarding this Letter of Credit, please contact us at **[insert number and any other necessary details]**.

**EXHIBIT H-2**  
**SIGHT DRAFT**

TO: [INSERT NAME AND ADDRESS OF PAYING BANK]

AMOUNT: \$

DATE:

AT SIGHT OF THIS DEMAND PAY TO THE ORDER OF \_\_\_\_\_ THE AMOUNT  
OF U.S.\$ \_\_\_\_\_ U.S. DOLLARS) DRAWN  
UNDER [INSERT NAME OF ISSUING BANK] LETTER OF CREDIT NO. XXXXXX.

REMIT FUNDS AS FOLLOWS:

[INSERT PAYMENT INSTRUCTIONS]

DRAWER

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

## EXHIBIT I

### FORM OF REPLACEMENT RA NOTICE

This Replacement RA Notice is delivered by [SELLER ENTITY] (“Seller”) to the City and County of San Francisco acting by and through its Public Utilities Commission, CleanPowerSF in accordance with the terms of the Energy Storage Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms not otherwise defined in this RA Notice shall have the meaning set forth in the Agreement.

UNIT SPECIFIC INFORMATION	
Resource Name	
Physical Location	
CAISO Resource ID	
SCID of Resource	
Unit NQC by month	
Unit EFC by month	
Resource Type	
Minimum Qualified Flexible Capacity Category	
TAC Area	
Prorated Percentage of Unit Factor	
Prorated Percentage of Unit Flexible Factor	
Local Capacity Area	
Resource Category as defined by the CPUC	

Showing Month and Year	Quantity (MW)
[MM] [YY]	

**EXHIBIT J**  
**STORAGE OPERATING PARAMETERS**

No later than one hundred eighty (180) days prior to the Commercial Operation Date, Buyer and Seller shall finalize the Operating Parameters, provided that, the Operating Parameters shall not be materially more restrictive of the operation of the Facility than set forth below, unless agreed to by Buyer in writing. The Operating Parameters may be reviewed annually (date and time to be mutually agreed) to optimize operations for both Parties. The Parties shall cooperate to integrate the systems and controls necessary to implement the Operating Parameters.

<b>OPERATING PARAMETERS</b>	<b>VALUES</b>
Instantaneous Maximum Charging Capacity [MW]	
Maximum Full Cycles/Year	365 plus the Surplus Cycles available for that Contract Year, subject to the Maximum Daily Discharge limit. Any cycle that is not a Full Cycle is a “Partial Cycle”. Buyer may perform any number of Partial Cycles as long as, in the aggregate across all Partial Cycles, the Maximum Daily Discharge and Maximum Annual Discharge limits in this Operating Parameters table are not violated.
Maximum Annual Discharge	
Maximum Monthly Discharge	
Maximum Daily Discharge	
Maximum SOC during Charging	
Maximum SOC during Discharging	
Maximum Charging Capacity	
Maximum Discharging Capacity	
Maximum Storage Level	
Minimum Storage Level	



**EXHIBIT K**  
**STORAGE CAPACITY TESTS**

**I. Storage Capacity Test Frequency.**

1. Commercial Operation Date Storage Capacity Tests. Upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test prior to the Commercial Operation Date. The initial SCT shall be performed in accordance with this Exhibit N and shall establish the Installed Capacity and Round Trip Efficiency Rate hereunder based on the actual capacity of the Facility determined by the SCT.
2. Subsequent Storage Capacity Tests. Commencing in the second Contract Year and in each subsequent Contract Year, within the first quarter of each calendar year of the Delivery Term and upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Storage Capacity Test. Buyer shall have the right to require a retest once per Contract Year upon no less than five (5) Business Days prior written notice to Seller, or any shorter period reasonable acceptable to Seller consistent with Prudent Operating Practice. Seller shall have the right to require a retest once per Contract Year of the Storage Delivery Term upon no less than five (5) Business Days prior written notice to Buyer, or any shorter period reasonable acceptable to Buyer consistent with Prudent Operating Practice.
3. Test Results and Re-Setting of Storage Contract Capacity. No later than five (5) days following any SCT, Seller shall submit a testing report detailing results and findings of the test. The report shall include meter readings and plant log sheets verifying the operating conditions and output of the Facility. In accordance with Section 5.4(f) of the Agreement and Part III below, the actual capacity determined pursuant to a Storage Capacity Test (up to, but not in excess of, the Guaranteed Storage Contract Capacity shall become the new Storage Contract Capacity at the beginning of the day following the completion of the Storage Capacity Test for all purposes under this Agreement.

**II. Storage Capacity Test Procedures.**

1. General. Each SCT (including the initial SCT) shall be conducted in accordance with Prudent Operating Practice, CAISO's testing procedures for energy storage facilities, and the provisions of this Exhibit K. Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment (at Buyer's sole cost).
2. Conditions Prior to Testing.
  - A. Energy Management System (EMS) Functionality. The EMS shall be successfully configured to receive data from the Battery Management System (BMS), exchange DNP3 data with the Buyer SCADA device, and transfer data to the database server for the calculation, recording and archiving of data points.
  - B. Communications. The Remote Terminal Unit (RTU) testing should be successfully completed prior to any testing. The interface between Seller's RTU and the Facility SCADA System should be fully tested and functional prior to starting any testing, including verification of the data transmission pathway between the Seller's RTU and Seller's EMS interface and the ability to record SCADA System data.
  - C. Commissioning Checklist. Commissioning shall be successfully completed per manufacturer guidance on all applicable installed Facility equipment, including verification that all controls, set points, and instruments of the EMS are configured.

3. Requirements Applicable to all Storage Capacity Tests.

A. Purpose of Test. Each SCT shall:

- (1) Determine an updated Storage Contract Capacity;
- (2) Determine the amount of Energy required to fully charge the Facility;
- (3) Determine the Facility charge ramp rate;
- (4) Determine the Facility discharge ramp rate;

B. Parameters. During each SCT, the following parameters shall be measured and recorded simultaneously for the Storage Facility, at a minimum of ten (10) minute intervals:

- (1) Time (minutes);
- (2) Charging Energy (MWh);
- (3) Discharging Energy (MWh);
- (4) Stored Energy Level (MWh);
- (5) Station Uses (MWh).

C. Conditions. During each SCT, the following conditions at the Site shall be measured and recorded simultaneously at thirty (30) minute intervals:

- (1) Relative humidity (%);
- (2) Barometric pressure (inches Hg) near the horizontal centerline of the Storage Facility;
- (3) Ambient air temperature (°F).

D. Test Showing. Each SCT shall record and report the following datapoints:

- (1) That the SCT successfully started;
- (2) The maximum sustained discharging level for XXX (X) consecutive hours pursuant to A(1) above;
- (3) The maximum sustained charging level for XXX (X) consecutive hours pursuant to A(2) above;
- (4) Amount of time between the Facility's electrical output going from 0 to the maximum sustained discharging level registered during the Test (for purposes of calculating the Ramp Rate);
- (5) Amount of time between the Facility's electrical input going from 0 to the maximum sustained charging level registered during the Test (for purposes of calculating the Ramp Rate);
- (6) Amount of Charging Energy and Energy In, registered at the Facility Meter, to go from 0% SOC to 100% SOC;
- (7) Amount of Facility Energy and Energy Out, registered at the Facility Meter, to go from 100% SOC to 0% SOC.

E. Test Conditions.

- (1) General. At all times during a SCT, the Facility shall be operated in compliance with Prudent Operating Practice and all operating protocols recommended, required or established by the manufacturer for operation.
- (2) Abnormal Conditions. If abnormal operating conditions that prevent the recordation of any required parameter occur during a SCT, Seller may postpone or reschedule all or part of such SCT in accordance with Part II.2.F below.

- (3) Instrumentation and Metering. Seller shall provide all instrumentation, metering and data collection equipment required to perform the SCT. The instrumentation, metering and data collection equipment electrical meters shall be calibrated in accordance with Prudent Operating Practice.
- F. Incomplete Test. If any SCT is not completed in accordance with this Exhibit N, Buyer may in its sole discretion: (i) accept the results up to the time the SCT stopped without any modification to the Storage Contract Capacity pursuant to Section III, below; (ii) require that the portion of the SCT not completed, be completed within a reasonable specified time period; or (iii) require that the SCT be entirely repeated. Notwithstanding the above, if Seller is unable to complete a SCT due to a Force Majeure Event or the actions or inactions of Buyer, the CAISO, or the Transmission Provider, Seller shall be permitted to reconduct such SCT on dates and at times reasonably acceptable to the Parties.
- G. Final Report. Within five (5) Business Days after the completion of any SCT, Seller shall prepare and submit to Buyer a written report of the results of the SCT, which report shall include:
- (1) a record of the personnel present during the SCT that served in an operating, testing, monitoring or other such participatory role;
  - (2) the measured data for each parameter set forth in Part II.2.A through C, including copies of the raw data taken during the test;
  - (3) the level of Storage Contract Capacity, Charging Capacity, Discharging Capacity and Stored Energy Level determined by the SCT, including supporting calculations;
  - (4) the Round Trip Efficiency; and
  - (5) Seller's statement of either Seller's acceptance of the SCT or Seller's rejection of the SCT results and reason(s) therefor.

Within ten (10) Business Days after receipt of such report, Buyer shall notify Seller in writing of either Buyer's acceptance of the SCT results or Buyer's rejection of the SCT and reason(s) therefor. If either Party rejects the results of any SCT, such SCT shall be repeated in accordance with Part II.2.F.

3. Supplementary Storage Capacity Test Protocol. No later than sixty (60) days prior to commencing Facility construction, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) a supplement to this Exhibit N with additional and supplementary details, procedures and requirements applicable to SCTs based on the then current design of the Facility ("Supplementary Storage Test Protocol"). Thereafter, from time to time, Seller may deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) any Seller recommended updates to the then current Supplementary Storage Test Protocol. The initial Supplementary Storage Test Protocol (and each update thereto), once approved by Buyer, shall be deemed an amendment to this Exhibit N.

### **III. Storage Capacity Test Results and Re-Setting of Storage Contract Capacity.**

The total amount of Discharging Energy delivered to the Delivery Point (expressed in MWh AC) during each of the first \_\_\_\_ hours of discharge (up to, but not in excess of, the product of (i) the Guaranteed Annual Capacity multiplied by (ii) \_\_\_\_ hours) shall be divided by \_\_\_\_ hours to determine the Storage Contract Capacity, which shall be expressed in MW AC, and shall be the new Storage Contract Capacity commencing at the beginning of the day following the completion of the test for calculating the Contract Price and for all other purposes under this Agreement.

**EXHIBIT L**  
**STORAGE AVAILABILITY CALCULATION**

Calculation of Monthly Storage Availability. Seller shall calculate the “Monthly Storage Availability” for each month of the Delivery Term using the formula set forth below:

$$\text{Monthly Storage Availability (\%)} = \frac{[\text{MONHRS}_m - \text{UNAVAILHRS}_m]}{[\text{MONHRS}_m]}$$

where:

$m$  = the relevant month “m” in which availability is calculated;

$\text{MONHRS}_m$  is the total number of hours for the applicable month;

$\text{UNAVAILHRS}_m$ , is the total number of hours, or partial hours, in the month during which the Facility was unavailable to deliver Product for any reason other than the occurrence of any of the following (each, an “Availability Excused Event”): a Force Majeure Event, Buyer Default, System Emergencies, up to one hundred twenty (120) hours of scheduled maintenance (including Planned Outages), or violation of the Operating Parameters.

- Guaranteed Capacity Deficit: During hours in which Storage Contract Capacity is less than the Guaranteed Annual Capacity (“Capacity Deficit Period”), the difference in capacity (“Capacity Deficit”) will be counted as an equivalent amount of  $\text{UNAVAILHRS}_m$ .
- Partial Hours and Partial Availability: If, for any reason other than an Availability Excused Event, the Facility is unavailable for less than a full hour or if a portion of the Facility is unavailable during any hour, the hours in which the Facility is partially available will be adjusted by an equivalent percentage to reflect the reduction in availability and will be included in this calculation of  $\text{UNAVAILHRS}_m$ . Any Availability Excused Event that results in unavailability of the Facility for less than a full hour or unavailability of a portion of the Facility during any hour, the hours in which the Facility is partially available will be adjusted by an equivalent percentage to reflect the reduction in availability for this calculation.
- If the Facility or any component thereof was previously deemed unavailable for an hour or part of an hour, and Seller provides a revised Notice indicating the Facility is available for that hour or part of an hour by 5:00 a.m. of the morning Buyer schedules or bids the Facility in the Day-Ahead Market, the Facility will be deemed to be available to the extent set forth in the revised Notice.
- If the Facility or any component thereof was previously deemed unavailable for an hour or part of an hour and Seller provides a revised Notice indicating the Facility is available for that hour or part of an hour at least sixty (60) minutes prior to the time the Buyer is required to schedule or bid the Facility in the Real-Time Market, and the Facility is dispatched in the Real-Time Market, the Facility will be deemed to be available to the extent set forth in the revised Notice.

### **Availability Adjustment**

The applicable “Availability Adjustment” is calculated as follows:

- (i) If the Monthly Storage Availability is greater than or equal to 98%, then:

$$AA = 100\%$$

- (ii) If the Monthly Storage Availability is less than 98%, but greater than or equal to 70%, then:

$$AA = 100\% - [(98\% - \text{Monthly Storage Availability}) \times 2]$$

- (iii) If the Monthly Storage Availability is less than 70% then:

$$AA = 0$$

## EXHIBIT M

### ROUND TRIP EFFICIENCY ADJUSTMENT FACTOR

Seller shall calculate the “Round Trip Efficiency (or RTE) Adjustment Factor” for each month of the Delivery Term using the following calculation:

- (i) If the RTE Rate is greater than or equal to the GRTE Rate, then:  
RTE Adjustment Factor = 100%
- (ii) If the RTE Rate is less than the GRTE Rate, then:  
RTE Adjustment Factor =  $[100\% - [(GRTE \text{ Rate} - RTE \text{ Rate})]]$

Where:

- “GRTE Rate” = The applicable Guaranteed Round Trip Efficiency Rate
- “RTE Rate” = Round Trip Efficiency Rate shall be the actual measured round trip efficiency of the Facility based on the total amount of Discharging Energy divided by the total amount of Charging Energy during each month of the Delivery Term (in %)

### GUARANTEED ROUND TRIP EFFICIENCY

Contract Year	Guaranteed Round Trip Efficiency Rate %
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	

**[ENERGY STORAGE PROJECT NAME]**  
**PROJECT PARTICIPATION SHARE AGREEMENT**

among

**CITY AND COUNTY OF SAN FRANCISCO, ACTING BY AND THROUGH ITS  
PUBLIC UTILITIES COMMISSION CLEANPOWERSF**

and

**[OTHER PARTICIPATING MEMBERS]**

and

**CALIFORNIA COMMUNITY POWER**

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**[ENERGY STORAGE PROJECT NAME]**  
**PROJECT PARTICIPATION SHARE AGREEMENT**

**PREAMBLE**

This Project Participation Share Agreement (“**Agreement**”) is entered into as of \_\_\_\_\_ (the “**Effective Date**”), by and among the City and County of San Francisco acting by and through its Public Utilities Commission, CleanPowerSF, [Other Participating Members] (each individually a “**Project Participant**” and collectively referred to as the “**Project Participants**”) and California Community Power (“CCP”), a California joint powers authority. CCP and the Project Participants are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.” All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

**RECITALS**

WHEREAS CCP is a Joint Powers Authority, was formed for the purpose of developing, acquiring, constructing, owning, managing, contracting for, engaging in, or financing electric energy generation and storage projects, and for other purposes; and

WHEREAS, the Project Participants have participated with CCP in the negotiation of an agreement for purchase of the certain products of [Project Name] (the “**Project**” as defined in Exhibit A of the ESSA), and CCP is to enter into an Agreement (“**ESSA**”), which is incorporated herein by this reference, with [Project Company Name] (“**Project Developer**”), providing for purchase of the energy storage products, and associated rights, benefits, and credits from the Project on behalf of the Project Participants.

WHEREAS, pursuant to this Agreement, CCP shall cause to deliver to each Project Participant the Project Participant’s associated share of the electricity products and services and associated rights, benefits, and credits of the Project.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

**ARTICLE 1**  
**DEFINITIONS**

1.1. **Definitions.** The following terms, when used herein with initial capitalization, shall have the meanings set forth below:

“**AC**” means alternating current.

“**Affiliate**” means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes

of this definition and the definition of “Permitted Transferee”, “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least fifty percent (50%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least fifty percent (50%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

“**Agreement**” has the meaning set forth in the Preamble and any Exhibits, schedules, and any written supplements hereto.

“**Amended Annual Budget**” means the budget approved by the Project Committee and adopted by the CCP Board pursuant to Section 5.1(c) of this Agreement.

“**Ancillary Services**” means all ancillary services, products and other attributes, if any, associated with the Installed Capacity of the Facility.

“**Annual Budget**” means the budget approved by the Project Committee and adopted by the CCP Board pursuant to Section 5.1(c) of this Agreement.

“**Bankrupt**” or “**Bankruptcy**” means, with respect to any entity, such entity that (a) 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, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) 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 (f) is generally unable to pay its debts as they fall due.

“**Billing Statement**” has the meaning set forth in Section 9.2 of this Agreement.

“**Buyer Liability Pass Through Agreement**” or “**BLPTA**” means, for each Project Participant, the form set forth in Exhibit L of the ESSA, as executed by such Project Participant, countersigned by CCP, and delivered to the Project Developer.

“**Business Day**” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 a.m. and ends at 5:00 p.m. local time for the Party sending a Notice, or payment, or performing a specified action.

“**CAISO**” means the California Independent System Operator Corporation or any successor entity performing similar functions.

“**CAISO Balancing Authority Area**” has the meaning set forth in the CAISO Tariff.

“**CAISO Certification**” means the certification and testing requirements for a storage unit set forth in the CAISO Tariff that are applicable to the Facility, including certification and testing for all Ancillary Services, PMAX, and PMIN associated with such storage units, that are applicable to the Facility.

**“CAISO Grid”** has the same meaning as “CAISO Controlled Grid” as defined in the CAISO Tariff.

**“CAISO Tariff”** means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures, and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.

**“California Renewables Portfolio Standard”** or **“RPS”** means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.

**“Capital Improvements”** means any unit of property, property right, land or land right which is a replacement, repair, addition, improvement or betterment to the Project or any transmission facilities relating to, or for the benefit of, the Project, the betterment of land or land rights or the enlargement or betterment of any such unit of property constituting a part of the Project or related transmission facilities which is (i) consistent with Prudent Utility Practices and determined necessary and/or desirable by the CCP Board or (ii) required by any governmental agency having jurisdiction over the Project.

**“CCP Board”** means the Board of Directors of California Community Power.

**“CCP Manager”** means the General Manager of California Community Power.

**“CEC”** means the California Energy Commission, or any successor agency performing similar statutory functions.

**“Capacity Attribute”** means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Facility can charge, discharge, and deliver to the Delivery Point at a particular moment and that can be purchased, sold, or conveyed under CAISO or CPUC market rules, including Resource Adequacy Benefits.

**“CEQA”** means the California Environmental Quality Act, as amended or supplemented from time to time.

**“Chairperson”** has the meaning set forth in Exhibit D.

**“Change of Control”** has the meaning set forth in Section 1.1 of the ESSA.

**“Charging Energy”** means the Energy delivered to the Facility pursuant to a Charging Notice as measured at the Facility Metering Point by the Facility Meter, as such meter readings are adjusted by the CAISO for any applicable Electrical Losses.

**“Charging Notice”** means the operating instruction, and any subsequent updates, given by CCP’s SC or the CAISO to Project Developer, directing the Facility to charge at a specific MW rate for a specified period of time or amount of MWh; *provided*, any such operating instruction

shall be in accordance with the Operating Restrictions.

**“Commercial Operation”** has the meaning set forth in Section 1.1 of the ESSA.

**“Commercial Operation Date”** or **“COD”** has the meaning set forth in Section 1.1 of the ESSA.

**“Commercial Operation Delay Damages”** has the meaning set forth in Section 1.1 of the ESSA.

**“Communications Protocols”** has the meaning set forth in Section 1.1 of the ESSA.

**“Community Choice Aggregator”** has the meaning set forth in California Public Utilities Code § 331.1.

**“Confidential Information”** has the meaning set forth in Section 18.1 of the ESSA.

**“Construction Start”** has the meaning set forth in Exhibit B of the ESSA.

**“Construction Start Date”** has the meaning set forth in Exhibit B of the ESSA.

**“Contract Price”** has the meaning set forth on the Cover Sheet of the ESSA.

**“Contract Term”** has the meaning set forth in Section 2.1 of the ESSA.

**“Contract Year”** means a period of twelve (12) consecutive months. The first Contract Year shall commence on the Commercial Operation Date and each subsequent Contract Year shall commence on the anniversary of the Commercial Operation Date.

**“Coordinated Operations Agreement”** means the agreement by and among CCP and all Project Participants for purposes of operating the Project.

**“Costs”** means, with respect to a Project Participant assuming all or a portion of a Defaulting Project Participant’s Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c), brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such Project Participant in terminating any arrangement pursuant to which it has hedged its obligations; and all reasonable attorneys’ fees and expenses incurred by the Project Participant in connection with the Step-Up Allocation.

**“CPUC”** means the California Public Utilities Commission, or successor entity.

**“Cured Payment Default”** means a Payment Default that has been cured in accordance with Section 12.4 of this Agreement.

**“Daily Delay Damages”** has the meaning set forth in Section 1.1 of the ESSA.

**“Damage Payment”** means the amount to be paid by the ESSA Defaulting Party to the ESSA Non-Defaulting Party after a Terminated Transaction occurring prior to the Commercial Operation Date, in a dollar amount set forth in Section 11.3(a) of the ESSA.

**“Day-Ahead Market”** has the meaning set forth in the CAISO Tariff.

**“Day-Ahead Schedule”** has the meaning set forth in the CAISO Tariff.

**“Defaulting Project Participant”** has the meaning set forth in Section 12.1.

**“Delivery Point”** means the Facility Pnode on the CAISO grid.

**“Delivery Term”** means the period of Contract Years set forth on the Cover Sheet of the ESSA beginning on the Commercial Operation Date, unless terminated earlier in accordance with the terms and conditions of the ESSA.

**“Designated Fund”** has the meaning set forth in Section 10.5.

**“Development Security”** means (a) cash or (b) a Letter of Credit in the amount set forth on the Cover Sheet of the ESSA.

**“Discharging Energy”** means the Energy delivered from the Facility to the Delivery Point pursuant to a Discharging Notice during any Settlement Interval or Settlement Period, as measured at the Facility Metering Point by the Facility Meter, as such meter readings are adjusted by the CAISO for any applicable Electrical Losses.

**“Discharging Notice”** means the operating instruction, and any subsequent updates, given by CCP’s SC or the CAISO to the Facility, directing the Facility to discharge Facility Energy at a specific MW rate for a specified period of time or to an amount of MWh.

**“Effective Date”** has the meaning set forth in the Preamble.

**“Electrical Losses”** means all transmission or transformation losses (a) between the Delivery Point and the Facility Metering Point associated with delivery of Charging Energy, and (b) between the Facility Metering Point and the Delivery Point associated with delivery of Facility Energy.

**“Emission Reduction Credits”** or **“ERCs”** means emission reductions that have been authorized by a local air pollution control district pursuant to California Division 26 Air Resources; Health and Safety Code Sections 40709 and 40709.5, whereby a district has established a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall be banked prior to use to offset future increases in emissions.

**“Energy”** means electrical energy, measured in kilowatt-hours or Megawatt-hours or multiple units thereof.

**“Energy Management System”** or **“EMS”** means the Facility’s energy management system.

**“Energy Storage Service Agreement”** or **“ESSA”** means the agreement between CCP and Project Developer for the purchase of energy storage products of Tumbleweed Energy Storage, executed on \_\_\_\_\_.

**“ESSA Defaulting Party”** has the meaning set forth in Section 11.1(a) of the ESSA.

**“ESSA Non-Defaulting Party”** has the meaning set forth in Section 11.2 of the ESSA.

**“Entitlement Share”** means the percentage entitlement of each Project Participant as set forth in Exhibit B of this Agreement (entitled “Schedule of Project Participant Entitlement Shares and Step-Up Allocation Caps”) attributable to each such Project Participant, as may be amended pursuant to Section 4.2 or 12.8.

**“Entitlement Share Reduction Amount”** has the meaning set forth in Exhibit C.

**“Entitlement Share Reduction Compensation Amount”** has the meaning set forth in Exhibit C.

**“Entitlement Share Reduction Notice”** has the meaning set forth in Exhibit C.

**“Environmental Attributes”** shall mean any and all attributes under the RPS regulations or under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable now, or in the future to the Facility and its displacement of conventional energy generation.

**“Estimated Monthly Project Cost”** has the meaning set forth in Section 8.1.

**“Event of Default”** has the meaning set forth in Section 11.1 of the ESSA.

**“Expected Commercial Operation Date”** means the date set forth on the Cover Sheet of the ESSA.

**“Facility”** means the energy storage facility described on the Cover Sheet of the ESSA and in Exhibit A of the ESSA, located at the Site and including mechanical equipment and associated facilities and equipment required to deliver Product (but excluding any Shared Facilities), as such storage facility may be expanded or otherwise modified from time to time in accordance with the terms of the ESSA.

**“Facility Energy”** means the Energy delivered from the Facility to the Delivery Point during any Settlement Interval or Settlement Period, as measured at the Facility Metering Point by the Facility Meter, as such meter readings are adjusted by the CAISO for any applicable Electrical Losses or Station Use.

**“Facility Meter”** has the meaning set forth in Section 1.1 of the ESSA.



**“Facility Metering Point”** means the location(s) of the Facility Meter shown in Exhibit R of the ESSA.

**“FERC”** means the Federal Energy Regulatory Commission or any successor government agency.

**“Flexible Capacity”** means, with respect to any particular Showing Month, the number of MWs of Product which are eligible to satisfy Flexible RAR.

**“Flexible RAR”** means the flexible capacity requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff, the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority.

**“Force Majeure Event”** has the meaning set forth in Section 10.1 of the ESSA.

**“Full Capacity Deliverability Status”** or **“FCDS”** has the meaning set forth in the CAISO Tariff.

**“Full Capacity Deliverability Status Finding”** means a written confirmation from the CAISO that the Facility is eligible for Full Capacity Deliverability Status.

**“Gains”** means, with respect to a Project Participant assuming all or a portion of a Defaulting Project Participant’s Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c), an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from such Step-Up Allocation for the remaining Contract Term of the ESSA, determined in a commercially reasonable manner. Factors used in determining the economic benefit to such Project Participant may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of such Project Participant, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NP-15), all of which should be calculated for the remaining Contract Term, and include the value of Environmental Attributes and Capacity Attributes.

**“GHG Regulations”** means Title 17, Division 3 (Air Resources), Chapter 1 (Air Resources Board), Subchapter 10 (Climate Change), Article 5 (Emissions Cap), Sections 95800 to 96023 of the California Code of Regulations, as amended or supplemented from time to time.

**“Governmental Authority”** means any federal, state, provincial, local, or municipal government, any political subdivision thereof or any other governmental, congressional, or parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau, or entity with authority to bind a Party at law, including CAISO; *provided*, “Governmental Authority” shall not in any event include any Party, except to the extent that the Party is acting solely in its governmental capacity.

**“Greenhouse Gas”** or **“GHG”** has the meaning set forth in the GHG Regulations or in any other applicable Laws.

**“Guaranteed Commercial Operation Date”** means the date set forth on the Cover Sheet of the ESSA, as such date may be extended pursuant to Exhibit B of the ESSA.

**“Guaranteed Construction Start Date”** means the date set forth on the Cover Sheet of the ESSA, as such date may be extended pursuant to Exhibit B of the ESSA.

**“Installed Capacity”** means the lesser of (a) P<sub>MAX</sub>, and (b) maximum dependable operating capacity of the Facility to discharge Energy for eight (8) hours of continuous discharge, as measured in MW AC at the Facility Meter Point by the Facility Meter and adjusted for Electrical Losses to the Delivery Point, that achieves Commercial Operation, as evidenced by a certificate substantially in the form attached as Exhibit I of the ESSA, as such capacity may be adjusted pursuant to Section 5 of Exhibit B of the ESSA.

**“Interconnection Agreement”** means the interconnection agreement entered into by Project Developer pursuant to which the Facility will be interconnected with the Transmission System, and pursuant to which Project Developer’s Interconnection Facilities and any other Interconnection Facilities will be constructed, operated, and maintained during the ESSA Contract Term.

**“Interconnection Facilities”** means the interconnection facilities, control and protective devices, and metering facilities required to connect the Facility with the Transmission System in accordance with the Interconnection Agreement.

**“Interest Rate”** has the meaning set forth in Section 8.2 of the ESSA.

**“Invoice Amount”** has the meaning set forth in Section 9.2.

**“ITC”** means the investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.

**“Joint Powers Act”** means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).

**“Joint Powers Agreement”** means that certain Joint Powers Agreement dated January 29, 2021, as amended from time to time, under which CCP is organized as a Joint Powers Authority in accordance with the Joint Powers Act.

**“kWh”** means a kilowatt-hour measured in alternating current, unless expressly stated in terms of direct current.

**“Late Payment Notice”** means a notice issued by CCP to a Project Participant pursuant to Section 9.7.

**“Late Payment Charge”** has the meaning set forth in Section 9.7.

**“Law”** means any applicable law, statute, rule, regulation, decision, writ, order, decree or judgment, permit or any interpretation thereof, promulgated or issued by a Governmental Authority.

**“Letter(s) of Credit”** has the meaning set forth in Section 1.1 the ESSA.

**“Local Capacity Area Resource”** has the meaning set forth in the CAISO Tariff.

**“Local RAR”** means the local Resource Adequacy Requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff, the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority. “Local RAR” may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirements in other regulatory proceedings or legislative actions.

**“Losses”** means, with respect to a Project Participant assuming all or a portion of a Defaulting Project Participant’s Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c), an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from such Step-Up Allocation for the remaining Contract Term of the ESSA, determined in a commercially reasonable manner. Factors used in determining economic loss to such Project Participant may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Project Participant, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NP-15), all of which should be calculated for the remaining Contract Term of the ESSA and must include the value of Environmental Attributes and Capacity Attributes.

**“Marketable Emission Trading Credits”** means emissions trading credits or units pursuant to the requirements of California Division 26 Air Resources; Health & Safety Code Section 39616 and Section 40440.2 for market-based incentive programs such as the South Coast Air Quality Management District’s Regional Clean Air Incentives Market, also known as RECLAIM, and allowances of sulfur dioxide trading credits as required under Title IV of the Federal Clean Air Act (42 U.S.C. § 7651b (a) to (f)).

**“Month”** means a calendar month.

**“Monthly Costs”** has the meaning set forth in Section 9.1.

**“Monthly Capacity Payment”** means the payment required to be made by CCP to Project Developer each month of the Delivery Term as compensation for the Product, as calculated in accordance with Exhibit C of the ESSA.

**“MW”** means megawatts in alternating current, unless expressly stated in terms of direct current.

**“MWh”** means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.

**“NERC”** means the North American Electric Reliability Corporation.

**“Net Qualifying Capacity”** or **“NQC”** has the meaning set forth in the CAISO Tariff.

**“Non-Defaulting Project Participant”** has the meaning set forth in Section 12.1.

**“Normal Vote”** has the meaning set forth in Exhibit D.

**“Notice”** shall, unless otherwise specified in the Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, or electronic messaging (e-mail).

**“Operating Account”** means an account established by CCP for each Project Participant pursuant to Section 8.2.

**“Operating Cost”** means the share of the Annual Budget or Amended Annual Budget attributable to the applicable Month for a Billing Statement.

**“Operating Restrictions”** means those restrictions, rules, requirements, and procedures set forth in Exhibit Q of the ESSA.

**“Party”** has the meaning set forth in the Preamble.

**“Payment Default”** has the meaning set forth in Section 12.2.

**“Payment Default Termination Deadline”** has the meaning set forth in Section 12.6.

**“Performance Guarantees”** has the meaning set forth in Section 4.3(b) of the ESSA.

**“Performance Security”** means (i) cash or (ii) a Letter of Credit in the amount set forth on the Cover Sheet of the ESSA.

**“Permitted Transferee”** has the meaning set forth in Section 1.1 of the ESSA.

**“Person”** means any individual, sole proprietorship, corporation, limited liability company, limited or general partnership, joint venture, association, joint-stock company, trust, incorporated organization, institution, public benefit corporation, unincorporated organization, government entity or other entity.

**“PMAX”** means the applicable CAISO-certified maximum operating level of the Facility.

**“PMIN”** means the applicable CAISO-certified minimum operating level of the Facility.

**“PNode”** has the meaning set forth in the CAISO Tariff.

**“Product”** has the meaning set forth in Section 3.1

**“Progress Report”** means a progress report including the items set forth in Exhibit E of the ESSA.

**“Project”** shall be broadly construed to entail the aggregate of rights, liabilities, interests, and obligations of CCP pursuant to the ESSA, including but not limited to all rights, liabilities, interests, and obligations associated with the Product, all rights, liabilities, interests and obligations

associated with the Facility, and including all aspects of the operation and administration of the Facility and the ESSA and the rights, liabilities, interests and obligations associated therewith.

**“Project Committee”** means the committee established in accordance with Section 6.1.

**“Project Developer”** means [REDACTED], or assignee as permitted under the ESSA.

**“Project Participants”** means those entities executing this Agreement, as identified in the Preamble, together in each case with each entity’s successors or assigns.

**“Project Revenue Rights”** means all rights of a Project Participant under this Agreement to any revenue associated with the Facility Energy, Capacity Attributes, or Ancillary Services associated with the Facility.

**“Project Rights”** means all rights and privileges of a Project Participant under this Agreement, including but not limited to its Entitlement Share, its right to receive the Product from the Facility, and its right to vote on Project Committee matters.

**“Project Rights and Obligations”** means the Project Participants’ Project Rights and obligations under the terms of this Agreement.

**“Proposed Entitlement Share Reduction Compensation Amount”** has the meaning set forth in Exhibit C.

**“Prudent Operating Practice”** means (a) the applicable practices, methods and acts required by or consistent with applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric industry during the relevant time period with respect to grid-interconnected, utility-scale energy storage facilities in the Western United States, and (b) any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale energy storage facilities in the Western United States. Prudent Operating Practice shall include compliance with applicable Laws, applicable safety and reliability criteria, and the applicable criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules, and standards of any successor organizations.

**“Qualifying Capacity”** has the meaning set forth in the CAISO Tariff.

**“RA Compliance Showing”** means the (a) Local RAR compliance or advisory showings (or similar or successor showings), (b) RAR compliance or advisory showings (or similar or successor showings), and (c) Flexible RAR compliance or advisory showings (or similar successor showings), in each case, an entity is required to make to the CAISO pursuant to the CAISO Tariff,

to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings, or to any Governmental Authority.

**“RA Deficiency Amount”** has the meaning set forth in Section 1.1 of the ESSA.

**“RA Guarantee Date”** means the date by which the Facility is expected to achieve Full Capacity Deliverability Status, which is the Commercial Operation Date.

**“RA Shortfall Month”** has the meaning set forth in Section 1.1 of the ESSA.

**“Real-Time Market”** has the meaning set forth in the CAISO Tariff.

**“Receiving Party”** has the meaning set forth in Section 18.2 of the ESSA.

**“Reliability Network Upgrades”** has the meaning set forth in the CAISO Tariff.

**“Remedial Action Plan”** has the meaning set forth in Section 2.4 of the ESSA.

**“Replacement RA”** has the meaning set forth in Section 1.1 of the ESSA.

**“Resource Adequacy Benefits”** means the rights and privileges attached to the Facility that satisfy any entity’s Resource Adequacy Requirements, as those obligations are set forth in any ruling issue by a Governmental Authority, including the Resource Adequacy Rulings and shall include Flexible Capacity, and any local, zonal or otherwise locational attributes associated with the Facility.

**“Resource Adequacy Requirements”** or **“RAR”** means the resource adequacy requirements applicable to an entity as established by the CAISO pursuant to the CAISO Tariff, by the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority.

**“Resource Adequacy Resource”** has the meaning used in Resource Adequacy Rulings.

**“Resource Adequacy Rulings”** means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-04-040, 06-06-064, 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 13-06-024, 14-06-050, 15-06-063, 16-06-045, 17-06-027, 18-06-030, 18-06-031, 19-02-022, 19-06-026, 19-10-021, 20-01-004, 20-03-016, 20-06-002, 20-06-031, 20-06-028, 20-12-006, 21-06-035 and any other existing or subsequent ruling or decision, or any other resource adequacy laws, rules or regulations enacted, adopted or promulgated by any applicable Governmental Authority, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Contract Term.

**“Schedule”** has the meaning set forth in the CAISO Tariff, and **“Scheduled”** has a corollary meaning.

**“Scheduled Energy”** means the Facility Energy that clears under the applicable CAISO market based on the final Day-Ahead Schedule(s), FMM Schedule(s) (as defined in the CAISO

Tariff), and/or any other financially binding Schedule(s), market instruction or dispatch for the Facility for a given period of time implemented in accordance with the CAISO Tariff.

**“Scheduling Coordinator”** or **“SC”** means an entity certified by the CAISO as qualifying as a Scheduling Coordinator pursuant to the CAISO Tariff for the purposes of undertaking the functions specified in “Responsibilities of a Scheduling Coordinator,” of the CAISO Tariff, as amended from time to time.

**“Scheduling Coordinator Services Agreement”** means the agreement between CCP and a Scheduling Coordinator that was approved by the CCP Board pursuant to Section 5.2(a)(xiii).

**“Settlement Interval”** has the meaning set forth in the CAISO Tariff.

**“Settlement Period”** has the meaning set forth in the CAISO Tariff.

**“Shared Facilities”** means the gen-tie lines, transformers, substations, or other equipment, permits, contract rights, and other assets and property (real or personal), in each case, as necessary to enable delivery of Facility Energy to the Delivery Point, including the Interconnection Facilities and the Interconnection Agreement itself, if applicable, that are used in common with third parties or by the Project Developer for electric generation or storage facilities owned by Project Developer other than the Facility.

**“Showing Month”** means the calendar month of the Delivery Term, commencing with the Showing Month that contains the RA Guarantee Date, that is the subject of the RA Compliance Showing, as set forth in the Resource Adequacy Rulings and outlined in the CAISO Tariff. For illustrative purposes only, pursuant to the CAISO Tariff and Resource Adequacy Rulings in effect as of the Effective Date, the monthly RA Compliance Showing made in June is for the Showing Month of August.

**“Site”** has the meaning set forth in Section 1.1 of the ESSA, as further described in Exhibit A of the ESSA.

**“Station Use”** means the Energy that is used within the Facility to power the lights, motors, temperature control systems, control systems and other electrical loads that are necessary for operation of the Facility.

**“Step-Up Allocation Cap”** has the meaning set forth in Section 12.8(a).

**“Step-Up Invoice”** means an invoice sent to a Non-Defaulting Project Participant as a result of a Defaulting Project Participant’s Payment Default, which invoice shall separately identify any amount owed with respect to the monthly Billing Statement of the Defaulting Project Participant, as the case may be, pursuant to Section 12.7.

**“Step-Up Invoice Amount”** has the meaning set forth in Section 12.7.

**“Step-Up Invoice Amount Cap”** has the meaning set forth in Section 12.7.

**“Step-Up Reserve Account”** has the meaning set forth in Section 12.7(a)(i).

**“Storage Level”** means, at a particular time, the amount of electric Energy in the Facility available to be discharged as Facility Energy, expressed in MWh.

**“System Emergency”** means any condition that requires, as determined, and declared by CAISO or the Transmission Provider, automatic or immediate action to (i) prevent or limit harm to or loss of life or property, (ii) prevent loss of transmission facilities or generation supply in the immediate vicinity of the Facility, or (iii) to preserve Transmission System reliability.

**“Tax”** or **“Taxes”** means all U.S. federal, state and local, and any foreign taxes, levies, assessments, surcharges, duties and other fees and charges of any nature imposed by a Governmental Authority, whether currently in effect or adopted during the Contract Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any and all items of withholding, deficiency, penalty, additions, interest or assessment related thereto.

**“Tax Credits”** means any state, local and/or federal production tax credit, depreciation benefit, tax deduction and/or investment tax credit, including the ITC, specific to investments in renewable energy facilities and/or energy storage facilities.

**“Terminated Transaction”** has the meaning set forth in Section 11.2(a) the ESSA.

**“Termination Payment”** has the meaning set forth in Section 11.3 of the ESSA.

**“Transmission Provider”** means any entity that owns, operates, and maintains transmission or distribution lines and associated facilities and/or has entitlements to use certain transmission or distribution lines and associated facilities for the purpose of transmitting or transporting the Facility Energy from the Delivery Point.

**“Transmission System”** means the transmission facilities operated by the CAISO, now or hereafter in existence, which provide energy transmission service downstream from the Delivery Point.

**“Unanimous Vote”** has the meaning set forth in Exhibit D.

**“Uncontrollable Forces”** means any Force Majeure event and any cause beyond the control of any Party, which by the exercise of due diligence such Party is unable to prevent or overcome, including but not limited to, failure or refusal of any other Person to comply with then existing contracts, an act of God, fire, flood, explosion, earthquake, strike, sabotage, epidemic or pandemic (excluding impacts of the disease designated COVID-19 or the related virus designated SARS-CoV-2 impacts actually known by the Party claiming the Force Majeure Event as of the Effective Date), an act of the public enemy (including terrorism), civil or military authority including court orders, injunctions and orders of governmental agencies with proper jurisdiction or the failure of such agencies to act, insurrection or riot, an act of the elements, failure of equipment, a failure of any governmental entity to issue a requested order, license or permit, inability of any Party or any Person engaged in work on the Project to obtain or ship materials or equipment because of the effect of similar causes on suppliers or carriers. Notwithstanding the foregoing, Uncontrollable Forces as defined herein shall also include events of Force Majeure pursuant to the ESSA, as defined therein.



1.2. Rules of Interpretation. In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

(a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;

(b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;

(c) the words “hereof”, “herein”, and “hereunder” and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;

(d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;

(e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation, or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

(f) a reference to a Person includes that Person’s successors and permitted assigns;

(g) the terms “include” and “including” mean “include or including (as applicable) without limitation” and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;

(h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified, or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;

(i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;

(j) references to any amount of money shall mean a reference to the amount in United States Dollars;

(k) the expression “and/or” when used as a conjunction shall connote “any or all of”;

(l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning in Prudent Operating Practice shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning in Prudent Operating

Practice but that have well known and generally accepted technical or trade meanings, shall have such recognized meanings;

(m) each Party acknowledges that it was represented by counsel in connection with this Agreement and that it or its counsel reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement; and

(n) in the event of any conflict or inconsistency between the terms of this Agreement and the terms of the ESSA or the Coordinated Operations Agreement, the terms and provisions of this Agreement shall control.

## **ARTICLE 2**

### **EFFECTIVE DATE AND TERM**

#### **2.1. Term.**

(a) The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the occurrence of all of the following: (i) the termination of the ESSA and (ii) the termination of the Buyer Liability Pass Through Agreement for all the Project Participants, and (iii) all Parties have met their obligations under this Agreement (“**Term**”).

(b) Applicable provisions of this Agreement shall continue in effect after termination to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. All indemnity and audit rights shall remain in full force and effect for three (3) years following the termination of this Agreement.

## **ARTICLE 3**

### **AGREEMENT**

3.1. **Transaction.** Subject to the terms and conditions of this Agreement, the Project Participants authorize CCP to purchase all Facility Energy, Capacity Attributes, Ancillary Services, and Environmental Attributes associated with the Facility and any Replacement RA provided pursuant to the ESSA (collectively the “**Product**”), on behalf of the Project Participants. Pursuant to the procedures set forth in the Coordinated Operations Agreement, CCP shall cause Project Developer to deliver each Project Participant’s Entitlement Share of the Product to such Project Participant, including but not limited to (i) any revenue associated with the Facility Energy, Capacity Attributes, Ancillary Services, or Environmental Attributes associated with the Facility, and (ii) the Capacity Attributes and Environmental Attributes associated with the Facility or otherwise provided to CCP pursuant to the ESSA. CCP shall administer the ESSA and oversee the operation of the Project. CCP shall not sell, assign, or otherwise transfer any Product, or any portion thereof, to any third party other than to the Project Participants, unless authorized by the Project Participants pursuant to this Agreement.

## **ARTICLE 4**

### **ENTITLEMENT SHARE**

4.1. Initial Entitlement Share. Each Project Participant's initial Entitlement Share as of the Effective Date shall be set forth in Column B of the Table provided in Exhibit B of this Agreement (entitled "Schedule of Project Participant Entitlement Shares and Step-Up Allocation Caps"). Any revisions to the Entitlement Share specified in Exhibit B pursuant to Section 4.2. or Section 12.8 shall be considered an element of the administration of this Agreement and shall not require the consent of the Parties hereto.

4.2. Change of Entitlement Share. Any Project Participant may reduce its Entitlement Share of the Project pursuant to the process set forth in Exhibit C.

4.3. Reduction of Entitlement Share to Zero. If any Project Participant's Entitlement Share is reduced to zero through any process specified in Exhibit C, such Project Participant shall remain a Party to this Agreement and shall be subject to all rights, obligations, and liabilities of this Agreement, including but not limited to any liabilities for Monthly Capacity Payments, Damage Payment or Termination Payment, as applicable, and any other damage payments or reimbursement amounts under the ESSA.

## **ARTICLE 5**

### **OBLIGATIONS OF CCP; ROLE OF CCP BOARD AND CCP MANAGER**

#### **5.1. Obligations of CCP.**

(a) CCP shall take such commercially reasonable actions or implement such commercially reasonable measures as may be necessary or desirable for the utilization, maintenance, or preservation of the rights and interests of the Project Participants in the Project including, if appropriate, such enforcement actions or other measures as the Project Committee or CCP Board deems to be in the Project Participants' best interests. To the extent not inconsistent with the ESSA or other applicable agreements, CCP may also be authorized by the Project Participants to assume responsibilities for planning, designing, financing, developing, acquiring, insuring, contracting for, administering, operating, and maintaining the Project to effectuate the conveyance of the Product to Project Participants in accordance with Project Participants' Entitlement Shares.

(b) To the extent such services are available and can be carried forth in accordance with the ESSA, CCP shall also provide such other services, as approved by the Project Committee or CCP Board, as may be deemed necessary to secure the benefits and/or satisfy the obligations associated with the ESSA.

(c) Adoption of Annual Budget. The Annual Budget and any amendments to the Annual Budget shall be prepared and approved in accordance with this Section 5.1(c).

(i) The CCP Manager will prepare and submit to the Project Committee a proposed Annual Budget at least ninety (90) days prior to the beginning of each Contract Year during the term of this Agreement. The proposed Annual Budget shall be based on the prior Contract Year's actual costs and shall include reasonable estimates of the costs CCP expects to incur during the applicable Contract Year in association with the administration of the ESSA, including the cost of insurance coverages that are determined to be attributable to the Project by action of the CCP Board. Upon approval of the proposed Annual Budget by a Normal Vote of the

Project Committee, the CCP Manager shall present the proposed Annual Budget to the CCP Board. The CCP Board shall adopt the Annual Budget no later than thirty (30) days prior to the beginning of such Contract Year and shall cause copies of such adopted Annual Budget to be delivered to each Project Participant.

(ii) At any time after the adoption of the Annual Budget for a Contract Year, the CCP Manager may prepare and submit to the Project Committee a proposed Amended Annual Budget for and applicable to the remainder of such Contract Year. The proposal shall (A) explain why an amendment to the Annual Budget is needed, (B) compare estimated costs against actual costs, and (C) describe the events that triggered the need for additional funding. Upon approval of the proposed Amended Annual Budget by a Normal Vote of the Project Committee, the CCP Manager shall present the proposed Amended Annual Budget to the CCP Board. Upon adoption of the Amended Annual Budget by the CCP Board, such Amended Annual Budget shall apply to the remainder of the Contract Year and the CCP Board shall cause copies of such adopted Amended Annual Budget to be delivered to each Project Participant.

(iii) Reports. CCP will prepare and issue to Project Participants the following reports each quarter of a year during the Term:

(A) Financial and operating statement relating to the Project.

(B) Variance report comparing the costs in the Annual Budget versus actual costs, and the status of other cost-related issues with respect to the Project.

(d) Records and Accounts. CCP will keep, or cause to be kept, accurate records and accounts of the Project as well as of the operations relating to the Project, all in a manner similar to accepted accounting methodologies associated with similar projects. All transactions of CCP relating to the Project with respect to each Contract Year shall be subject to an annual audit. Each Project Participant shall have the right at its own expense to examine and copy the records and accounts referred to above on reasonable notice during regular business hours.

(e) Information Sharing. Upon CCP's request, each Project Participant agrees to coordinate with CCP to provide such information, documentation, and certifications that are reasonably necessary for the design, financing, refinancing, development, operation, administration, maintenance, and ongoing activities of the Project, including information required to respond to requests for such information from any federal, state, or local regulatory body or other authority.

(f) Consultants and Advisors Available. CCP shall make available to the Project Committee all consultants and advisors, including financial advisors and legal counsel that are retained by CCP, and such consultants, counsel and advisors shall be authorized to consult with and advise the Project Committee on Project matters. CCP agrees to waive any conflicts of interest or any other applicable professional standards or rules as required by consultants, counsel, and advisors to advise the Project Committee on Project matters.

(g) Deposit of Insurance Proceeds. CCP shall promptly deposit any insurance proceeds received by CCP from any insurance obtained pursuant to this Agreement or otherwise

associated with the Project into the Operating Accounts of the Project Participants based on each Project Participants' Entitlement Shares.

(h) Liquidated and Other Damages. Any amounts paid to CCP, or applied against payments otherwise due by CCP pursuant to the ESSA or each Project Participant's respective BLPTA, by the Project Developer shall be deposited on a pro rata share, based on each Project Participant's Entitlement Share into each Project Participant's Operating Account. Liquidated Damages include, but are not limited to Daily Delay Damages, RA Deficiency Amount, Damage Payment, and Termination Payment.

(i) Charging and Discharging Energy. Subject to the direction of the Project Committee, CCP shall reasonably coordinate, schedule, and do all other things necessary or appropriate, except as otherwise prohibited under this Agreement, to provide for the delivery of Charging Energy from the grid to the Point of Delivery to enable CCP to exercise its rights and obligations in connection with Charging Energy in accordance with the requirements of the ESSA. Subject to the direction of the Project Committee, CCP shall reasonably coordinate, schedule, and do all other things necessary or appropriate, except as otherwise prohibited under this Agreement, to provide for the delivery of Discharging Energy from the Point of Delivery to the grid to enable CCP to maximize the value of the ESSA to the Project Participants in accordance with the requirements of the ESSA.

(j) Resale of Product. Any Project Participant may direct CCP to remarket such Project Participant's Entitlement Share of the Product, or such Project Participant's Entitlement Share of any part of the Product. If CCP incurs any expenses associated with the remarketing activities pursuant to this Section 5.1(j), then CCP shall include the total amount of such expenses as a Monthly Cost on the Project Participant's next Billing Statement. Prior to offering the Project Participant's Entitlement Share of the Product, or the Project Participant's Entitlement Share of any part of the Product to any third party, CCP shall first offer the Product or portion of the Product to the other Project Participants. The amount of compensation paid to the selling Project Participant shall be negotiated and agreed to between the selling Project Participant and the purchasing Project Participant or third party. Any payments for any resold Product pursuant to this Section 5.1(j) shall be transmitted directly from the purchasing Project Participant or purchasing third party to the reselling Project Participant. Any such resale to a third party shall not convey any rights or authority over the operation of the Project, and the Project Participant shall not make a representation to the third party that the resale conveys any rights or authority over the operation of the Project.

(k) Uncontrollable Forces. CCP shall not be required to provide, and CCP shall not be liable for failure to provide, the Product, Replacement RA, or other service under this Agreement when such failure, or the cessation or curtailment of, or interference with, the service is caused by Uncontrollable Forces or by the failure of the Project Developer, or its successors or assigns, to obtain any required governmental permits, licenses, or approvals to acquire, administer, or operate the Project; provided, however, that the Project Participants shall not thereby be relieved of their obligations to make payments under this Agreement except to the extent CCP is so relieved pursuant to the ESSA, and provided further that CCP shall pursue all applicable remedies against the Project Developer under the ESSA and distribute any remedies obtained pursuant to Section 5.1(h).

(l) **Insurance.** Within one hundred and eighty days (180) of the Effective Date of this Agreement, CCP shall secure and maintain, during the Term, insurance coverage as follows:

(i) **Commercial General Liability.** CCP shall maintain, or cause to be maintained, commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of One Million Dollars (\$1,000,000) per occurrence, and an annual aggregate of not less than Two Million Dollars (\$2,000,000), endorsed to provide contractual liability in said amount, specifically covering CCP's obligations under this Agreement and including each Project Participant as an additional insured.

(ii) **Employer's Liability Insurance.** CCP, if it has employees, shall maintain Employers' Liability insurance with limits of not less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.

(iii) **Workers' Compensation Insurance.** CCP, if it has employees, shall also maintain at all times during the Term workers' compensation and employers' liability insurance coverage in accordance with statutory amounts, with employer's liability limits of not less than One Million Dollars (\$1,000,000.00) for each accident, injury, or illness; and include a blanket waiver of subrogation.

(iv) **Business Auto Insurance.** CCP shall maintain at all times during the Term business auto insurance for bodily injury and property damage with limits of One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of CCP's use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of the Agreement and shall name each Project Participant as an additional insured and contain standard cross-liability and severability of interest provisions.

(v) **Public Entity Liability Insurance.** CCP shall maintain public entity liability insurance, including public officials' liability insurance, public entity reimbursement insurance, and employment practices liability insurance in an amount not less than One Million Dollars (\$1,000,000) per claim, and an annual aggregate of not less than One Million Dollars (\$1,000,000) and CCP shall maintain such coverage for at least two (2) years from the termination of this Agreement.

(m) **Evidence of Insurance.** Within ten (10) days after the deadline for securing insurance coverage specified in Section 5.1(l), and upon annual renewal thereafter, CCP shall deliver to each Project Participant certificates of insurance evidencing such coverage with insurers with ratings comparable to A-VII or higher, and that are authorized to do business in the State of California, in a form evidencing all coverages set forth above. Such certificates shall specify that each Project Participant shall be given at least thirty (30) days prior Notice by CCP in the event of cancellation or termination of coverage. Such insurance shall be primary coverage without right of contribution from any insurance of each Project Participant. Any other insurance maintained by CCP not associated with this Agreement is for the exclusive benefit of CCP and shall not in any manner inure to the benefit of Project Participants. The general liability, auto liability and worker's compensation policies shall be endorsed with a waiver of subrogation in favor of each Project Participant for all work performed by CCP, its employees, agents and sub-contractors.

## 5.2. Role of CCP Board.

(a) The rights and obligations of CCP under the ESSA shall be subject to the ultimate control at all times of the CCP Board. The CCP Board, shall have, in addition to the duties and responsibilities set forth elsewhere in this Agreement, the following duties and responsibilities, among others:

(i) Dispute Resolution. The CCP Board shall review, discuss and attempt to resolve any disputes among CCP, any of the Project Participants, and the Project Developer relating to the Project, the operation and management of the Facility, and CCP's rights and interests in the Facility.

(ii) ESSA. The CCP Board shall have the authority to review, modify, and approve, as appropriate, all amendments, modifications, and supplements to the ESSA.

(iii) Capital Improvements. The CCP Board shall review, modify, and approve, if appropriate, all Capital Improvements undertaken with respect to the Project and all financing arrangements for such Capital Improvements. The CCP Board shall approve those budgets or other provisions for the payments associated with the Project and the financing for any development associated with the Project.

(iv) Committees. The CCP Board shall exercise such review, direction, or oversight as may be appropriate with respect to the Project Committee and any other committees established pursuant to this Agreement.

(v) Budgeting. Upon the submission of a proposed Annual Budget or proposed Amended Annual Budget, approved by a Normal Vote of the Project Committee, the CCP Board shall review, modify, and approve each Annual Budget and Amended Annual Budget in accordance with Section 5.1(c) of this Agreement.

(vi) Early Termination of ESSA. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(ii) of this Agreement, as to an early termination of the ESSA pursuant to Section 11.2 of the ESSA.

(vii) Assignment by Project Developer. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(iii) of this Agreement, as to any assignment by Project Developer pursuant to Section 14.1 of the ESSA other than any assignment pursuant to Sections 14.2 or 14.3 of the ESSA.

(viii) Buyer Financing Assignment. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(iv) of this Agreement, as to an assignment by CCP to a financing entity pursuant to Section 14.5 of the ESSA.

(ix) Change of Control. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(v) of this Agreement, as to any Change of Control requiring CCP's consent, as specified in Section 14.1 of the ESSA.

(x) Supervening Authority of the Board. The CCP Board has complete and plenary supervening power and authority to act upon any matter which is capable of being acted upon by the Project Committee or which is specified as being within the authority of the Project Committee pursuant to the provisions of this Agreement.

(xi) Other Matters. The CCP Board is authorized to perform such other functions and duties, including oversight of those matters and responsibilities addressed by the Project Committee or CCP Manager as may be provided for under this Agreement and under the ESSA, or as may otherwise be appropriate.

(xii) Periodic Audits. The CCP Board or the Project Committee may arrange for the annual audit by certified accountants, selected by the CCP Board and experienced in electric generation or electric utility accounting, of the books and accounting records of CCP, the Project Developer to the extent authorized under the ESSA, and any other counterparty under any agreement to the extent allowable, and such audit shall be completed and submitted to the CCP Board as soon as reasonably practicable after the close of the Contract Year. CCP shall promptly furnish to the Project Participant copies of all audits. No more frequently than once every calendar year, each Project Participant may, at its sole cost and expense, audit, or cause to be audited the books and cost records of CCP, and/or the Project Developer to the extent authorized under the ESSA.

(xiii) Scheduling Coordinator Services Agreement. Upon a recommendation by Normal Vote of the Project Committee pursuant to Section 6.4(b)(vi), the CCP Board shall review, modify, and approve, or delegate the authority to approve, a Scheduling Coordinator Services Agreement or amendment thereto.

(b) Pursuant to Section 5.06 of the Joint Powers Agreement, this Agreement modifies the voting rules of the CCP Board for purposes of approving or acting on any matter identified in this Agreement, as follows:

(i) Quorum. A quorum shall consist of a majority of the CCP Board members that represent Project Participants.

(ii) Voting. Each CCP Board member that represents a Project Participant shall have one vote for any matter identified in this Agreement. Any CCP Board member representing a CCP member that is not a Project Participant shall abstain from voting on any matter identified in this Agreement. A vote of the majority of the CCP Board members representing Project Participants that are in attendance shall be sufficient to constitute action, provided a quorum is established and maintained.

### 5.3. Role of CCP Manager.

(a) In addition to the duties and responsibilities set forth elsewhere in this Agreement, the CCP Manager is delegated the following authorities and responsibilities:

(i) Request for Tax Documentation. Respond to any requests for tax-related documentation by the Project Developer.



(ii) Request for Financial Statements. Provide the Project Developer with Financial Statements as may be required by the ESSA.

(iii) Request for Information by Project Participant. Respond to any request by a Project Participant for information or documents that are reasonably available to allow the Project Participant to respond to requests for such information from any federal, state, or local regulatory body or other authority.

(iv) Coordinate Response to a Request for Confidential Information. Upon a request or demand by any third person that is not a Party to the ESSA or a Project Participant, for Confidential Information as described in Section 18.2 of the ESSA, the CCP Manager shall notify the Project Developer and coordinate the response of CCP and Project Participants.

(v) Invoices. The CCP Manager shall review each invoice submitted by Project Developer and shall request such other data necessary to support the review of such invoices.

## **ARTICLE 6**

### **PROJECT COMMITTEE**

6.1. Establishment and Authorization of the Project Committee. The Project Committee is hereby established and duly authorized to act on behalf of the Project Participants as provided for in this Section 6 for the purpose of (a) providing coordination among, and information to, the Project Participants and CCP, (b) making any recommendations to the CCP Board regarding the administration of the Project, and (c) execution of the Project Committee responsibilities set forth in Section 6.4.

6.2. Project Committee Membership. The Project Committee shall consist of one representative from each Project Participant. The CCP Manager shall be a non-voting member of the Project Committee. Within thirty (30) days after the Effective Date, each Project Participant shall provide notice to each other of such Project Participant's representative on the Project Committee. Alternate representatives may be appointed by similar written notice to act on the Project Committee, or on any subcommittee established by the Project Committee, in the absence of the regular representative. An alternate representative may attend all meetings of the Project Committee but may vote only if the representative for whom they serve as alternate for is absent. No Project Participant's representative shall exercise any greater authority than permitted by the Project Participant which they represent.

6.3. Project Committee Operations, Meetings, and Voting. Project Committee operations, meetings, and voting shall be in accordance with the procedures and requirements specified in Exhibit D.

6.4. Project Committee Responsibilities. The Project Committee shall have the following responsibilities:

(a) General Responsibilities of the Project Committee.

(i) Provide a liaison between CCP and the Project Participants with respect to the ongoing administration of the Project.

(ii) Exercise general supervision over any subcommittee established pursuant to Section 6.5.

(iii) Oversee, as appropriate, the completion of any Project design, feasibility, or planning studies or activities.

(iv) Review, discuss, and attempt to resolve any disputes among the Project Participants relating to this Agreement or the ESSA.

(v) Perform such other functions and duties as may be provided for under this Agreement, the ESSA, or as may otherwise be appropriate or beneficial to the Project or the Project Participants.

(b) Recommendations to the CCP Board by a Normal Vote.

(i) Budgeting. Review, modify, and approve by a Normal Vote each proposed Annual Budget and proposed Amended Annual Budget for submission to the CCP Board for final approval.

(ii) Early Termination of ESSA. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding an early termination of the ESSA pursuant to Section 11.2 of the ESSA.

(iii) Assignment by Project Developer. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding any assignment by Project Developer pursuant to Section 14.1 of the ESSA other than any assignment pursuant to Sections 14.2 or 14.3 of the ESSA.

(iv) Buyer Financing Assignment. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding an assignment by CCP to a financing entity pursuant to Section 14.5 of the ESSA.

(v) Change of Control. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding any Change of Control requiring CCP's consent, as specified in Section 14.1 of the ESSA.

(vi) Scheduling Coordinator. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding the selection of a Scheduling Coordinator and the form of the Scheduling Coordinator Services Agreement, including any amendments thereto. Such Scheduling Coordinator Services Agreement shall: (i) require that the scheduling and dispatch of the Project is in accordance with the criteria set forth in Exhibit C of the Coordinated Operations Agreement; (ii) include the Scheduling Coordinator responsibilities specified in Exhibit D of the Coordinated Operations Agreement; and (iii) address requirements relating to CAISO settlements, the Operating Restrictions, and communications and reporting from the Scheduling Coordinator to the Project Participants.

(c) Actions Delegated to the Project Committee by this Agreement Subject to a Unanimous Vote.

(i) Project Design. Review, modify, and approve by a Unanimous Vote any recommendations to the Project Developer on the design of the Project.

(ii) Extension of Guaranteed Construction Start Date and Guaranteed Commercial Operation Date. Review and confirm that requirements of Exhibit B of the ESSA have been satisfied, such that the Guaranteed Construction Start Date and/or Guaranteed Commercial Operation Date has been extended.

(iii) Event of Default. Direct CCP to exercise its rights under the ESSA if an Event of Default has occurred under Section 11.1 of the ESSA or under the Scheduling Coordinator Services Agreement.

(d) Actions Delegated to the Project Committee by this Agreement Subject to a Normal Vote.

(i) Make recommendations to the CCP Manager, the CCP Board, the Project Participants or to the Project Developer, as appropriate, with respect to the development, operation, and ongoing administration of the Project.

(ii) Review, develop, and, if appropriate, modify and approve rules, procedures, and protocols for the administration of the Project, including rules, procedures, and protocols for the management of the costs of the Facility and the scheduling, handling, tagging, dispatching, and crediting of the Product, the handling and crediting of Environmental Attributes associated with the Facility and the control and use of the Facility.

(iii) Review, develop, and, if appropriate, modify rules, procedures, and protocols for the monitoring, inspection, and the exercise of due diligence activities relating to the operation of the Facility.

(iv) Review, and, if appropriate, modify or otherwise act upon, the form or content of any written statistical, administrative, or operational reports, Facility-related data and storage information, technical information, facility reliability data, transmission information, forecasting, scheduling, dispatching, tagging, parking, firming, exchanging, balancing, movement, or other delivery information, and similar information and records, or matters pertaining to the Project which are furnished to the Project Committee by the CCP Manager, the Project Developer, experts, consultants or others.

(v) Review, formulate, and, if appropriate, modify, or otherwise act upon, practices and procedures to be followed by Project Participants for, among other things, the production, scheduling, tagging, transmission, delivery, firming, balancing, exchanging, crediting, tracking, monitoring, remarketing, sale, or disposition of the Product, including the control and use of the Facility, and the supply, scheduling, and use of Charging Energy.

(vi) Review and act upon any matters involving any arrangements and instruments entered into by the Project Developer or any affiliate thereof to, among other things,

secure certain performance requirements, including, but not limited to, the ESSA, the Development Security or the Performance Security and any other letter of credit delivered to, or for the benefit of, CCP by the Project Developer and take such actions or make such recommendations as may be appropriate or desirable in connection therewith.

(vii) Review, and, if appropriate, recommend, modify, or approve policies or programs formulated by CCP or Project Developer for determining or estimating storage resources or the values, quantities, volumes, or costs of the Product from the Facility.

(viii) Review, and where appropriate, recommend the implementation of metering technologies and methodologies appropriate for the delivery, accounting for, transferring and crediting of the Product to the Point of Delivery (directly or through the Facility).

(ix) Review, to the extent permitted by this Agreement, the ESSA, or any other relevant agreement relating to the Project, modify and approve or disapprove the specifications, vendors' proposals, bid evaluations, or any other matters with respect to the Facility.

(x) Review and approve any Remedial Action Plan submitted by Project Developer to CCP pursuant to Section 2.4 of the ESSA.

(xi) Review and approve the submission of the written acknowledgement of the Commercial Operation Date in accordance with Section 2.2 of the ESSA.

(xii) Review and approve the return of the Development Security to Project Developer in accordance with Section 8.7 of the ESSA.

(xiii) Review and approve the return of any unused Performance Security to Project Developer in accordance with Section 8.8 of the ESSA.

(xiv) Review Progress Reports provided by Project Developer to CCP pursuant to Section 2.3 of the ESSA and participate in any associated regularly scheduled meetings with Project Developer to discuss construction progress.

(xv) Direct CCP to collect any liquidated damages owed by Project Developer to CCP under the ESSA, and to the extent authorized by ESSA, draw upon the Development Security or Performance Security.

(xvi) Review invoices received by CCP from the Project Developer and, if appropriate, direct CCP to dispute an invoice pursuant to Section 8.5 of the ESSA.

(xvii) Review invoices received by CCP from the Scheduling Coordinator and, if appropriate, direct CCP to collect any damages owed by the Scheduling Coordinator to CCP under the Scheduling Coordinator Services Agreement or to take any action permitted by law to enforce its rights under the Scheduling Coordinator Services Agreement, including but not limited to bringing any suit, action or proceeding at law or in equity as may be necessary or appropriate to recover damages and/or enforce any covenant, agreement, or obligation against the Scheduling Coordinator.

6.5. Subcommittees. The CCP Manager may establish as needed subcommittees including, but not limited to, auditing, legal, financial, engineering, mechanical, weather, geologic, diurnal, barometric, meteorological, operating, insurance, governmental relations, environmental, and public information subcommittees. The authority, membership, and duties of any subcommittee shall be established by the CCP Manager; provided, however, such authority, membership or duties shall not conflict with the provisions of the ESSA or this Agreement.

6.6. Representative's Expenses. Any expenses incurred by any representative of any Project Participant or group of Project Participants serving on the Project Committee or any other committee in connection with their duties on such committee shall be the responsibility of the Project Participant which they represent and shall not be an expense payable under this Agreement.

6.7. Inaction by Committee. It is recognized by CCP and Project Participants that if the Project Committee is unable or fails to agree with respect to any matter or dispute which it is authorized to determine, resolve, approve, disapprove or otherwise act upon after a reasonable opportunity to do so, or within the time specified herein or in the ESSA, then CCP may take such commercially reasonable action as CCP determines is necessary for its timely performance under any requirement pursuant to the ESSA or this Agreement, pending the resolution of any such inability or failure to agree, but nothing herein shall be construed to allow CCP to act in violation of the express terms of the ESSA or this Agreement.

6.8. Delegation. To secure the effective cooperation and interchange of information in a timely manner in connection with various administrative, technical, and other matters which may arise from time to time in connection with administration of the ESSA, in appropriate cases, duties and responsibilities of the CCP Board or the Project Committee, as the case may be under this Section 6, may be delegated to the CCP Manager by the CCP Board upon notice to the Project Participants.

## **ARTICLE 7**

### **OPERATING COMMITTEE**

7.1. Operating Committee. The Operating Committee is established through the Coordinated Operations Agreement, as may be subsequently amended.

7.2. Operating Committee Responsibilities. In addition to any specific roles and responsibilities identified in the Coordinated Operations Agreement, the Project Committee may, through a Normal Vote, assign additional tasks to the Operating Committee as long as such additional tasks are within the scope of the Operating Committee's authority set forth in the Coordinated Operations Agreement.

## **ARTICLE 8**

### **OPERATING ACCOUNT**

8.1. Calculation of Estimated Monthly Project Cost.

(a) No later than one hundred and eighty (180) days after the Effective Date, the CCP Manager shall present to the Project Committee a proposed Estimated Monthly Project Cost, which shall be equal to a forecast of expected Monthly Capacity Payments over an entire

Contract Year, divided by twelve (12). The Project Committee shall review, and, if appropriate, recommend, modify, or approve through a Normal Vote, the proposed Estimated Monthly Project Cost.

8.2. Operating Account. CCP shall establish an Operating Account for each Project Participant that is accessible to and can be drawn upon by both CCP and the applicable Project Participant. Such Operating Accounts are for the purpose of providing a reliable source of funds for the payment obligations of the Project and, taking into account the variability of costs associated with the Project for the purpose of providing a reliable payment mechanism to address the ongoing costs associated with the Project.

(a) Operating Account Amount. The Operating Account Amount for each Project Participant shall be an amount equal to the Estimated Monthly Project Cost multiplied by three, the product of which is multiplied by such Project Participant's Entitlement Share ("Operating Account Amount").

(b) Initial Funding of Operating Account. By no later than three hundred and sixty-five (365) days after the Effective Date, each Project Participant shall deposit into such Project Participant's Operating Account an amount equal to that Project Participant's Operating Account Amount.

(c) Use of Operating Account. CCP shall draw upon each Project Participant's Operating Account each month in an amount equal to the Monthly Costs multiplied by such Project Participant's Entitlement Share. As required by Section 9.5, each Project Participant must deposit sufficient funds into such Project Participant's Operating Account by the deadline specified in Section 9.5.

(d) Final Distribution of Operating Account. Following the expiration or earlier termination of the ESSA, and upon payment and satisfaction of any and all liabilities and obligations to make payments of the Project Participants under this Agreement and upon satisfaction of all remaining costs and obligations of CCP under the ESSA, any amounts then remaining in any Project Participant's Operating Account shall be paid to the associated Project Participant.

## **ARTICLE 9**

### **BILLING**

9.1. Monthly Costs. The amount of Monthly Costs for a particular Month shall be the sum of the Project Participant's Entitlement Share multiplied by the Monthly Capacity Payments for the Product, as specified in Section 8.2 of the ESSA for such Month and to the extent such payment is made by CCP to the Project Developer, plus the Project Participant's Entitlement Share multiplied by the Operating Cost for such Month and subtracting the Project Participant's Entitlement Share multiplied by the positive revenue associated with the sale of any Facility Energy or Ancillary Services net of any CAISO costs or Scheduling Coordinator costs for such Month, as shown in the following formula:

Monthly Cost = ((Project Participant's Entitlement Share) × (Monthly Capacity Payments)) + ((Project Participant's Entitlement Share) × (Operating Costs)) – ((Project Participant's Entitlement Share) × (revenue from sale of Facility Energy or Ancillary

Services, net of any CAISO costs or Scheduling Coordinator costs))

9.2. Billing Statements. By no later than ten (10) calendar days after CCP receives an invoice from Project Developer for the prior Month of each Contract Year pursuant to Section 8.1 of the ESSA, CCP shall issue to each Project Participant a copy of the invoice and a “Billing Statement,” which specifies such Project Participant’s Monthly Costs, itemized by each part of such Monthly Cost. The amount of Monthly Costs attributable to a Project Participant, and specified in such Billing Statement, shall be the “**Invoice Amount.**”

9.3. Disputed Monthly Billing Statement. A Project Participant may dispute, by written Notice to CCP, any portion of any Billing Statement submitted to that Project Participant by CCP pursuant to Section 9.2, provided that the Project Participant shall pay the full amount of the Billing Statement when due. If CCP determines that any portion of the Billing Statement is incorrect, CCP will deposit the difference between such correct amount and such full amount, if any, including interest at the rate received by CCP on any overpayment into the Project Participant’s Operating Account. If CCP and a Project Participant disagree regarding the accuracy of a Billing Statement, CCP will give consideration to such dispute and will advise all Project Participants with regard to CCP’s position relative thereto within thirty (30) days following receipt of written Notice by Project Participant of such dispute.

9.4. Payment Adjustments; Billing Errors. If CCP or Project Developer determines that a prior invoice or Billing Statement was inaccurate, CCP shall credit against or increase as appropriate each Project Participant’s subsequent Monthly Costs according to such adjustment. The accompanying Billing Statement shall describe the cause of such adjustment and the amount of such adjustment.

9.5. Payment of Invoice Amount. Each Project Participant shall deposit the Invoice Amount for the applicable Month into such Project Participant’s Operating Account by no later than the twentieth (20<sup>th</sup>) calendar day of the following Month after the Billing Statement is issued, unless CCP has failed to issue the Billing Statement by the deadline specified in Section 9.2, in which case, each Project Participant shall deposit the Invoice Amount for the applicable Month by no later than thirty (30) days after the date on which CCP issues the Billing Statement to the Project Participant.

9.6. Withdrawal of Invoice Amount from Operating Account. No sooner than five (5) calendar days after CCP issues a Billing Statement to a Project Participant or a Step-Up Invoice to a Project Participant, CCP shall withdraw the Invoice Amount or the Step-Up Invoice Amount from each Project Participant’s Operating Account. If the Monthly Cost attributable to such Project Participant is a negative number, CCP shall deposit such funds into the Operating Account of that Project Participant.

9.7. Late Payments.

(a) If any Project Participant fails to deposit the Invoice Amount into the Project Participant’s Operating Account by the deadline specified in Section 9.5, then CCP will issue such Project Participant a Late Payment Notice within five (5) days of the deadline specified in Section 9.5 directing the Project Participant to immediately deposit the Invoice Amount into the Project Participant’s Operating Account and informing the Project Participant that such Project

Participant must pay a charge (“**Late Payment Charge**”). Upon issuing a Late Payment Notice to any Project Participant, CCP shall promptly provide Notice of such occurrence to all other Project Participants.

(b) The Late Payment Charge shall be equal to the Invoice Amount minus any partial payment that was deposited into such Project Participant’s Operating Account multiplied by the Interest Rate specified in Section 8.2 of the ESSA for the period from the deadline specified in Section 9.5 until the date on which the Project Participant deposits the Invoice Amount plus the Late Payment Charge into such Project Participant’s Operating Account. Upon payment, CCP shall withdraw the full amount of such Late Payment Charge from the Project Participant’s Operating Account and deposit any such Late Payment Charge into the Operating Accounts of all other Project Participants on a pro rata share, based on such other Project Participants’ Entitlement Shares.

## **ARTICLE 10**

### **UNCONDITIONAL PAYMENT OBLIGATIONS; AUTHORIZATIONS; CONFLICTS; LITIGATION.**

10.1. Unconditional Payment Obligation. Beginning with the earliest of (i) the date CCP is obligated to pay any portion of the costs of the Project, (ii) the date of the COD, or (iii) the date of the first delivery of the Product to Project Participants and continuing through the term of this Agreement, Project Participants shall pay CCP the amounts of Monthly Costs set forth in the Billing Statements submitted by CCP to Project Participants in accordance with the provisions of Section 9, whether or not the Project or any part thereof has been completed, is functioning, producing, operating or operable or its output or the provision of Facility products are suspended, interrupted, interfered with, reduced or curtailed or terminated in whole or in part, and such payments shall not be subject to reduction whether by offset or otherwise and shall not be conditional upon the performance or nonperformance by any party of any agreement for any cause whatsoever, provided that the obligation of Project Participants to pay amounts associated with the Monthly Capacity Payment shall be limited to the amount of Monthly Capacity Payment charged by the Project Developer to CCP and paid by CCP to the Project Developer.

10.2. Authorizations. Each Project Participant hereby represents and warrants that no order, approval, consent, or authorization of any governmental or public agency, authority, or person, is required on the part of such Project Participant for the execution and delivery by the Project Participant, or the performance by the Project Participant of its obligations under this Agreement except for such as have been obtained.

10.3. Conflicts. Each Project Participant represents and warrants to CCP as of the Effective Date that, to the Project Participant’s knowledge, the execution and delivery of this Agreement by the Project Participants and the Project Participants’ performance hereunder will not constitute a default under any agreement or instrument to which it is a party, or any order, judgment, decree or ruling of any court that is binding on the Project Participant, or a violation of any applicable law of any governmental authority, which default or violation would have a material adverse effect on the financial condition of the Project Participant.



10.4. Litigation. Each Project Participant represents and warrants to CCP that, as of the Effective Date, to the Project Participant's knowledge, except as disclosed, there are no actions, suits or proceedings pending against the Project Participant (service of process on the Project Participant having been made) in any court that questions the validity of the authorization, execution or delivery by the Project Participant of this Agreement, or the enforceability on the Project Participant of this Agreement.

10.5. San José Clean Energy.

(a) The City of San José is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies without an appropriation for such obligation, and, therefore, nothing in the Agreement shall constitute an obligation of future legislative bodies of the City of San José to appropriate funds for purposes of the Agreement; provided, however, that the City of San José has created and set aside a designated fund (being the San Jose Energy Operating Fund established pursuant to City of San Jose Municipal Code, Title 4, Part 63, Section 4.80.4050 *et. seq.*) ("**Designated Fund**") for payment of its obligations under this Agreement.

(b) Limited Obligations. The City of San José's payment obligations under this Agreement are special limited obligations of San José Clean Energy payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Community Energy Department or the City of San José.

10.6. Clean Power San Francisco. With regard to Clean Power San Francisco only, (1) obligations under this Agreement are special limited obligations of Clean Power San Francisco payable solely from the revenues of Clean Power San Francisco, and shall not be a charge upon the revenues or general fund of the San Francisco Public Utilities Commission or the City and County of San Francisco or upon any non-Clean Power San Francisco moneys or other property of the San Francisco Public Utilities Commission or the City and County of San Francisco, (2) cannot exceed the amount certified by the San Francisco City Controller for the purpose and period stated in such certification, and (3) absent an authorized emergency per the San Francisco City Charter or Code, no San Francisco City representative is authorized to offer or promise, nor is San Francisco required to honor, any offered or promised payments under this Agreement for work beyond the agreed upon scope or in excess of the certified maximum amount without the San Francisco City Controller having first certified the additional promised amount.

## ARTICLE 11

### **PROJECT SPECIFIC MATTERS AND PROJECT PARTICIPANTS' RIGHTS AND OBLIGATIONS UNDER THE ESSA.**

11.1. CCP Rights and Obligations under the ESSA. Notwithstanding anything to the contrary contained in this Agreement: (i) the obligation of CCP to cause the delivery of the Project Participants' Entitlement Shares of the Product during the Delivery Term of this Agreement is limited to the Product which CCP receives from the Facility (or the Project Developer, as applicable); (ii) the obligation of CCP to pay any amount to Project Participants hereunder or to give credits against amounts due from Project Participants hereunder is limited to amounts CCP

receives in connection with the transaction to which the payment or credit relates (or is otherwise available to CCP in connection with this Agreement for which such payment or credit relates); (iii) any purchase costs, operating costs, energy costs (including costs related to Charging Energy), capacity costs, Facility costs, environmental attribute costs, transmission costs, tax costs, insurance costs, indemnifications, other costs or other charges for which CCP is responsible under the ESSA shall be considered purchase costs, operating costs, energy costs, capacity costs, Facility costs, environmental attribute costs, transmission costs, tax costs, insurance costs, indemnifications, other costs or other charges incurred by CCP and payable by Project Participants as provided in this Agreement; (iv) CCP shall carry out its obligations and exercise its rights under the ESSA in a commercially reasonable manner; (v) all remedies provided to CCP pursuant to the ESSA or the Scheduling Coordinator Services Agreement shall be provided to Project Participants in accordance with Section 5.1(h); and (vi) any Force Majeure under the ESSA or other event of force majeure affecting the delivery of Product pursuant to applicable provisions of the ESSA shall be considered an event caused by Uncontrollable Forces affecting CCP with respect to the delivery of the Product hereunder and CCP forwarding to Project Participants notices and information from the Project Developer concerning an event of Force Majeure upon receipt thereof shall be sufficient to constitute a Notice that Uncontrollable Forces have occurred pursuant to Section 5.1 of this Agreement. Any net proceeds received by CCP from the sale of the Product by the Project Developer to any third-party as a result of a Force Majeure event or failure by CCP to accept delivery of Product pursuant to the ESSA and any reimbursement received by CCP for purchase of Replacement RA shall be remitted by CCP to the Project Participants in accordance with their respective Entitlement Shares.

## **ARTICLE 12**

### **NONPERFORMANCE AND PAYMENT DEFAULT.**

12.1. Nonperformance by Project Participants. If a Project Participant fails to perform any covenant, agreement, or obligation under this Agreement or shall cause CCP to be in default with respect to any undertaking entered into for the Project or to be in default under the ESSA (“**Defaulting Project Participant**”), CCP may, in the event the performance of any such obligation remains unsatisfied after thirty (30) days’ prior written notice thereof to such Project Participant and a demand to so perform, take any action permitted by law to enforce its rights under this Agreement, including but not limited to termination of such Project Participant’s rights under this Agreement including any rights to its Entitlement Share of the Product, and/or bring any suit, action or proceeding at law or in equity as may be necessary or appropriate to recover damages and/or enforce any covenant, agreement or obligation against such Project Participant with regard to its failure to so perform. Any Project Participant that is not the Defaulting Project Participant (“**Non-Defaulting Project Participant**”) may submit Notice directly to the CCP Board, if such Non-Defaulting Project Participant determines that CCP is or may not be fully taking appropriate actions to enforce CCP’s rights under this Agreement against a Defaulting Project Participant. The CCP Board shall consider such Notice and direct CCP to take appropriate action, if any.

12.2. Payment Default. If any Project Participant fails to deposit the Invoice Amount into the Project Participant’s Operating Account by the deadline specified in Section 9.5, and if such Participant has not deposited the Invoice Amount plus the Late Payment Charge into such Project Participant’s Operating Account within ten (10) calendar days of the issuance of the Late Payment

Notice to such Project Participant by CCP, then such occurrence shall constitute a “**Payment Default**.”

12.3. Payment Default Notice. Upon the occurrence of a Payment Default, CCP shall issue a Notice of Payment Default to the Project Participant notifying such Project Participant that as a result of a Payment Default, it is in default under this Agreement and has assumed the status of a Defaulting Project Participant and that such Defaulting Project Participant’s Project Revenue Rights have been suspended and that such Defaulting Project Participant’s Project Rights are subject to termination and disposal in accordance with Sections 12.6 and 12.8 of this Agreement. CCP shall provide a copy of such Notice of Default to all other Project Participants within five (5) calendar days after the issuance of the written Notice of Payment Default by CCP to the Defaulting Project Participant.

12.4. Cured Payment Default. If after a Payment Default, the Defaulting Project Participant cures such Payment Default within forty-five (45) calendar days after the issuance of the Late Payment Notice by CCP, the Defaulting Project Participant’s Project Revenue Rights shall be reinstated and its Project Rights shall not be subject to termination and disposal as provided for in Sections 12.6 and 12.8. In order to cure a Payment Default, the Defaulting Project Participant must deposit the full amount of any unpaid Invoice Amounts and any associated Late Payment Penalties into its Operating Account.

12.5. Suspension of Project Participant’s Project Revenue Rights and Treatment of Capacity Attributes.

(i) Upon the occurrence of a Payment Default, the Defaulting Project Participant’s Project Revenue Rights shall be suspended until such time as such Defaulting Project Participant cures the Payment Default pursuant to the requirements of Section 12.4. Any revenue associated with the Facility Energy or Ancillary Services associated with the Facility shall be deposited by CCP into the Step-Up Reserve Account, as specified in Section 12.7.

(ii) For any Month where the funds remaining in a Defaulting Project Participant’s Operating Account are sufficient to pay the entire Invoice Amount, CCP shall withdraw the Invoice Amount from such Defaulting Project Participant’s Operating Account and shall cause the delivery of the Defaulting Project Participant’s Entitlement Share of the Capacity Attributes and Environmental Attributes associated with the Facility or otherwise provided for pursuant to the ESSA. For any Month where the funds remaining in a Defaulting Project Participant’s Operating Account are less than the amount necessary to pay the entire Invoice Amount, CCP shall withdraw all remaining funds from the Defaulting Project Participant’s Operating Account, and to the extent reasonably possible, in CCP’s sole discretion, CCP shall cause the delivery of a quantity of Capacity Attributes and Environmental Attributes proportionate to the portion of the Invoice Amount that the remaining funds were sufficient to pay for. For any Month where the Defaulting Project Participant’s Operating Account has no funds remaining, the Defaulting Project Participant shall have no right to any such Capacity Attributes or Environmental Attributes associated with the Facility or otherwise provided for under the ESSA.

12.6. Termination and Disposal of Project Participant’s Project Rights. If a Defaulting Project Participant has not cured a Payment Default within forty-five (45) calendar days after the

payment deadline specified in Section 9.5 by CCP ("**Payment Default Termination Deadline**"), then all Project Rights and Obligations pursuant to this Agreement shall be terminated and disposed in accordance with Sections 12.6 and 12.8 of this Agreement; provided, however, that the Defaulting Project Participant shall be liable for all outstanding payment obligations accrued prior to the Payment Default Termination Deadline and shall remain subject to all rights, obligations, and liabilities of this Agreement, including but not limited to any liabilities for Damage Payment or Termination Payment, as applicable, and any other damage payments or reimbursement amounts under the ESSA. CCP shall provide to the Defaulting Project Participant a separate monthly invoice of any such payment obligations of such Defaulting Project Participant. CCP shall immediately notify the other Project Participants of such termination of the Defaulting Project Participant's Project Rights and Obligations.

#### 12.7. Step-Up Invoices.

(a) Upon the occurrence of a Payment Default, CCP shall, concurrently with the Late Payment Notice issued pursuant to Section 9.7(a), issue a Step-Up Invoice to each Non-Defaulting Project Participant that specifies such Non-Defaulting Project Participant's pro rata payment obligation, calculated based on the Entitlement Share of such Non-Defaulting Project Participant, of the amount of the Payment Default for the Defaulting Project Participant (the "**Step-Up Invoice Amount**"); provided, however, that a Non-Defaulting Project Participant's Step-Up Invoice Amount shall not exceed twenty-five percent (25%) of such Non-Defaulting Project Participant's Invoice Amount for the same month for which the Payment Default occurred (the "**Step-Up Invoice Amount Cap**").

(i) Each Non-Defaulting Project Participant shall deposit the Step-Up Invoice Amount into such Non-Defaulting Project Participant's Operating Account by the later of the twentieth (20<sup>th</sup>) calendar day of the following Month or thirty (30) days after the date on which CCP issues the Step-Up Invoice to the other Project Participants. No sooner than five (5) calendar days after CCP issues the Step-Up Invoice, CCP may withdraw the amount of the Step-Up Invoice from each Project Participant's Operating Account and deposit such funds in a separate account ("**Step-Up Reserve Account**"), which shall be accessible only by CCP, and which CCP may in its sole discretion draw upon in order to ensure that CCP can meet the payment obligations of the ESSA. CCP first shall withdraw all funds from a Defaulting Project Participant's Operating Account before withdrawing funds from the Step-Up Reserve Account.

(ii) Application of Moneys Received from a Defaulting Project Participant. If a Defaulting Project Participant cures a Payment Default on or before the Payment Default Termination Deadline, any funds remaining in the Step-Up Reserve Account shall be deposited into the Operating Accounts of the other Project Participants on a pro rata share, based on the Entitlement Share of such other Project Participant. If a Defaulting Project Participant fails to cure a Payment Default and the Defaulting Project Participant's Project Rights and Obligations are terminated and disposed of in accordance with Section 12.8, any funds remaining in the Step-Up Reserve Account shall be deposited into the Operating Accounts of the Non-Defaulting Project Participants on a pro rata share, based on the Entitlement Share, subject to the Step-Up Invoice Amount Cap, of such other Project Participant. If any Non-Defaulting Project Participant has not deposited the full amount of its share of the Step-Up Invoice Amount into its Operating Account by the deadline specified in Section 12.7(a)(i), then such occurrence shall be a Late Payment as

specified in Section 9.7(a) and is subject to a Late Payment Charge pursuant to Section 9.7(b), and any such Non-Defaulting Project Participant shall not be entitled to its share of any moneys received from the Defaulting Project Participant or any funds remaining in the Step-Up Reserve Account in accordance with this Section 12.7(a)(ii) until such Non-Defaulting Project Participant has deposited the full amount of its Step-Up Invoice Amount and the Late Payment Charge into its Operating Account.

12.8. Step-Up Allocation of Project Participant's Project Rights. In the event that a Defaulting Project Participant's Project Rights are terminated pursuant to Section 12.6, then such Defaulting Project Participant's Entitlement Share shall be allocated to the other Project Participants ("Step-Up Allocation") pursuant to the process set forth in this Section 12.8. If a Project Participant has defaulted in the performance of any of its obligations under its BLPTA, and any applicable cure periods under the BLPTA have expired, the Project Participants shall, to the extent required by each respective Project Participant's BLPTA, utilize the procedures set forth in this Section 12.8 to allocate the Project Rights and Obligations of the Project Participant that has defaulted under the BLPTA to the Project Participants that have not defaulted under the BLPTA, subject to the Step-Up Allocation Cap specified in Section 12.8(a).

(a) Step-Up Allocation Cap. If a Defaulting Project Participant's Entitlement Share is allocated to the Non-Defaulting Project Participants pursuant to this Section 12.8, no individual Non-Defaulting Project Participant shall be obligated to assume an allocation that exceeds that Project Participant's Step-Up Allocation Cap set forth in Column E of the Table in Exhibit B of this Agreement. Each Non-Defaulting Project Participant's initial Step-Up Allocation Cap shall be equal to the Non-Defaulting Project Participant Entitlement Share as of the Effective Date and set forth in Column B of the Table in Exhibit B of this Agreement, multiplied by one hundred and twenty-five percent (125%). If a Project Participant modifies its Entitlement Share pursuant to Section 4.2 of this Agreement, then that Project Participant's Step-Up Allocation Cap shall be equal to the Project Participant's Entitlement Share as modified pursuant to Section 4.2 multiplied by one hundred and twenty-five percent (125%). Upon a modification of a Project Participant's Entitlement Share pursuant to Section 4.2, the CCP Manager shall cause the Step-Up Allocation Cap specified in Column E of the Table in Exhibit B of this Agreement to be modified in accordance with this Section 12.8(a). For avoidance of doubt, if a Project Participant's Entitlement Share is increased pursuant to Section 12.8(b) or (c), then such Project Participant's Step-Up Allocation Cap shall not be modified.

(b) Step-Up Allocation Share. If a Defaulting Project Participant's Project Rights are terminated pursuant to Section 12.6, then such Defaulting Project Participant's Entitlement Share shall be allocated to each Non-Defaulting Project Participant based on such Non-Defaulting Project Participant's pro rata share, calculated based on its Entitlement Share of the entire project minus the Entitlement Share of the Defaulting Project Participant, unless such allocation would cause any individual Non-Defaulting Project Participant to exceed its Step-Up Allocation Cap, in which case Section 12.8(c) shall apply. Upon allocation of a defaulting Project Participant's Entitlement Share pursuant to this Section 12.8(b), the CCP Manager shall cause each affected Project Participant's Entitlement Share specified in Column D of the Table in Exhibit B to be modified in accordance with this Section 12.8.

(c) Voluntary Allocation of Project Rights in Excess of the Step-Up Allocation Caps. If the allocation of a Defaulting Project Participant's Entitlement Share pursuant to Section 12.8(b) would cause any Non-Defaulting Project Participant's Entitlement Share to exceed its Step-Up Allocation Cap, then no allocation shall occur pursuant to Section 12.8(b). In such case, the CCP Manager shall oversee the offering of the total amount of the Defaulting Project Participant's Entitlement Share to the Non-Defaulting Project Participants on a voluntary basis. The initial offering shall be to each Non-Defaulting Project Participant on a pro rata share, based on such Non-Defaulting Project Participant's Entitlement Share. Each Project Participant may accept or reject the portion of the Defaulting Project Participant's Entitlement Share. If any portion of the Defaulting Project Participant's Entitlement Share remains unclaimed after the initial offering, then the remaining portion shall be offered to any Non-Defaulting Project Participant that accepted its full share of the Defaulting Project Participant's Entitlement Share in the initial offering on a pro rata share, based on such Non-Defaulting Project Participant's Entitlement Share as a percentage of the total Entitlement Shares of all Project Participants that are participating in the subsequent round of offerings. The CCP Manager shall conduct subsequent offering rounds until either the total amount of the Defaulting Project Participant's Entitlement Share is accepted by one or more of the Non-Defaulting Project Participants or some portion of the Defaulting Project Participant's Entitlement Share remains, but all Non-Defaulting Project Participants have rejected such remaining amount.

(d) Step-Up Allocation Damage Payment. A Defaulting Project Participant shall owe to each Non-Defaulting Project Participant that assumes any portion of the Defaulting Project Participant's Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c) a "**Step-Up Allocation Damage Payment**" equal to the Costs and Losses, on the one hand, netted against its Gains, on the other. If the Non-Defaulting Project Participant's Costs and Losses exceed its Gains, then the Step-Up Allocation Damage Payment shall be an amount owing to such Non-Defaulting Project Participant. If the Non-Defaulting Project Participant's Gains exceed its Costs and Losses, then the Step-Up Allocation Damage Payment shall be zero dollars (\$0). A Defaulting Project Participant shall not be entitled to any Step-Up Allocation Damage Payment or any other damages otherwise authorized under this Agreement from any other Project Participant. The Step-Up Allocation Damage Payment does not include consequential, incidental, punitive, exemplary, or indirect or business interruption damages. Each Non-Defaulting Project Participant that assumes any portion of the Defaulting Project Participant's Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c) shall calculate, in a commercially reasonable manner, the Step-Up Allocation Damage Payment for the Defaulting Project Participant's Entitlement Share assumed by the Non-Defaulting Project Participant as of the effective date of such Step-Up Allocation. Third parties supplying 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. If the Defaulting Project Participant disputes the Non-Defaulting Project Participant's calculation of the Step-Up Allocation Damage Payment, in whole or in part, the Defaulting Project Participant shall, within five (5) Business Days of receipt of the Non-Defaulting Project Participant's calculation of the Step-Up Allocation Damage Payment, provide to the Non-Defaulting Project Participant a detailed written explanation of the basis for such dispute. Disputes regarding the Step-Up Allocation Damage Payment shall be determined in accordance with Article 16. Each Party agrees and acknowledges that (i) the actual damages that the other Project Participant would incur in connection with a Step-Up Allocation would be difficult or impossible to predict with certainty, (ii) the Step-Up Allocation

Damage Payment described in this Section 12.8(d) is a reasonable and appropriate approximation of such damages, and (iii) the Step-Up Allocation Damage Payment described in this Section 12.8(d) is the exclusive remedy of a Project Participant in connection with a Step-Up Allocation pursuant to the process set forth in Sections 12.8(b) or 12.8(c) against a Defaulting Project Participant but shall not otherwise act to limit any of the Non-Defaulting Project Participant's rights or remedies under this Agreement.

(e) Remarketing of Unclaimed Defaulting Project Participant's Entitlement Share. If after the process set forth in Section 12.8(c), some portion of the Defaulting Project Participant's Entitlement Share remains unclaimed, the CCP Manager, in their discretion or as directed by the Non-Defaulting Project Participants, may take any action to generate revenue from such unclaimed Entitlement Share in order to meet CCP's payment obligation under the ESSA. For avoidance of doubt, the CCP Manager shall not be limited by the requirements of Section 4.2 or 5.1(j) of this Agreement in remarketing or generating revenue base on the unclaimed share.

12.9. Elimination or Reduction of Payment Obligations. Notwithstanding anything to the contrary in this Agreement, upon termination of a Defaulting Project Participant's Project Rights pursuant to Section 12.6 and the disposal of such Defaulting Project Participant's Project Rights and Obligations pursuant to Section 12.8, such Defaulting Project Participant's obligation to make payments under this Agreement (notwithstanding anything to the contrary herein) shall not be eliminated or reduced; provided, however, such payment obligations for the Defaulting Project Participant may be eliminated or reduced to the extent permitted by law, through an amendment to this Agreement, which shall be subject to the consent and approval of all Parties to this Agreement.

## **ARTICLE 13**

### **LIABILITY**

13.1. Project Participants' Obligations Several. No Project Participant shall be liable under this Agreement for the obligations of any other Project Participant or for the obligations of CCP incurred on behalf of other Project Participants. Each Project Participant shall be solely responsible and liable for performance of its obligations under this Agreement, except as otherwise provided for herein. The obligation of Project Participants to make payments under this Agreement is a several obligation and not a joint obligation with those of the other Project Participants.

13.2. No Liability of CCP or Project Participants, Their Directors, Officers, Etc.; CCP, The Project Participants' and CCP Manager's Directors, Officers, Employees Not Individually Liable. Except as provided for under Section 13.5 herein, the Parties agree that neither CCP, Project Participants, nor any of their past, present or future directors, officers, employees, board members, agents, attorneys or advisors (collectively, the "**Released Parties**") shall be liable to any other of the Released Parties for any and all claims, demands, liabilities, obligations, losses, damages (whether direct, indirect or consequential), penalties, actions, loss of profits, judgments, orders, suits, costs, expenses (including attorneys' fees and expenses) or disbursements of any kind or nature whatsoever in law, equity or otherwise (including, without limitation, death, bodily injury or personal injury to any person or damage or destruction to any property of Project Participants, CCP, or third persons) suffered by any Released Party as a result of the action or inaction or

performance or non-performance by the Project Developer under the ESSA. Except as provided for under Section 13.5 herein, each Party shall release each of the other Released Parties from any claim or liability that such Party may have cause to assert as a result of any actions or inactions or performance or non-performance by any of the other Released Parties under this Agreement (excluding gross negligence and willful misconduct, which, unless otherwise agreed to by the Parties, are both to be determined and established by a court of competent jurisdiction in a final, non-appealable order). Notwithstanding the foregoing, no such action or inaction or performance or non-performance by any of the Released Parties shall relieve CCP or any Project Participants from their respective obligations under this Agreement, including, without limitation, the Project Participants' obligation to make payments required under Section 9.5 of this Agreement and CCP's obligation to make payments under Section 8.2 of the ESSA. The provisions of this Section 13.2 shall not be construed so as to relieve the CCP or the Project Developer from any obligation or liability under this Agreement or the ESSA.

13.3. Extent of Exculpation; Enforcement of Rights. The exculpation provision set forth in Section 13.2 hereof shall apply to all types of claims or actions including, but not limited to, claims or actions based on contract or tort. Notwithstanding the foregoing, any Party may protect and enforce its rights under this Agreement by a suit or suits in equity for specific performance of any obligations or duty of any other Party, and each Party shall at all times retain the right to recover, by appropriate legal proceedings, any amount determined to have been an overpayment, underpayment or other monetary damages owed by the other Party in accordance with the terms of this Agreement.

13.4. No General Liability of CCP. The undertakings under this Agreement by CCP shall not constitute a debt or indebtedness of CCP within the meaning of any provision or limitation of the Constitution or statutes of the State of California, and shall not constitute or give rise to a charge against its general credit.

13.5. Indemnification. Each Party shall indemnify, defend, protect, hold harmless, and release the other Parties, their directors, board members, officers, employees, agents, attorneys and advisors, past, present or future, from and against any and all claims, demands, liabilities, obligations, losses, damages (whether direct, indirect or consequential), penalties, actions, loss of profits, judgments, orders, suits, costs, expenses (including attorneys' fees and expenses) or disbursements of any kind or nature whatsoever in law, equity or otherwise, which include, without limitation, death, bodily injury, or personal injury to any person or damage or destruction to any property of Project Participants, CCP, or third persons, that may be imposed on, incurred by or asserted against any Party arising by manner of any breach of this Agreement, or the negligent acts, errors, omissions or willful misconduct incident to the performance of this Agreement on the part of any Party or any Party's directors, board members, officers, employees, agents and advisors, past, present or future.

## **ARTICLE 14**

### **NOTICES**

14.1. Addresses for the Delivery of Notices. Any Notice required, permitted, or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the



address set forth in Exhibit A or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

14.2. Acceptable Means of Delivering Notice. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, five (5) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) at the time indicated by the time stamp upon delivery and, if after 5:00 pm, on the next Business Day; or (d) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

## **ARTICLE 15**

### **ASSIGNMENT**

15.1. General Prohibition on Assignments. No Party may assign this Agreement, or its rights or obligations under this Agreement, without the prior written consent of all other Parties, in each Party's sole discretion.

## **ARTICLE 16**

### **GOVERNING LAW AND DISPUTE RESOLUTION**

16.1. Governing Law. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced, and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. To the extent enforceable at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement. The Parties agree that any suit, action, or other legal proceeding by or against any Party with respect to or arising out of this Agreement shall be brought in the federal or state courts located in the State of California in a location to be mutually chosen by all Parties, or in the absence of mutual agreement, the County of San Francisco.

16.2. Dispute Resolution. In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a Notice from either Party identifying such dispute, the Parties shall meet, negotiate, and attempt, in good faith, to resolve the dispute quickly and informally without significant legal costs. If the Parties are unable to resolve a dispute arising hereunder within thirty (30) days after Notice of the dispute, the Parties may pursue all remedies available to them at Law or in equity.

## **ARTICLE 17**

### **MISCELLANEOUS**

17.1. Entire Agreement; Integration; Exhibits. This Agreement, together with the Exhibits attached hereto constitutes the entire agreement and understanding by and among the

Parties with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. The headings used herein are for convenience and reference purposes only. This 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.

17.2. Amendments. This Agreement may only be amended, modified, or supplemented by an instrument in writing executed by duly authorized representatives of all Parties; *provided*, this Agreement may not be amended by electronic mail communications. Any revisions to the Entitlement Share specified in Exhibit B pursuant to Section 4.2. or Section 12.8 shall be considered an element of the administration of this Agreement and shall not require the consent of the Parties hereto.

17.3. No Waiver. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

17.4. Severability. In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. 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 and this Agreement as a whole.

17.5. Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original.

17.6. Electronic Delivery. This Agreement may be duly executed and delivered by a Party by electronic format (including portable document format (.pdf)). Delivery of an executed counterpart in .pdf electronic version shall be binding as if delivered in the original. The words “execution,” “signed,” “signature,” and words of like import in this Agreement shall be deemed to include electronic signatures or electronic records, each of which shall be of the same legal effect, validity, or enforceability as a manually executed signature or the use of a paper-based record keeping system, as the case may be, to the extent and as provided for in any applicable law.

17.7. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

17.8. Forward Contract. The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the U.S. Bankruptcy Code, and that the Parties are “forward contract merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the

other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.

17.9. City of San Francisco Standard Provisions.

(a) False Claims. Pursuant to San Francisco Administrative Code § 21.35, any Party to this Agreement who submits a false claim shall be liable to the City and County of San Francisco for the statutory penalties set forth in that section. A Party will be deemed to have submitted a false claim to the City and County of San Francisco if the Party: (a) knowingly presents or causes to be presented to an officer or employee of the City and County of San Francisco 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 City and County of San Francisco; (c) conspires to defraud the City and County of San Francisco by getting a false claim allowed or paid by the City and County of San Francisco; (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 City and County of San Francisco; or (e) is a beneficiary of an inadvertent submission of a false claim to the City and County of San Francisco, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City and County of San Francisco within a reasonable time after discovery of the false claim.

(b) Political Activity. In performing its responsibilities under this Agreement, CCP shall comply with San Francisco Administrative Code Chapter 12G, which prohibits funds appropriated by the City and County of San Francisco for this Agreement from being expended to participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure.

(c) Non-discrimination Requirements.

(i) Non-discrimination in Contracts. CCP shall comply with the provisions of Chapters 12B and 12C of the San Francisco Administrative Code. CCP shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. CCP is subject to the enforcement and penalty provisions in Chapters 12B and 12C.

(ii) Non-discrimination in the Provision of Employee Benefits. San Francisco Administrative Code 12B.2. CCP does not as of the date of this Agreement, and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the City 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.

(d) Consideration of Criminal History in Hiring and Employment Decisions. CCP agrees to comply fully with and be bound by all of the provisions of Chapter 12T, "City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code, including the remedies provided, and

implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to CCP's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law. MacBride Principles – Northern Ireland. Pursuant to San Francisco Administrative Code § 12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride principles.

(e) MacBride Principles – Northern Ireland. Pursuant to San Francisco Administrative Code § 12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride Principles.

(f) Tropical Hardwood and Virgin Redwood Ban. The City and County of San Francisco urges contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood product, virgin redwood or virgin redwood product. If this order is for wood products or a service involving wood products: (a) Chapter 8 of the Environment Code is incorporated herein and by reference made a part hereof as though fully set forth. (b) Except as expressly permitted by the application of Sections 802(B), 803(B), and 804(B) of the Environment Code, CCP shall not provide any items to the City in performance of this Agreement which are tropical hardwoods, tropical hardwood products, virgin redwood or virgin redwood products. (c) Failure of CCP to comply with any of the requirements of Chapter 8 of the Environment Code shall be deemed a material breach of contract.

#### 17.10. City of San José Standard Provisions.

(a) Nondiscrimination/Non-Preference. The Parties shall not, and shall not cause or allow its subcontractors to, discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing. The Parties will inform all subcontractors of these obligations. This prohibition is subject to the following conditions: (i) the prohibition is not intended to preclude Parties from providing a reasonable accommodation to a person with a disability; (ii) the City of San José's Compliance Officer may require the Parties to file, and cause any Party's subcontractor to file, reports demonstrating compliance with this section. Any such reports shall be filed in the form and at such times as the City's Compliance Officer designates. They shall contain such information, data and/or records as the City's Compliance Officer determines is needed to show compliance with this provision.

(b) Conflict of Interest. The Parties represent that they are familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. The Parties certify that, as of the Effective Date, are unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. The Parties shall avoid all conflicts of interest or appearances of conflicts of interest in performing this Agreement. The Parties have the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest or an appearance of a conflict of interest, and a Party shall immediately notify the City of San José in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest. A Party's violation of this Section 17.10(b) is a material breach.

(c) Environmentally Preferable Procurement Policy. Parties shall perform its obligations under this Agreement in conformance with San José City Council Policy 1-19, entitled "Prohibition of City Funding for Purchase of Single serving Bottled Water," and San José City Council Policy 4-6, entitled "Environmentally Preferable Procurement Policy," as those policies may be amended from time to time. The Parties acknowledge and agree that in no event shall a breach of this Section 17.10(c) be a material breach of this Agreement or otherwise give rise to an Event of Default or entitle the City of San José to terminate this Agreement.

(d) Gifts Prohibited. The Parties represent that they are familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City of San José officer or designated employee from accepting any gift. The Parties shall not offer any City of San José officer or designated employee any gift prohibited by Chapter 12.08. A Party's violation of this Section 17.10(d) is a material breach.

(e) Disqualification of Former Employees. The Parties represent that they are familiar with Chapter 12.10 of the San José Municipal Code, which generally prohibits a former City of San José officer and former designated employee from providing services to the City of San José connected with his/her former duties or official responsibilities. Parties shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10.

17.11. Further Assurances. Each of the Parties hereto agrees to provide such information, execute, and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.

*[Signatures on following page]*

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

<p>California Community Power</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>Clean PowerSF</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>
<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>

<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>
<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>

**EXHIBIT A**  
**NOTICES**

<b>Party</b>	<b><i>All Notices</i></b>	<b><i>Invoices</i></b>
<b>California Community Power</b>	<b>California Community Power</b> _____ _____	



## EXHIBIT B

### SCHEDULE OF PROJECT PARTICIPANT ENTITLEMENT SHARES AND STEP-UP ALLOCATION CAPS

*Dated:* \_\_\_\_\_

A	B	C	D	E
Project Participant	Entitlement Share <i>As of Effective Date</i>	Entitlement Share <i>As Modified Pursuant to Section 4.2</i>	Entitlement Share <i>As Modified Pursuant to Section 12.8(b) or 12.8(c)</i>	Step-Up Allocation Cap <i>125% multiplied by Column B or C as applicable</i>
CleanPowerSF				
Total	100%			

**Instructions:** If the CCP Manager modifies one or more Project Participant's Entitlement Share pursuant to Section 4.2, the CCP Manager shall prepare an updated Exhibit B that shows the prior Entitlement Share (Column B or D) in ~~strikeout~~ and specifies the new Entitlement Share values and the effective date of such modification in Column C. If the CCP Manager modifies one or more Project Participant's Entitlement Share pursuant to Section 12.8, the CCP Manager shall prepare an updated Exhibit B that shows the prior Entitlement Share (Column B or Column C) in ~~strikeout~~ and specifies the new Entitlement Share values and the effective date of such modification in Column D.

## EXHIBIT C

### PROCEDURE FOR VOLUNTARY REDUCTION OF PROJECT PARTICIPANT'S ENTITLEMENT SHARE

(a) Offer to Other Project Participants. A Project Participant proposing to reduce its Entitlement Share of the Project shall provide Notice to all other Project Participants and CCP specifying the quantity of the proposed reduction of Entitlement Share ("**Entitlement Share Reduction Amount**") and the first Month for which the Project Participant Proposes that the change of Entitlement Share would become effective (such Notice referred to as the "**Entitlement Share Reduction Notice**").

(i) Upon receiving an Entitlement Share Reduction Notice from any Project Participant, the CCP Manager shall promptly do all of the following:

(A) Establish Entitlement Share Reduction Compensation Amount. The CCP Manager shall secure at least one (1), but no more than three (3), valuations of the net present value of the Entitlement Share Reduction Amount over the remaining term of the ESSA from one or more qualified firm(s) with the requisite experience to determine such valuation. The valuation, or if more than one valuation is obtained, the average of all valuations received, shall be the "**Proposed Entitlement Share Reduction Compensation Amount**." The CCP Manager shall call a meeting of the Project Committee and present the Proposed Entitlement Share Reduction Compensation Amount to the Project Committee. The Project Committee shall by a Normal Vote either approve the Proposed Entitlement Share Reduction Compensation Amount or direct the CCP Manager to secure additional valuations. The Proposed Entitlement Share Reduction Compensation Amount approved by the Project Committee shall be the "**Entitlement Share Reduction Compensation Amount**." The Project Participant proposing to reduce its Entitlement Share may modify the quantity of the Entitlement Share Reduction Amount associated with its proposal or withdraw its proposal at any time prior to the initiation of the process set forth in paragraph (a)(i)(B).

(B) Oversee the Offering of the Entitlement Share Reduction Amount to Other Project Participants. The CCP Manager shall facilitate the offering of the Entitlement Share Reduction Amount to the other Project Participants through multiple rounds of offerings.

a) The initial offering shall be to each Project Participant on a pro rata share, based on such Project Participant's Entitlement Share. Each Project Participant may accept or reject the portion of the Entitlement Share Reduction Amount offered to the Project Participant through this process. If any portion of the Entitlement Share Reduction Amount remains after the initial offering, then the remaining portion shall be offered to any Project Participant that accepted the share of the Entitlement Share Reduction Amount offered in the initial offering on a pro rata share, based on such Project Participant's Entitlement Share as a percentage of the total Entitlement Shares of all Project Participants that accepted the portion of the Entitlement Share Reduction Amount offered to them in the initial offering.

b) The CCP Manager shall conduct subsequent offering rounds until either the total Entitlement Share Reduction Amount is accepted by one or more of the other Project Participants or some portion of the Entitlement Share Reduction Amount remains, but all Project Participants have rejected such amount.

c) Any Project Participant accepting a share of the offered Entitlement Share Reduction Amount shall either pay the offering Project Participant or be compensated by the offering Project Participant at the Entitlement Share Reduction Compensation Amount multiplied by the quantity of the portion being accepted.

d) Before a transfer of all or a portion of any Project Participant's Entitlement share to another Project Participant can become effective, the proposed transfer must be submitted to and approved by the Project Committee through a Normal Vote.

e) After acceptance and payment for such portion of the Entitlement Share Reduction Amount, and upon approval of such transfer by the Project Committee, the CCP Manager shall cause the Entitlement Share specified in Exhibit B to be modified accordingly, and such modification shall be considered an element of the administration of this Agreement and shall not require the consent of the Parties hereto.

(C) Oversee the Offering of the Entitlement Share Reduction Amount to CCP Members that are not Project Participants. If there is any portion of the Entitlement Share Reduction Amount that remains unaccepted after the process specified in paragraph (a)(i)(B) is complete, then the Project Participant proposing to reduce its Entitlement Share may request that the CCP Manager offer the remaining portion of the Entitlement Share Reduction Amount to CCP Members that are not Project Participants. If any CCP Member wishes to accept any or all of the remaining portion of the Entitlement Share Reduction Amount, such action shall require the CCP Member to become a Project Participant through an amendment to this Agreement, which shall be subject to the consent and approval of all Parties to this Agreement and the CCP Member becoming a Project Participant. The compensation amount associated with the CCP Member accepting the remaining portion of the Entitlement Share Reduction Amount shall be negotiated between the CCP Member and the offering Project Participant.

(D) Oversee the Offering of the Entitlement Share Reduction Amount to a Community Choice Aggregator that is not a CCP Member. If there is any portion of the Entitlement Share Reduction Amount that remains unaccepted after the process specified in both paragraphs (a)(i)(B) and (a)(k)(C) is complete, then the Project Participant proposing to reduce its Entitlement Share, may request that the CCP Manager offer the remaining portion of the Entitlement Share Reduction Amount to a community choice aggregator that is not a CCP Member. If any community choice aggregator wishes to accept any or all of the remaining portion of the Entitlement Share Reduction Amount, such action shall require the community choice aggregator to become a CCP Member, and subsequent to becoming a CCP Member, to become a Project Participant through an amendment to this Agreement that is subject to the consent and approval of all Parties to this Agreement and the community choice aggregator becoming a Project Participant. The compensation amount associated with the community choice aggregator accepting the remaining portion of the Entitlement Share Reduction Amount shall be negotiated between the community choice aggregator and the offering Project Participant.

## EXHIBIT D

### PROJECT COMMITTEE OPERATIONS, MEETINGS, AND VOTING

(a) Chairperson of Project Committee. The chairperson of the Project Committee (“**Chairperson**”) shall be the CCP Manager. The Chairperson shall be responsible for calling and presiding over meetings of the Project Committee in a manner and to the extent permitted by law.

(b) Conducting Meetings. Conducting of Project Committee meetings and actions taken by the Project Committee may be taken by vote given in an assembled meeting, by telephone, by video conferencing, or by any combination thereof, to the extent permitted by law.

(c) Calling of Meetings.

(i) The Chairperson may call a meeting of the Project Committee at their discretion.

(ii) The Chairperson shall promptly call a meeting of the Project Committee at the request of any representative of a Project Participant.

(d) Unanimous Votes. Certain actions, as designated in Section 6.4(c), require a unanimous affirmative vote by all Project Participants (“**Unanimous Vote**”). No such vote may be taken unless a representative from every Project Participant is present at the meeting of the Project Committee. If any Project Participant’s Entitlement Share is reduced to zero through the process specified in Exhibit C, such Project Participant shall not be required to be present or be entitled to vote in order for such vote to be a Unanimous Vote.

(e) Normal Votes. All actions not designated as requiring unanimous vote, shall proceed pursuant to the “**Normal Vote**” process set forth in this paragraph (e).

(i) Quorum. No Normal Vote of the Project Committee shall be taken unless a representative is present for at least fifty percent (50%) of the total number of Project Participants, without regard to each Project Participant’s Entitlement Share.

(ii) Initial Normal Vote. Unless a representative requests an Alternate Normal Vote, pursuant to paragraph (e)(iii), all actions requiring a Normal Vote, as specified in Section 6.4(b) or 6.4(d), shall require an affirmative vote of at least fifty-one percent (51%) of the total number of Project Participants, without regard to each Project Participant’s Entitlement Share.

(iii) Alternate Normal Vote. Any representative may request that any Normal Vote be taken on an Entitlement Share basis (referred to as an “**Alternate Normal Vote**”). If a representative requests an Alternate Normal Vote, then the following vote requirements shall apply:

(A) If any individual Project Participant has an Entitlement Share exceeding fifty percent (50%), then all actions for which an Alternate Normal Vote is taken shall require that the Project Participant with an Entitlement Share exceeding fifty percent (50%) plus any other Project Participant vote in the affirmative.

(B) If no individual Project Participant has an Entitlement Share exceeding fifty percent (50%), then all actions for which an Alternate Normal Vote is taken shall require an affirmative vote of Project Participants having Entitlement Shares aggregating at least fifty-one percent (51%) of the total Entitlement Shares.

**PROJECT PARTICIPATION SHARE AGREEMENT  
(RENEWABLE ENERGY)**

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# PROJECT PARTICIPATION SHARE AGREEMENT

## PREAMBLE

This Project Participation Share Agreement (“**Agreement**”) is entered into as of \_\_\_\_\_ (the “**Effective Date**”), by and among \_\_\_\_\_ (each individually a “**Project Participant**” and collectively referred to as the “**Project Participants**”) and California Community Power (“CCP”), a California joint powers authority. CCP and the Project Participants are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.” All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

## RECITALS

WHEREAS CCP is a Joint Powers Authority, was formed for the purpose of developing, acquiring, constructing, owning, managing, contracting for, engaging in, or financing electric energy generation and storage projects, and for other purposes; and

WHEREAS, the Project Participants have participated with CCP in the negotiation of an agreement for purchase of the electric output of the \_\_\_\_\_ (the “**Project**” as defined in Exhibit A of the PPA), and CCP is to enter into a Renewable Power Purchase Agreement (“**PPA**”), which is incorporated herein by this reference, with [Seller], a \_\_\_\_\_ (“**Project Developer**”), providing for purchase of the electric output, and associated rights, benefits, and credits from the Project on behalf of the Project Participants.

WHEREAS, pursuant to this Agreement, CCP shall cause to deliver to each Project Participant the Project Participant’s associated share of the electric output and associated rights, benefits, and credits of the Project.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

## ARTICLE 1 **DEFINITIONS**

1.1. **Definitions.** The following terms, when used herein with initial capitalization, shall have the meanings set forth below:

“**AC**” means alternating current.

“**Affiliate**” means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes of this definition and the definition of “Permitted Transferee”, “control” (including, with correlative meanings, the terms “controlled by” and “under common control with”), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least fifty percent (50%)

of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least fifty percent (50%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

“**Agreement**” has the meaning set forth in the Preamble and any Exhibits, schedules, and any written supplements hereto.

“**Amended Annual Budget**” means the budget approved by the Project Committee and adopted by the CCP Board pursuant to Section 5.1(c) of this Agreement.

“**Ancillary Services**” means all ancillary services, products and other attributes, if any, associated with the Installed Capacity of the Facility.

“**Annual Budget**” means the budget approved by the Project Committee and adopted by the CCP Board pursuant to Section 5.1(c) of this Agreement.

“**Bankrupt**” or “**Bankruptcy**” means, with respect to any entity, such entity that (a) 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, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) 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 (f) is generally unable to pay its debts as they fall due.

“**Billing Statement**” has the meaning set forth in Section 9.2 of this Agreement.

“**Buyer Liability Pass Through Agreement**” or “**BLPTA**” means, for each Project Participant, the form set forth in Exhibit L of the PPA, as executed by such Project Participant, countersigned by CCP, and delivered to the Project Developer.

“**Business Day**” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 a.m. and ends at 5:00 p.m. local time for the Party sending a Notice, or payment, or performing a specified action.

“**CAISO**” means the California Independent System Operator Corporation or any successor entity performing similar functions.

“**CAISO Balancing Authority Area**” has the meaning set forth in the CAISO Tariff.

“**CAISO Grid**” has the same meaning as “CAISO Controlled Grid” as defined in the CAISO Tariff.

“**CAISO Tariff**” means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures, and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.

**“California Renewables Portfolio Standard”** or **“RPS”** means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.

**“Capital Improvements”** means any unit of property, property right, land or land right which is a replacement, repair, addition, improvement or betterment to the Project or any transmission facilities relating to, or for the benefit of, the Project, the betterment of land or land rights or the enlargement or betterment of any such unit of property constituting a part of the Project or related transmission facilities which is (i) consistent with Prudent Utility Practices and determined necessary and/or desirable by the CCP Board or (ii) required by any governmental agency having jurisdiction over the Project.

**“CCP Board”** means the Board of Directors of California Community Power.

**“CCP Manager”** means the General Manager of California Community Power.

**“CEC”** means the California Energy Commission, or any successor agency performing similar statutory functions.

**“Capacity Attribute”** means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Facility can generate or deliver to the Delivery Point at a particular moment and that can be purchased, sold, or conveyed under CAISO or CPUC market rules, including Resource Adequacy Benefits.

**“Capacity Damages”** means any liquidated damages paid by the Project Developer to CCP pursuant to Exhibit B of the PPA.

**“CEQA”** means the California Environmental Quality Act, as amended or supplemented from time to time.

**“Chairperson”** has the meaning set forth in Exhibit D.

**“Change of Control”** has the meaning set forth in Section 1.1 of the PPA.

**“Commercial Operation”** has the meaning set forth in Section 1.1 of the PPA.

**“Commercial Operation Date”** or **“COD”** has the meaning set forth in Section 1.1 of the PPA.

**“Commercial Operation Delay Damages”** has the meaning set forth in Section 1.1 of the PPA.

**“Community Choice Aggregator”** has the meaning set forth in California Public Utilities Code § 331.1.

**“Confidential Information”** has the meaning set forth in Section 18.1 of the PPA.

**“Construction Start”** has the meaning set forth in Exhibit B of the PPA.

**“Construction Start Date”** has the meaning set forth in Exhibit B of the PPA.

**“Contract Price”** has the meaning set forth on the Cover Sheet of the PPA.

**“Contract Term”** has the meaning set forth in Section 2.1 of the PPA.

**“Contract Year”** means a period of twelve (12) consecutive months. The first Contract Year shall commence on the Commercial Operation Date and each subsequent Contract Year shall commence on the anniversary of the Commercial Operation Date.

**“Costs”** means, with respect to a Project Participant assuming all or a portion of a Defaulting Project Participant’s Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c), brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such Project Participant in terminating any arrangement pursuant to which it has hedged its obligations; and all reasonable attorneys’ fees and expenses incurred by the Project Participant in connection with the Step-Up Allocation.

**“CPUC”** means the California Public Utilities Commission, or successor entity.

**“Cured Payment Default”** means a Payment Default that has been cured in accordance with Section 12.4 of this Agreement.

**“Daily Delay Damages”** has the meaning set forth in Section 1.1 of the PPA.

**“Damage Payment”** has the meaning set forth in Section 1.1 of the PPA.

**“Day-Ahead Market”** has the meaning set forth in the CAISO Tariff.

**“Day-Ahead Schedule”** has the meaning set forth in the CAISO Tariff.

**“Defaulting Project Participant”** has the meaning set forth in Section 12.1.

**“Delivery Point”** means the Facility Pnode on the CAISO grid.

**“Delivery Term”** means the period of Contract Years set forth on the Cover Sheet of the PPA beginning on the Commercial Operation Date, unless terminated earlier in accordance with the terms and conditions of the PPA.

**“Designated Fund”** has the meaning set forth in Section 10.5.

**“Development Security”** means (a) cash or (b) a Letter of Credit in the amount set forth on the Cover Sheet of the PPA.

**“Effective Date”** has the meaning set forth in the Preamble.

**“Electrical Losses”** has the meaning set forth in Section 1.1 of the PPA.

**“Emission Reduction Credits”** or **“ERCs”** means emission reductions that have been authorized by a local air pollution control district pursuant to California Division 26 Air Resources; Health and Safety Code Sections 40709 and 40709.5, whereby a district has established a system by which all reductions in the emission of air contaminants that are to be used to offset certain future increases in the emission of air contaminants shall be banked prior to use to offset future increases in emissions.

**“Energy”** means electrical energy, measured in kilowatt-hours or Megawatt-hours or multiple units thereof.

**“Energy Management System”** or **“EMS”** means the Facility’s energy management system.

**“Entitlement Share”** means the percentage entitlement of each Project Participant as set forth in Exhibit B of this Agreement (entitled “Schedule of Project Participant Entitlement Shares and Step-Up Allocation Caps”) attributable to each such Project Participant, as may be amended pursuant to Section 4.2 or 12.8.

**“Entitlement Share Reduction Amount”** has the meaning set forth in Exhibit C.

**“Entitlement Share Reduction Compensation Amount”** has the meaning set forth in Exhibit C.

**“Entitlement Share Reduction Notice”** has the meaning set forth in Exhibit C.

**“Environmental Attributes”** shall mean any and all attributes under the RPS regulations or under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable now, or in the future to the Facility and its displacement of conventional energy generation.

**“Estimated Monthly Project Cost”** has the meaning set forth in Section 8.1.

**“Event of Default”** has the meaning set forth in Section 11.1 of the PPA.

**“Expected Commercial Operation Date”** means the date set forth on the Cover Sheet of the PPA.

**“Expected Energy”** means the quantity of Energy specified on the Cover Sheet of the PPA.

**“Facility”** means the \_\_\_\_\_ generating facility described on the Cover Sheet of the PPA and in Exhibit A of the PPA, located at the Site, and including mechanical equipment and associated facilities and equipment required to deliver Energy to the Delivery Point.

**“Facility Energy”** means the Energy delivered from the Facility to the Delivery Point during any Settlement Interval or Settlement Period, as measured at the Facility Metering Point by the Facility Meter, as such meter readings are adjusted by the CAISO for any applicable Electrical Losses or Station Use.

**“Facility Meter”** has the meaning set forth in Section 1.1 of the PPA.

**“Facility Metering Point”** means the location(s) of the Facility Meter shown in Exhibit P of the PPA.

**“FERC”** means the Federal Energy Regulatory Commission or any successor government agency.

**“Flexible Capacity”** means, with respect to any particular Showing Month, the number of MWs of Product which are eligible to satisfy Flexible RAR.

**“Flexible RAR”** means the flexible capacity requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff, the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority.

**“Force Majeure Event”** has the meaning set forth in Section 10.1 of the PPA.

**“Full Capacity Deliverability Status”** or **“FCDS”** has the meaning set forth in the CAISO Tariff.

**“Full Capacity Deliverability Status Finding”** means a written confirmation from the CAISO that the Facility is eligible for Full Capacity Deliverability Status.

**“Gains”** means, with respect to a Project Participant assuming all or a portion of a Defaulting Project Participant’s Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c), an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from such Step-Up Allocation for the remaining Contract Term of the PPA, determined in a commercially reasonable manner. Factors used in determining the economic benefit to such Project Participant may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of such Project Participant, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NP-15), all of which should be calculated for the remaining Contract Term, and include the value of Environmental Attributes and Capacity Attributes.

**“GHG Regulations”** means Title 17, Division 3 (Air Resources), Chapter 1 (Air Resources Board), Subchapter 10 (Climate Change), Article 5 (Emissions Cap), Sections 95800 to 96023 of the California Code of Regulations, as amended or supplemented from time to time.

**“Governmental Authority”** means any federal, state, provincial, local, or municipal government, any political subdivision thereof or any other governmental, congressional, or

parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau, or entity with authority to bind a Party at law, including CAISO; *provided*, “Governmental Authority” shall not in any event include any Party, except to the extent that the Party is acting solely in its governmental capacity.

“**Greenhouse Gas**” or “**GHG**” has the meaning set forth in the GHG Regulations or in any other applicable Laws.

“**Guaranteed Commercial Operation Date**” means the date set forth on the Cover Sheet of the PPA, as such date may be extended pursuant to Exhibit B of the PPA.

“**Guaranteed Construction Start Date**” means the date set forth on the Cover Sheet of the PPA, as such date may be extended pursuant to Exhibit B of the PPA.

“**Guaranteed Energy Production Damages**” means any liquidated damages paid by the Project Developer to CCP pursuant to Section 4.7 of the PPA.

“**Indemnifying Party**” has the meaning set forth in Section 13.5.

“**Installed Capacity**” means the lesser of (a) Facility P<sub>MAX</sub>, and (b) the peak electrical output of the Facility, as measured in MW(AC) at the Delivery Point, that achieves Commercial Operation, adjusted for ambient conditions on the date of the performance test.

“**Interconnection Agreement**” means the interconnection agreement entered into by Project Developer pursuant to which the Facility will be interconnected with the Transmission System, and pursuant to which Project Developer’s Interconnection Facilities and any other Interconnection Facilities will be constructed, operated, and maintained during the PPA Contract Term.

“**Interconnection Facilities**” means the interconnection facilities, control and protective devices, and metering facilities required to connect the Facility with the Transmission System in accordance with the Interconnection Agreement.

“**Interest Rate**” has the meaning set forth in Section 8.2 of the PPA.

“**Invoice Amount**” has the meaning set forth in Section 9.2.

“**ITC**” means the investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.

“**Joint Powers Act**” means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).

“**Joint Powers Agreement**” means that certain Joint Powers Agreement dated January 29, 2021, as amended from time to time, under which CCP is organized as a Joint Powers Authority in accordance with the Joint Powers Act.

“**kWh**” means a kilowatt-hour measured in alternating current, unless expressly stated in



terms of direct current.

**“Late Payment Notice”** means a notice issued by CCP to a Project Participant pursuant to Section 9.7.

**“Late Payment Charge”** has the meaning set forth in Section 9.7.

**“Law”** means any applicable law, statute, rule, regulation, decision, writ, order, decree or judgment, permit or any interpretation thereof, promulgated or issued by a Governmental Authority.

**“Letter(s) of Credit”** has the meaning set forth in Section 1.1 the PPA.

**“Local Capacity Area Resource”** has the meaning set forth in the CAISO Tariff.

**“Local RAR”** means the local Resource Adequacy Requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff, the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority. “Local RAR” may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirements in other regulatory proceedings or legislative actions.

**“Losses”** means, with respect to a Project Participant assuming all or a portion of a Defaulting Project Participant’s Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c), an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from such Step-Up Allocation for the remaining Contract Term of the PPA, determined in a commercially reasonable manner. Factors used in determining economic loss to such Project Participant may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Project Participant, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., NP-15), all of which should be calculated for the remaining Contract Term of the PPA and must include the value of Environmental Attributes and Capacity Attributes.

**“Marketable Emission Trading Credits”** means emissions trading credits or units pursuant to the requirements of California Division 26 Air Resources; Health & Safety Code Section 39616 and Section 40440.2 for market-based incentive programs such as the South Coast Air Quality Management District’s Regional Clean Air Incentives Market, also known as RECLAIM, and allowances of sulfur dioxide trading credits as required under Title IV of the Federal Clean Air Act (42 U.S.C. § 7651b (a) to (f)).

**“Month”** means a calendar month.

**“Monthly Costs”** has the meaning set forth in Section 9.1.

“**Monthly Product Payment**” means the payment required to be made by CCP to Project Developer each month of the Delivery Term as compensation for the Product, as calculated in accordance with Exhibit C of the PPA.

“**MW**” means megawatts in alternating current, unless expressly stated in terms of direct current.

“**MWh**” means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.

“**Negative LMP Strike Price**” has the meaning set forth in Section 1.1 of the PPA.

“**NERC**” means the North American Electric Reliability Corporation.

“**Net Qualifying Capacity**” or “**NQC**” has the meaning set forth in the CAISO Tariff.

“**Non-Defaulting Project Participant**” has the meaning set forth in Section 12.1.

“**Normal Vote**” has the meaning set forth in Exhibit D.

“**Notice**” shall, unless otherwise specified in the Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, or electronic messaging (e-mail).

“**Operating Account**” means an account established by CCP for each Project Participant pursuant to Section 8.2.

“**Operating Cost**” means the share of the Annual Budget or Amended Annual Budget attributable to the applicable Month for a Billing Statement plus any Accepted Compliance Costs approved by the CCP Board pursuant to Section 5.2(a)(xiii).

“**Party**” has the meaning set forth in the Preamble.

“**Payment Default**” has the meaning set forth in Section 12.2.

“**Payment Default Termination Deadline**” has the meaning set forth in Section 12.6.

“**Performance Security**” means (i) cash or (ii) a Letter of Credit in the amount set forth on the Cover Sheet of the PPA.

“**Permitted Transferee**” has the meaning set forth in Section 1.1 of the PPA.

“**Person**” means any individual, sole proprietorship, corporation, limited liability company, limited or general partnership, joint venture, association, joint-stock company, trust, incorporated organization, institution, public benefit corporation, unincorporated organization, government entity or other entity.

**“Power Purchase Agreement”** or **“PPA”** means the agreement between CCP and Project Developer for the purchase of the electric output of the \_\_\_\_\_ Project, executed on \_\_\_\_\_.

**“PPA Defaulting Party”** has the meaning set forth in Section 11.1(a) of the PPA.

**“PPA Non-Defaulting Party”** has the meaning set forth in Section 11.2 of the PPA.

**“PMAx”** means the applicable CAISO-certified maximum operating level of the Facility.

**“PMIN”** means the applicable CAISO-certified minimum operating level of the Facility.

**“PNode”** has the meaning set forth in the CAISO Tariff.

**“Product”** has the meaning set forth in Section 3.1

**“Progress Report”** means a progress report including the items set forth in Exhibit E of the PPA.

**“Project”** shall be broadly construed to entail the aggregate of rights, liabilities, interests, and obligations of CCP pursuant to the PPA, including but not limited to all rights, liabilities, interests, and obligations associated with the Product, all rights, liabilities, interests and obligations associated with the Facility, and including all aspects of the operation and administration of the Facility and the PPA and the rights, liabilities, interests and obligations associated therewith.

**“Project Committee”** means the committee established in accordance with Section 6.1.

**“Project Developer”** means \_\_\_\_\_, or assignee as permitted under the PPA.

**“Project Participants”** means those entities executing this Agreement, as identified in the Preamble, together in each case with each entity’s successors or assigns.

**“Project Revenue Rights”** means all rights of a Project Participant under this Agreement to any revenue associated with the Facility Energy, Capacity Attributes, Ancillary Services, or Environmental Attributes associated with the Facility.

**“Project Rights”** means all rights and privileges of a Project Participant under this Agreement, including but not limited to its Entitlement Share, its right to receive the Product from the Facility, and its right to vote on Project Committee matters.

**“Project Rights and Obligations”** means the Project Participants’ Project Rights and obligations under the terms of this Agreement.

**“Proposed Entitlement Share Reduction Compensation Amount”** has the meaning set forth in Exhibit C.

**“Prudent Operating Practice”** means (a) the applicable practices, methods and acts required by or consistent with applicable Laws and reliability criteria, and otherwise engaged in

or approved by a significant portion of the electric industry during the relevant time period with respect to grid-interconnected, utility-scale generating facilities in the Western United States, and (b) any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale generating facilities in the Western United States. Prudent Operating Practice shall include compliance with applicable Laws, applicable safety and reliability criteria, and the applicable criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules, and standards of any successor organizations.

**“Qualifying Capacity”** has the meaning set forth in the CAISO Tariff.

**“RA Compliance Showing”** means the (a) Local RAR compliance or advisory showings (or similar or successor showings), (b) RAR compliance or advisory showings (or similar or successor showings), and (c) Flexible RAR compliance or advisory showings (or similar successor showings), in each case, an entity is required to make to the CAISO pursuant to the CAISO Tariff, to the CPUC (and, to the extent authorized by the CPUC, to the CAISO) pursuant to the Resource Adequacy Rulings, or to any Governmental Authority.

**“RA Deficiency Amount”** has the meaning set forth in Section 1.1 of the PPA.

**“RA Guarantee Date”** means the date by which the Facility is expected to achieve Full Capacity Deliverability Status, which is the Commercial Operation Date.

**“RA Shortfall Month”** has the meaning set forth in Section 1.1 of the PPA.

**“Real-Time Market”** has the meaning set forth in the CAISO Tariff.

**“Reliability Network Upgrades”** has the meaning set forth in the CAISO Tariff.

**“Remedial Action Plan”** has the meaning set forth in Section 2.4 of the PPA.

**“Replacement RA”** has the meaning set forth in Section 1.1 of the PPA.

**“Resource Adequacy Benefits”** means the rights and privileges attached to the Facility that satisfy any entity’s Resource Adequacy Requirements, as those obligations are set forth in any ruling issue by a Governmental Authority, including the Resource Adequacy Rulings and shall include Flexible Capacity, and any local, zonal or otherwise locational attributes associated with the Facility.

**“Resource Adequacy Requirements”** or **“RAR”** means the resource adequacy requirements applicable to an entity as established by the CAISO pursuant to the CAISO Tariff, by the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority.

**“Resource Adequacy Resource”** has the meaning used in Resource Adequacy Rulings.

**“Resource Adequacy Rulings”** means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-04-040, 06-06-064, 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 13-06-024, 14-06-050, 15-06-063, 16-06-045, 17-06-027, 18-06-030, 18-06-031, 19-02-022, 19-06-026, 19-10-021, 20-01-004, 20-03-016, 20-06-002, 20-06-031, 20-06-028, 20-12-006, 21-06-035 and any other existing or subsequent ruling or decision, or any other resource adequacy laws, rules or regulations enacted, adopted or promulgated by any applicable Governmental Authority, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Contract Term.

**“Schedule”** has the meaning set forth in the CAISO Tariff, and **“Scheduled”** has a corollary meaning.

**“Scheduled Energy”** means the Facility Energy that clears under the applicable CAISO market based on the final Day-Ahead Schedule(s), FMM Schedule(s) (as defined in the CAISO Tariff), and/or any other financially binding Schedule(s), market instruction or dispatch for the Facility for a given period of time implemented in accordance with the CAISO Tariff.

**“Scheduling Coordinator”** or **“SC”** means an entity certified by the CAISO as qualifying as a Scheduling Coordinator pursuant to the CAISO Tariff for the purposes of undertaking the functions specified in “Responsibilities of a Scheduling Coordinator,” of the CAISO Tariff, as amended from time to time.

**“Scheduling Coordinator Services Agreement”** means the agreement between CCP and a Scheduling Coordinator that was approved by the CCP Board pursuant to Section 5.2(a)(xiii).

**“Settlement Interval”** has the meaning set forth in the CAISO Tariff.

**“Settlement Period”** has the meaning set forth in the CAISO Tariff.

**“Shared Facilities”** means the gen-tie lines, transformers, substations, or other equipment, permits, contract rights, and other assets and property (real or personal), in each case, as necessary to enable delivery of Energy from the Facility (which is excluded from Shared Facilities) to the point of interconnection, including the Interconnection Agreement itself, that are used in common with third parties.

**“Shared Facilities Agreements”** has the meaning set forth in Section 6.3 PPA.

**“Showing Month”** means the calendar month of the Delivery Term, commencing with the Showing Month that contains the RA Guarantee Date, that is the subject of the RA Compliance Showing, as set forth in the Resource Adequacy Rulings and outlined in the CAISO Tariff. For illustrative purposes only, pursuant to the CAISO Tariff and Resource Adequacy Rulings in effect as of the Effective Date, the monthly RA Compliance Showing made in June is for the Showing Month of August.

**“Site”** has the meaning set forth in Section 1.1 of the PPA, as further described in Exhibit A of the PPA.

**“Station Use”** means the Energy that is used within the Facility to power the lights, motors, temperature control systems, control systems and other electrical loads that are necessary for operation of the Facility.

**“Step-Up Allocation Cap”** has the meaning set forth in Section 12.8(a).

**“Step-Up Invoice”** means an invoice sent to a Non-Defaulting Project Participant as a result of a Defaulting Project Participant’s Payment Default, which invoice shall separately identify any amount owed with respect to the monthly Billing Statement of the Defaulting Project Participant, as the case may be, pursuant to Section 12.7.

**“Step-Up Invoice Amount”** has the meaning set forth in Section 12.7.

**“Step-Up Invoice Amount Cap”** has the meaning set forth in Section 12.7.

**“Step-Up Reserve Account”** has the meaning set forth in Section 12.7(a)(i).

**“System Emergency”** means any condition that requires, as determined, and declared by CAISO or the Transmission Provider, automatic or immediate action to (i) prevent or limit harm to or loss of life or property, (ii) prevent loss of transmission facilities or generation supply in the immediate vicinity of the Facility, or (iii) to preserve Transmission System reliability.

**“Tax”** or **“Taxes”** means all U.S. federal, state and local, and any foreign taxes, levies, assessments, surcharges, duties and other fees and charges of any nature imposed by a Governmental Authority, whether currently in effect or adopted during the Contract Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any and all items of withholding, deficiency, penalty, additions, interest or assessment related thereto.

**“Tax Credits”** means any state, local and/or federal production tax credit, depreciation benefit, tax deduction and/or investment tax credit, including the ITC, specific to investments in renewable energy facilities and/or energy storage facilities.

**“Terminated Transaction”** has the meaning set forth in Section 11.2(a) the PPA.

**“Termination Payment”** has the meaning set forth in Section 11.3 of the PPA.

**“Transmission Provider”** means any entity that owns, operates, and maintains transmission or distribution lines and associated facilities and/or has entitlements to use certain transmission or distribution lines and associated facilities for the purpose of transmitting or transporting the Facility Energy from the Delivery Point.

**“Transmission System”** means the transmission facilities operated by the CAISO, now or hereafter in existence, which provide energy transmission service downstream from the Delivery Point.

**“Unanimous Vote”** has the meaning set forth in Exhibit D.

**“Uncontrollable Forces”** means any Force Majeure event and any cause beyond the control of any Party, which by the exercise of due diligence such Party is unable to prevent or overcome, including but not limited to, failure or refusal of any other Person to comply with then existing contracts, an act of God, fire, flood, explosion, earthquake, strike, sabotage, epidemic or pandemic (excluding impacts of the disease designated COVID-19 or the related virus designated SARS-CoV-2 impacts actually known by the Party claiming the Force Majeure Event as of the Effective Date), an act of the public enemy (including terrorism), civil or military authority including court orders, injunctions and orders of governmental agencies with proper jurisdiction or the failure of such agencies to act, insurrection or riot, an act of the elements, failure of equipment, a failure of any governmental entity to issue a requested order, license or permit, inability of any Party or any Person engaged in work on the Project to obtain or ship materials or equipment because of the effect of similar causes on suppliers or carriers. Notwithstanding the foregoing, Uncontrollable Forces as defined herein shall also include events of Force Majeure pursuant to the PPA, as defined therein.

1.2. Rules of Interpretation. In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

(a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;

(b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;

(c) the words “hereof”, “herein”, and “hereunder” and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;

(d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;

(e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation, or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

(f) a reference to a Person includes that Person’s successors and permitted assigns;

(g) the terms “include” and “including” mean “include or including (as applicable) without limitation” and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;

(h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified, or

reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;

(i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;

(j) references to any amount of money shall mean a reference to the amount in United States Dollars;

(k) the expression “and/or” when used as a conjunction shall connote “any or all of”;

(l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning in Prudent Operating Practice shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning in Prudent Operating Practice but that have well known and generally accepted technical or trade meanings, shall have such recognized meanings;

(m) each Party acknowledges that it was represented by counsel in connection with this Agreement and that it or its counsel reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement; and

(n) in the event of any conflict or inconsistency between the terms of this Agreement and the terms of the PPA, the terms and provisions of this Agreement shall control.

## **ARTICLE 2**

### **EFFECTIVE DATE AND TERM**

#### **2.1. Term.**

(a) The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the occurrence of all of the following: (i) the termination of the PPA and (ii) the termination of the Buyer Liability Pass Through Agreement for all the Project Participants, and (iii) all Parties have met their obligations under this Agreement (“**Term**”).

(b) Applicable provisions of this Agreement shall continue in effect after termination to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. All indemnity and audit rights shall remain in full force and effect for three (3) years following the termination of this Agreement.

## **ARTICLE 3**

### **AGREEMENT**

3.1. Transaction. Subject to the terms and conditions of this Agreement, the Project Participants authorize CCP to purchase all Facility Energy, Capacity Attributes, Ancillary Services, and Environmental Attributes associated with the Facility and any Replacement RA



provided pursuant to the PPA (collectively the “**Product**”), on behalf of the Project Participants. CCP shall cause Project Developer to deliver each Project Participant’s Entitlement Share of the Product to such Project Participant, including but not limited to (i) any revenue associated with the Facility Energy, Capacity Attributes, Ancillary Services, or Environmental Attributes associated with the Facility, and (ii) the Capacity Attributes and Environmental Attributes associated with the Facility or otherwise provided to CCP pursuant to the PPA. To the extent that any Facility Energy, Capacity Attributes, Ancillary Services, or Environmental Attributes associated with the Project or any Replacement RA are delivered to CCP, then CCP shall transfer each Project Participant’s Entitlement Share of such Facility Energy, Capacity Attributes, Ancillary Services, or Environmental Attributes to the Project Participants. CCP shall administer the PPA and oversee the operation of the Project. CCP shall not sell, assign, or otherwise transfer any Product, or any portion thereof, to any third party other than to the Project Participants, unless authorized by the Project Participants pursuant to this Agreement.

### 3.2. RPS Compliance.

(a) Pursuant to the terms and conditions of the PPA or this Agreement, to the extent that such action is capable of being carried out by CCP:

(i) the Product purchased by CCP on behalf of the Project Participants consists only of Energy and Environmental Attributes from Eligible Renewable Energy Resources of the portfolio content set forth in California Public Utilities Code Section 399.16(b)(1);

(ii) the Energy and Environmental Attributes that are delivered to Project Participants by Project Developer, or delivered to Project Participants by CCP to the extent Project Developer delivers Energy and Environmental Attributes to CCP, consists only of Energy and Environmental Attributes that have not yet been generated prior to the commencement of the term of the PPA or the Effective Date of this Agreement;

(iii) the Energy that is delivered to Project Participants by Project Developer, or delivered to Project Participants by CCP to the extent Project Developer delivers Energy to CCP, shall be transferred to each Project Participant in real time; and

(b) If the PPA includes an agreement to dynamically transfer electricity to a California balancing authority, then any transactions implemented under this Agreement are not contrary to any condition imposed by a balancing authority participating in the dynamic transfer arrangement.

## **ARTICLE 4**

### **ENTITLEMENT SHARE**

4.1. Initial Entitlement Share. Each Project Participant’s initial Entitlement Share as of the Effective Date shall be set forth in Column B of the Table provided in Exhibit B of this Agreement (entitled “Schedule of Project Participant Entitlement Shares and Step-Up Allocation Caps”). Any revisions to the Entitlement Share specified in Exhibit B pursuant to Section 4.2. or

Section 12.8 shall be considered an element of the administration of this Agreement and shall not require the consent of the Parties hereto.

4.2. Change of Entitlement Share. Any Project Participant may reduce its Entitlement Share of the Project pursuant to the process set forth in Exhibit C.

4.3. Reduction of Entitlement Share to Zero. If any Project Participant's Entitlement Share is reduced to zero through any process specified in Exhibit C, such Project Participant shall remain a Party to this Agreement and shall be subject to all rights, obligations, and liabilities of this Agreement, including but not limited to any liabilities for Monthly Product Payments, Damage Payment, or Termination Payment, as applicable, and any other damage payments or reimbursement amounts under the PPA.

## **ARTICLE 5**

### **OBLIGATIONS OF CCP; ROLE OF CCP BOARD AND CCP MANAGER**

#### **5.1. Obligations of CCP.**

(a) CCP shall take such commercially reasonable actions or implement such commercially reasonable measures as may be necessary or desirable for the utilization, maintenance, or preservation of the rights and interests of the Project Participants in the Project including, if appropriate, such enforcement actions or other measures as the Project Committee or CCP Board deems to be in the Project Participants' best interests. To the extent not inconsistent with the PPA or other applicable agreements, CCP may also be authorized by the Project Participants to assume responsibilities for planning, designing, financing, developing, acquiring, insuring, contracting for, administering, operating, and maintaining the Project to effectuate the conveyance of the Product to Project Participants in accordance with Project Participants' Entitlement Shares.

(b) To the extent such services are available and can be carried forth in accordance with the PPA, CCP shall also provide such other services, as approved by the Project Committee or CCP Board, as may be deemed necessary to secure the benefits and/or satisfy the obligations associated with the PPA.

(c) Adoption of Annual Budget. The Annual Budget and any amendments to the Annual Budget shall be prepared and approved in accordance with this Section 5.1(c).

(i) The CCP Manager will prepare and submit to the Project Committee a proposed Annual Budget at least ninety (90) days prior to the beginning of each Contract Year during the term of this Agreement. The proposed Annual Budget shall be based on the prior Contract Year's actual costs and shall include reasonable estimates of the costs CCP expects to incur during the applicable Contract Year in association with the administration of the PPA, including the cost of insurance coverages that are determined to be attributable to the Project by action of the CCP Board. Upon approval of the proposed Annual Budget by a Normal Vote of the Project Committee, the CCP Manager shall present the proposed Annual Budget to the CCP Board. The CCP Board shall adopt the Annual Budget no later than thirty (30) days prior to the beginning of such Contract Year and shall cause copies of such adopted Annual Budget to be delivered to each Project Participant.

(ii) At any time after the adoption of the Annual Budget for a Contract Year, the CCP Manager may prepare and submit to the Project Committee a proposed Amended Annual Budget for and applicable to the remainder of such Contract Year. The proposal shall (A) explain why an amendment to the Annual Budget is needed, (B) compare estimated costs against actual costs, and (C) describe the events that triggered the need for additional funding. Upon approval of the proposed Amended Annual Budget by a Normal Vote of the Project Committee, the CCP Manager shall present the proposed Amended Annual Budget to the CCP Board. Upon adoption of the Amended Annual Budget by the CCP Board, such Amended Annual Budget shall apply to the remainder of the Contract Year and the CCP Board shall cause copies of such adopted Amended Annual Budget to be delivered to each Project Participant.

(iii) Reports. CCP will prepare and issue to Project Participants the following reports each quarter of a year during the Term:

(A) Financial and operating statement relating to the Project.

(B) Variance report comparing the costs in the Annual Budget versus actual costs, and the status of other cost-related issues with respect to the Project.

(d) Records and Accounts. CCP will keep, or cause to be kept, accurate records and accounts of the Project as well as of the operations relating to the Project, all in a manner similar to accepted accounting methodologies associated with similar projects. All transactions of CCP relating to the Project with respect to each Contract Year shall be subject to an annual audit. Each Project Participant shall have the right at its own expense to examine and copy the records and accounts referred to above on reasonable notice during regular business hours.

(e) Information Sharing. Upon CCP's request, each Project Participant agrees to coordinate with CCP to provide such information, documentation, and certifications that are reasonably necessary for the design, financing, refinancing, development, operation, administration, maintenance, and ongoing activities of the Project, including information required to respond to requests for such information from any federal, state, or local regulatory body or other authority.

(f) Consultants and Advisors Available. CCP shall make available to the Project Committee all consultants and advisors, including financial advisors and legal counsel that are retained by CCP, and such consultants, counsel and advisors shall be authorized to consult with and advise the Project Committee on Project matters. CCP agrees to waive any conflicts of interest or any other applicable professional standards or rules as required by consultants, counsel, and advisors to advise the Project Committee on Project matters.

(g) Deposit of Insurance Proceeds. CCP shall promptly deposit any insurance proceeds received by CCP from any insurance obtained pursuant to this Agreement or otherwise associated with the Project into the Operating Accounts of the Project Participants based on each Project Participants' Entitlement Shares.

(h) Liquidated and Other Damages. Any amounts paid to CCP, or applied against payments otherwise due by CCP pursuant to the PPA or each Project Participant's respective BLPTA, by the Project Developer shall be deposited on a pro rata share, based on each

Project Participant's Entitlement Share into each Project Participant's Operating Account. Liquidated damages include, but are not limited to Daily Delay Damages, RA Deficiency Amount, Capacity Damages, Guaranteed Energy Production Damages, Damage Payment, and Termination Payment.

(i) Environmental Attributes. CCP shall take such actions or implement such measures as may be necessary to facilitate the transfer of Environmental Attributes from the Project Developer to the Project Participants.

(j) Resale of Product. Any Project Participant may direct CCP to remarket such Project Participant's Entitlement Share of the Product, or such Project Participant's Entitlement Share of any part of the Product. If CCP incurs any expenses associated with the remarketing activities pursuant to this Section 5.1(j), then CCP shall include the total amount of such expenses as a Monthly Cost on the Project Participant's next Billing Statement. Prior to offering the Project Participant's Entitlement Share of the Product, or the Project Participant's Entitlement Share of any part of the Product to any third party, CCP shall first offer the Product or portion of the Product to the other Project Participants. The amount of compensation paid to the selling Project Participant shall be negotiated and agreed to between the selling Project Participant and the purchasing Project Participant or third party. Any payments for any resold Product pursuant to this Section 5.1(j) shall be transmitted directly from the purchasing Project Participant or purchasing third party to the reselling Project Participant. Any such resale to a third party shall not convey any rights or authority over the operation of the Project, and the Project Participant shall not make a representation to the third party that the resale conveys any rights or authority over the operation of the Project.

(k) Uncontrollable Forces. CCP shall not be required to provide, and CCP shall not be liable for failure to provide, the Product, Replacement RA, or other service under this Agreement when such failure, or the cessation or curtailment of, or interference with, the service is caused by Uncontrollable Forces or by the failure of the Project Developer, or its successors or assigns, to obtain any required governmental permits, licenses, or approvals to acquire, administer, or operate the Project; provided, however, that the Project Participants shall not thereby be relieved of their obligations to make payments under this Agreement except to the extent CCP is so relieved pursuant to the PPA, and provided further that CCP shall pursue all applicable remedies against the Project Developer under the PPA and distribute any remedies obtained pursuant to Section 5.1(h).

(l) Insurance. Within one hundred and eighty days (180) of the Effective Date of this Agreement, CCP shall secure and maintain, during the Term, insurance coverage as follows:

(i) Commercial General Liability. CCP shall maintain, or cause to be maintained, commercial general liability insurance, including products and completed operations and personal injury insurance, in a minimum amount of One Million Dollars (\$1,000,000) per occurrence, and an annual aggregate of not less than Two Million Dollars (\$2,000,000), endorsed to provide contractual liability in said amount, specifically covering CCP's obligations under this Agreement and including each Project Participant as an additional insured.

(ii) Employer's Liability Insurance. CCP, if it has employees, shall maintain Employers' Liability insurance with limits of not less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.

(iii) Workers' Compensation Insurance. CCP, if it has employees, shall also maintain at all times during the Term workers' compensation and employers' liability insurance coverage in accordance with statutory amounts, with employer's liability limits of not less than One Million Dollars (\$1,000,000.00) for each accident, injury, or illness; and include a blanket waiver of subrogation.

(iv) Business Auto Insurance. CCP shall maintain at all times during the Term business auto insurance for bodily injury and property damage with limits of One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of CCP's use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of the Agreement and shall name each Project Participant as an additional insured and contain standard cross-liability and severability of interest provisions.

(v) Public Entity Liability Insurance. CCP shall maintain public entity liability insurance, including public officials' liability insurance, public entity reimbursement insurance, and employment practices liability insurance in an amount not less than One Million Dollars (\$1,000,000) per claim, and an annual aggregate of not less than One Million Dollars (\$1,000,000) and CCP shall maintain such coverage for at least two (2) years from the termination of this Agreement.

(m) Evidence of Insurance. Within ten (10) days after the deadline for securing insurance coverage specified in Section 5.1(l), and upon annual renewal thereafter, CCP shall deliver to each Project Participant certificates of insurance evidencing such coverage with insurers with ratings comparable to A-VII or higher, and that are authorized to do business in the State of California, in a form evidencing all coverages set forth above. Such certificates shall specify that each Project Participant shall be given at least thirty (30) days prior Notice by CCP in the event of cancellation or termination of coverage. Such insurance shall be primary coverage without right of contribution from any insurance of each Project Participant. Any other insurance maintained by CCP not associated with this Agreement is for the exclusive benefit of CCP and shall not in any manner inure to the benefit of Project Participants. The general liability, auto liability and worker's compensation policies shall be endorsed with a waiver of subrogation in favor of each Project Participant for all work performed by CCP, its employees, agents and sub-contractors.

## 5.2. Role of CCP Board.

(a) The rights and obligations of CCP under the PPA shall be subject to the ultimate control at all times of the CCP Board. The CCP Board, shall have, in addition to the duties and responsibilities set forth elsewhere in this Agreement, the following duties and responsibilities, among others:

(i) Dispute Resolution. The CCP Board shall review, discuss and attempt to resolve any disputes among CCP, any of the Project Participants, and the Project

Developer relating to the Project, the operation and management of the Facility, and CCP's rights and interests in the Facility.

(ii) PPA. The CCP Board shall have the authority to review, modify, and approve, as appropriate, all amendments, modifications, and supplements to the PPA.

(iii) Capital Improvements. The CCP Board shall review, modify, and approve, if appropriate, all Capital Improvements undertaken with respect to the Project and all financing arrangements for such Capital Improvements. The CCP Board shall approve those budgets or other provisions for the payments associated with the Project and the financing for any development associated with the Project.

(iv) Committees. The CCP Board shall exercise such review, direction, or oversight as may be appropriate with respect to the Project Committee and any other committees established pursuant to this Agreement.

(v) Budgeting. Upon the submission of a proposed Annual Budget or proposed Amended Annual Budget, approved by a Normal Vote of the Project Committee, the CCP Board shall review, modify, and approve each Annual Budget and Amended Annual Budget in accordance with Section 5.1(c) of this Agreement.

(vi) Early Termination of PPA. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(ii) of this Agreement, as to an early termination of the PPA pursuant to Section 11.2 of the PPA.

(vii) Assignment by Project Developer. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(iii) of this Agreement, as to any assignment by Project Developer pursuant to Section 14.1 of the PPA other than any assignment pursuant to Sections 14.2 or 14.3 of the PPA.

(viii) Buyer Financing Assignment. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(iv) of this Agreement, as to an assignment by CCP to a financing entity.

(ix) Change of Control. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(v) of this Agreement, as to any Change of Control requiring CCP's consent, as specified in Section 14.1 of the PPA.

(x) Supervening Authority of the Board. The CCP Board has complete and plenary supervening power and authority to act upon any matter which is capable of being acted upon by the Project Committee or which is specified as being within the authority of the Project Committee pursuant to the provisions of this Agreement.

(xi) Other Matters. The CCP Board is authorized to perform such other functions and duties, including oversight of those matters and responsibilities addressed by the Project Committee or CCP Manager as may be provided for under this Agreement and under the PPA, or as may otherwise be appropriate.

(xii) Periodic Audits. The CCP Board or the Project Committee may arrange for the annual audit by certified accountants, selected by the CCP Board and experienced in electric generation or electric utility accounting, of the books and accounting records of CCP, the Project Developer to the extent authorized under the PPA, and any other counterparty under any agreement to the extent allowable, and such audit shall be completed and submitted to the CCP Board as soon as reasonably practicable after the close of the Contract Year. CCP shall promptly furnish to the Project Participant copies of all audits. No more frequently than once every calendar year, each Project Participant may, at its sole cost and expense, audit, or cause to be audited the books and cost records of CCP, and/or the Project Developer to the extent authorized under the PPA.

(xiii) Compliance Expenditures. The CCP Board shall review, modify, and approve the recommendations of the Project Committee, made pursuant to Section 6.4(b)(vi) of this Agreement, as to Compliance Expenditures, as specified in Section 13.2(c), (d), and (e) of the PPA. If the CCP Board authorizes CCP to agree to reimburse Project Developer for Accepted Compliance Costs, then such amount shall be added to the amount of Operating Costs included in the Monthly Cost calculation for the subsequent month.

(b) Pursuant to Section 5.06 of the Joint Powers Agreement, this Agreement modifies the voting rules of the CCP Board for purposes of approving or acting on any matter identified in this Agreement, as follows:

(i) Quorum. A quorum shall consist of a majority of the CCP Board members that represent Project Participants.

(ii) Voting. Each CCP Board member that represents a Project Participant shall have one vote for any matter identified in this Agreement. Any CCP Board member representing a CCP member that is not a Project Participant shall abstain from voting on any matter identified in this Agreement. A vote of the majority of the CCP Board members representing Project Participants that are in attendance shall be sufficient to constitute action, provided a quorum is established and maintained.

### 5.3. Role of CCP Manager.

(a) In addition to the duties and responsibilities set forth elsewhere in this Agreement, the CCP Manager is delegated the following authorities and responsibilities:

(i) Request for Tax Documentation. Respond to any requests for tax-related documentation by the Project Developer.

(ii) Request for Financial Statements. Provide the Project Developer with Financial Statements as may be required by the PPA.

(iii) Request for Information by Project Participant. Respond to any request by a Project Participant for information or documents that are reasonably available to allow the Project Participant to respond to requests for such information from any federal, state, or local regulatory body or other authority.

(iv) Coordinate Response to a Request for Confidential Information.

Upon a request or demand by any third person that is not a Party to the PPA or a Project Participant, for Confidential Information as described in Section 18.2 of the PPA, the CCP Manager shall notify the Project Developer and coordinate the response of CCP and Project Participants.

(v) Invoices. The CCP Manager shall review each invoice submitted by

Project Developer and shall request such other data necessary to support the review of such invoices.

## **ARTICLE 6** **PROJECT COMMITTEE**

6.1. Establishment and Authorization of the Project Committee. The Project Committee is hereby established and duly authorized to act on behalf of the Project Participants as provided for in this Section 6 for the purpose of (a) providing coordination among, and information to, the Project Participants and CCP, (b) making any recommendations to the CCP Board regarding the administration of the Project, and (c) execution of the Project Committee responsibilities set forth in Section 6.4.

6.2. Project Committee Membership. The Project Committee shall consist of one representative from each Project Participant. The CCP Manager shall be a non-voting member of the Project Committee. Within thirty (30) days after the Effective Date, each Project Participant shall provide notice to each other of such Project Participant's representative on the Project Committee. Alternate representatives may be appointed by similar written notice to act on the Project Committee, or on any subcommittee established by the Project Committee, in the absence of the regular representative. An alternate representative may attend all meetings of the Project Committee but may vote only if the representative for whom they serve as alternate for is absent. No Project Participant's representative shall exercise any greater authority than permitted by the Project Participant which they represent.

6.3. Project Committee Operations, Meetings, and Voting. Project Committee operations, meetings, and voting shall be in accordance with the procedures and requirements specified in Exhibit D.

6.4. Project Committee Responsibilities. The Project Committee shall have the following responsibilities:

(a) General Responsibilities of the Project Committee.

(i) Provide a liaison between CCP and the Project Participants with respect to the ongoing administration of the Project.

(ii) Exercise general supervision over any subcommittee established pursuant to Section 6.5.

(iii) Oversee, as appropriate, the completion of any Project design, feasibility, or planning studies or activities.



(iv) Review, discuss, and attempt to resolve any disputes among the Project Participants relating to this Agreement or the PPA.

(v) Perform such other functions and duties as may be provided for under this Agreement, the PPA, or as may otherwise be appropriate or beneficial to the Project or the Project Participants.

(b) Recommendations to the CCP Board by a Normal Vote.

(i) Budgeting. Review, modify, and approve by a Normal Vote each proposed Annual Budget and proposed Amended Annual Budget for submission to the CCP Board for final approval.

(ii) Early Termination of PPA. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding an early termination of the PPA pursuant to Section 11.2 of the PPA.

(iii) Assignment by Project Developer. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding any assignment by Project Developer pursuant to Section 14.1 of the PPA other than any assignment pursuant to Sections 14.2 or 14.3 of the PPA.

(iv) Buyer Financing Assignment. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding an assignment by CCP to a financing entity.

(v) Change of Control. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding any Change of Control requiring CCP's consent, as specified in Section 14.1 of the PPA.

(vi) Compliance Expenditures. Review, modify, and approve by a Normal Vote a recommendation to the CCP Board regarding Compliance Expenditures, as specified in Section 13.2(c), (d), and (e) of the PPA.

(c) Actions Delegated to the Project Committee by this Agreement Subject to a Unanimous Vote.

(i) Project Design. Review, modify, and approve by a Unanimous Vote any recommendations to the Project Developer on the design of the Project.

(ii) Extension of Guaranteed Construction Start Date and Guaranteed Commercial Operation Date. Review and confirm that requirements of Exhibit B of the PPA have been satisfied, such that the Guaranteed Construction Start Date and/or Guaranteed Commercial Operation Date has been extended.

(iii) Event of Default. Direct CCP to exercise its rights under the PPA if an Event of Default has occurred under Section 11.1 of the PPA.

(d) Actions Delegated to the Project Committee by this Agreement Subject to a Normal Vote.

(i) Make recommendations to the CCP Manager, the CCP Board, the Project Participants or to the Project Developer, as appropriate, with respect to the development, operation, and ongoing administration of the Project.

(ii) Review, develop, and, if appropriate, modify and approve rules, procedures, and protocols for the administration of the Project, including rules, procedures, and protocols for the management of the costs of the Facility and the scheduling, handling, tagging, dispatching, and crediting of the Product, the handling and crediting of Environmental Attributes associated with the Facility and the control and use of the Facility.

(iii) Review, develop, and, if appropriate, modify rules, procedures, and protocols for the monitoring, inspection, and the exercise of due diligence activities relating to the operation of the Facility.

(iv) Review, and, if appropriate, modify or otherwise act upon, the form or content of any written statistical, administrative, or operational reports, Facility-related data and technical information, facility reliability data, transmission information, forecasting, scheduling, dispatching, tagging, parking, firming, exchanging, balancing, movement, or other delivery information, and similar information and records, or matters pertaining to the Project which are furnished to the Project Committee by the CCP Manager, the Project Developer, experts, consultants or others.

(v) Review, formulate, and, if appropriate, modify, or otherwise act upon, practices and procedures to be followed by Project Participants for, among other things, the production, scheduling, tagging, transmission, delivery, firming, balancing, exchanging, crediting, tracking, monitoring, remarketing, sale, or disposition of the Product, including the control and use of the Facility.

(vi) Review and act upon any matters involving any arrangements and instruments entered into by the Project Developer or any affiliate thereof to, among other things, secure certain performance requirements, including, but not limited to, the PPA, the Development Security or the Performance Security and any other letter of credit delivered to, or for the benefit of, CCP by the Project Developer and take such actions or make such recommendations as may be appropriate or desirable in connection therewith.

(vii) Review, and, if appropriate, recommend, modify, or approve policies or programs formulated by CCP or Project Developer for determining or estimating the values, quantities, volumes, or costs of the Product from the Facility.

(viii) Review, and where appropriate, recommend the implementation of metering technologies and methodologies appropriate for the delivery, accounting for, transferring and crediting of the Product to the Point of Delivery (directly or through the Facility).

(ix) Review, to the extent permitted by this Agreement, the PPA, or any other relevant agreement relating to the Project, modify and approve or disapprove the

specifications, vendors' proposals, bid evaluations, or any other matters with respect to the Facility.

(x) Review and approve any Remedial Action Plan submitted by Project Developer to CCP pursuant to Section 2.4 of the PPA.

(xi) Review and approve the submission of the written acknowledgement of the Commercial Operation Date in accordance with Section 2.2 of the PPA.

(xii) Review and approve the return of the Development Security to Project Developer in accordance with Section 8.8 of the PPA.

(xiii) Review and approve the return of any unused Performance Security to Project Developer in accordance with Section 8.9 of the PPA.

(xiv) Review Progress Reports provided by Project Developer to CCP pursuant to Section 2.3 of the PPA and participate in any associated regularly scheduled meetings with Project Developer to discuss construction progress.

(xv) Direct CCP to collect any liquidated damages owed by Project Developer to CCP under the PPA, and to the extent authorized by PPA, draw upon the Development Security or Performance Security.

(xvi) Review invoices received by CCP from the Project Developer and, if appropriate, direct CCP to dispute an invoice pursuant to Section 8.5 of the PPA.

(xvii) Review and approve the return of the CP Security to Project Developer in accordance with Section 8.7 of the PPA.

(xviii) Review and approve the submission of the Pseudo-tie Participating Generator Agreement in accordance with Section 2.2(b) of the PPA.

(xix) Review and approve the submission of the Meter Service Agreement in accordance with Section 2.2(c) of the PPA.

(xx) Review and approve the submission of the Interconnection Agreement in accordance with Section 2.2(d) of the PPA.

(xxi) Review and confirm that Project Developer has secured the required Firm Transmission Rights in accordance with Section 2.2(f) of the PPA.

(xxii) Review and confirm that Project Developer has received CEC Precertification for the Facility in accordance with Section 2.2(g) of the PPA.

(xxiii) Direct CCP request that Project Developer submit a Green-e® Energy Tracking Attestation Form the Product delivered under the PPA to the Center for Resource Solutions pursuant to Section 4.10 of the PPA.

(xxiv) Direct CCP change the Negative LMP Strike Price in pursuant to subdivisions (e) of Exhibit C of the PPA.

(xxv) Direct CCP to take such actions or implement such measures as may be necessary to facilitate the transfer of Environmental Attributes from the Project Developer to the Project Participants.

6.5. Subcommittees. The CCP Manager may establish as needed subcommittees including, but not limited to, auditing, legal, financial, engineering, mechanical, weather, geologic, diurnal, barometric, meteorological, operating, insurance, governmental relations, environmental, and public information subcommittees. The authority, membership, and duties of any subcommittee shall be established by the CCP Manager; provided, however, such authority, membership or duties shall not conflict with the provisions of the PPA or this Agreement.

6.6. Representative's Expenses. Any expenses incurred by any representative of any Project Participant or group of Project Participants serving on the Project Committee or any other committee in connection with their duties on such committee shall be the responsibility of the Project Participant which they represent and shall not be an expense payable under this Agreement.

6.7. Inaction by Committee. It is recognized by CCP and Project Participants that if the Project Committee is unable or fails to agree with respect to any matter or dispute which it is authorized to determine, resolve, approve, disapprove or otherwise act upon after a reasonable opportunity to do so, or within the time specified herein or in the PPA, then CCP may take such commercially reasonable action as CCP determines is necessary for its timely performance under any requirement pursuant to the PPA or this Agreement, pending the resolution of any such inability or failure to agree, but nothing herein shall be construed to allow CCP to act in violation of the express terms of the PPA or this Agreement.

6.8. Delegation. To secure the effective cooperation and interchange of information in a timely manner in connection with various administrative, technical, and other matters which may arise from time to time in connection with administration of the PPA, in appropriate cases, duties and responsibilities of the CCP Board or the Project Committee, as the case may be under this Section 6, may be delegated to the CCP Manager by the CCP Board upon notice to the Project Participants.

## **ARTICLE 7**

### **[RESERVED]**

## **ARTICLE 8**

### **OPERATING ACCOUNT**

#### **8.1. Calculation of Estimated Monthly Project Cost.**

(a) No later than one hundred and eighty (180) days after the Effective Date, the CCP Manager shall present to the Project Committee a proposed Estimated Monthly Project Cost, which shall be equal to the Expected Energy for the applicable Contract Year multiplied by the Contract Price, divided by twelve (12). The Project Committee shall review, and, if

appropriate, recommend, modify, or approve through a Normal Vote, the proposed Estimated Monthly Project Cost.

8.2. Operating Account. CCP shall establish an Operating Account for each Project Participant that is accessible to and can be drawn upon by both CCP and the applicable Project Participant. Such Operating Accounts are for the purpose of providing a reliable source of funds for the payment obligations of the Project and, taking into account the variability of costs associated with the Project for the purpose of providing a reliable payment mechanism to address the ongoing costs associated with the Project.

(a) Operating Account Amount. The Operating Account Amount for each Project Participant shall be an amount equal to the Estimated Monthly Project Cost multiplied by three, the product of which is multiplied by such Project Participant's Entitlement Share ("Operating Account Amount").

(b) Initial Funding of Operating Account. By no later than three hundred and sixty-five (365) days after the Effective Date, each Project Participant shall deposit into such Project Participant's Operating Account an amount equal to that Project Participant's Operating Account Amount.

(c) Use of Operating Account. CCP shall draw upon each Project Participant's Operating Account each month in an amount equal to the Monthly Costs multiplied by such Project Participant's Entitlement Share. As required by Section 9.5, each Project Participant must deposit sufficient funds into such Project Participant's Operating Account by the deadline specified in Section 9.5.

(d) Final Distribution of Operating Account. Following the expiration or earlier termination of the PPA, and upon payment and satisfaction of any and all liabilities and obligations to make payments of the Project Participants under this Agreement and upon satisfaction of all remaining costs and obligations of CCP under the PPA, any amounts then remaining in any Project Participant's Operating Account shall be paid to the associated Project Participant.

## **ARTICLE 9**

### **BILLING**

9.1. Monthly Costs. The amount of Monthly Costs for a particular Month shall be the sum of the Project Participant's Entitlement Share multiplied by the Monthly Product Payments for the Product, as specified in Section 8.2 of the PPA for such Month and to the extent such payment is made by CCP to the Project Developer, plus the Project Participant's Entitlement Share multiplied by the Operating Cost for such Month and subtracting the Project Participant's Entitlement Share multiplied by the positive revenue associated with the sale of any Facility Energy, Capacity Attributes, Ancillary Services, and/or Environmental Attributes, as shown in the following formula:

Monthly Cost = ((Project Participant's Entitlement Share) × (Monthly Product Payments)) + ((Project Participant's Entitlement Share) × (Operating Costs)) – ((Project Participant's Entitlement Share) × (revenue from sale of Facility Energy, Capacity Attributes, Ancillary Services and/or Environmental Attributes))

9.2. Billing Statements. By no later than ten (10) calendar days after CCP receives an invoice from Project Developer for the prior Month of each Contract Year pursuant to Section 8.1 of the PPA, CCP shall issue to each Project Participant a copy of the invoice and a “Billing Statement,” which specifies such Project Participant’s Monthly Costs, itemized by each part of such Monthly Cost. The amount of Monthly Costs attributable to a Project Participant, and specified in such Billing Statement, shall be the “**Invoice Amount.**”

9.3. Disputed Monthly Billing Statement. A Project Participant may dispute, by written Notice to CCP, any portion of any Billing Statement submitted to that Project Participant by CCP pursuant to Section 9.2, provided that the Project Participant shall pay the full amount of the Billing Statement when due. If CCP determines that any portion of the Billing Statement is incorrect, CCP will deposit the difference between such correct amount and such full amount, if any, including interest at the rate received by CCP on any overpayment into the Project Participant’s Operating Account. If CCP and a Project Participant disagree regarding the accuracy of a Billing Statement, CCP will give consideration to such dispute and will advise all Project Participants with regard to CCP’s position relative thereto within thirty (30) days following receipt of written Notice by Project Participant of such dispute.

9.4. Payment Adjustments; Billing Errors. If CCP or Project Developer determines that a prior invoice or Billing Statement was inaccurate, CCP shall credit against or increase as appropriate each Project Participant’s subsequent Monthly Costs according to such adjustment. The accompanying Billing Statement shall describe the cause of such adjustment and the amount of such adjustment.

9.5. Payment of Invoice Amount. Each Project Participant shall deposit the Invoice Amount for the applicable Month into such Project Participant’s Operating Account by no later than the twentieth (20<sup>th</sup>) calendar day of the following Month after the Billing Statement is issued, unless CCP has failed to issue the Billing Statement by the deadline specified in Section 9.2, in which case, each Project Participant shall deposit the Invoice Amount for the applicable Month by no later than thirty (30) days after the date on which CCP issues the Billing Statement to the Project Participant.

9.6. Withdrawal of Invoice Amount from Operating Account. No sooner than five (5) calendar days after CCP issues a Billing Statement to a Project Participant or a Step-Up Invoice to a Project Participant, CCP shall withdraw the Invoice Amount or the Step-Up Invoice Amount from each Project Participant’s Operating Account. If the Monthly Cost attributable to such Project Participant is a negative number, CCP shall deposit such funds into the Operating Account of that Project Participant.

9.7. Late Payments.

(a) If any Project Participant fails to deposit the Invoice Amount into the Project Participant’s Operating Account by the deadline specified in Section 9.5, then CCP will issue such Project Participant a Late Payment Notice within five (5) days of the deadline specified in Section 9.5 directing the Project Participant to immediately deposit the Invoice Amount into the Project Participant’s Operating Account and informing the Project Participant that such Project Participant must pay a charge (“**Late Payment Charge**”). Upon issuing a Late Payment Notice to

any Project Participant, CCP shall promptly provide Notice of such occurrence to all other Project Participants.

(b) The Late Payment Charge shall be equal to the Invoice Amount minus any partial payment that was deposited into such Project Participant's Operating Account multiplied by the Interest Rate specified in Section 8.2 of the PPA for the period from the deadline specified in Section 9.5 until the date on which the Project Participant deposits the Invoice Amount plus the Late Payment Charge into such Project Participant's Operating Account. Upon payment, CCP shall withdraw the full amount of such Late Payment Charge from the Project Participant's Operating Account and deposit any such Late Payment Charge into the Operating Accounts of all other Project Participants on a pro rata share, based on such other Project Participants' Entitlement Shares.

## **ARTICLE 10**

### **UNCONDITIONAL PAYMENT OBLIGATIONS; AUTHORIZATIONS; CONFLICTS; LITIGATION.**

10.1. Unconditional Payment Obligation. Beginning with the earliest of (i) the date CCP is obligated to pay any portion of the costs of the Project, (ii) the date of the COD, or (iii) the date of the first delivery of the Product to Project Participants and continuing through the term of this Agreement, Project Participants shall pay CCP the amounts of Monthly Costs set forth in the Billing Statements submitted by CCP to Project Participants in accordance with the provisions of Section 9, whether or not the Project or any part thereof has been completed, is functioning, producing, operating or operable or its output or the provision of Facility products are suspended, interrupted, interfered with, reduced or curtailed or terminated in whole or in part, and such payments shall not be subject to reduction whether by offset or otherwise and shall not be conditional upon the performance or nonperformance by any party of any agreement for any cause whatsoever, provided that the obligation of Project Participants to pay amounts associated with the Monthly Product Payment shall be limited to the amount of Monthly Product Payment charged by the Project Developer to CCP and paid by CCP to the Project Developer.

10.2. Authorizations. Each Project Participant hereby represents and warrants that no order, approval, consent, or authorization of any governmental or public agency, authority, or person, is required on the part of such Project Participant for the execution and delivery by the Project Participant, or the performance by the Project Participant of its obligations under this Agreement except for such as have been obtained.

10.3. Conflicts. Each Project Participant represents and warrants to CCP as of the Effective Date that, to the Project Participant's knowledge, the execution and delivery of this Agreement by the Project Participants and the Project Participants' performance hereunder will not constitute a default under any agreement or instrument to which it is a party, or any order, judgment, decree or ruling of any court that is binding on the Project Participant, or a violation of any applicable law of any governmental authority, which default or violation would have a material adverse effect on the financial condition of the Project Participant.

10.4. Litigation. Each Project Participant represents and warrants to CCP that, as of the Effective Date, to the Project Participant's knowledge, except as disclosed, there are no actions,

suits or proceedings pending against the Project Participant (service of process on the Project Participant having been made) in any court that questions the validity of the authorization, execution or delivery by the Project Participant of this Agreement, or the enforceability on the Project Participant of this Agreement.

10.5. San José Clean Energy.

(a) The City of San José is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies without an appropriation for such obligation, and, therefore, nothing in the Agreement shall constitute an obligation of future legislative bodies of the City of San José to appropriate funds for purposes of the Agreement; provided, however, that the City of San José has created and set aside a designated fund (being the San Jose Energy Operating Fund established pursuant to City of San Jose Municipal Code, Title 4, Part 63, Section 4.80.4050 *et. seq.*) (“**Designated Fund**”) for payment of its obligations under this Agreement.

(b) Limited Obligations. The City of San José’s payment obligations under this Agreement are special limited obligations of San José Clean Energy payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Community Energy Department or the City of San José.

10.6. Clean Power San Francisco. With regard to Clean Power San Francisco only, (1) obligations under this Agreement are special limited obligations of Clean Power San Francisco payable solely from the revenues of Clean Power San Francisco, and shall not be a charge upon the revenues or general fund of the San Francisco Public Utilities Commission or the City and County of San Francisco or upon any non-Clean Power San Francisco moneys or other property of the San Francisco Public Utilities Commission or the City and County of San Francisco, (2) cannot exceed the amount certified by the San Francisco City Controller for the purpose and period stated in such certification, and (3) absent an authorized emergency per the San Francisco City Charter or Code, no San Francisco City representative is authorized to offer or promise, nor is San Francisco required to honor, any offered or promised payments under this Agreement for work beyond the agreed upon scope or in excess of the certified maximum amount without the San Francisco City Controller having first certified the additional promised amount.

**ARTICLE 11**  
**PROJECT SPECIFIC MATTERS AND PROJECT PARTICIPANTS’ RIGHTS AND OBLIGATIONS.**

11.1. CCP Rights and Obligations under the PPA. Notwithstanding anything to the contrary contained in this Agreement: (i) the obligation of CCP to cause the delivery of the Project Participants’ Entitlement Shares of the Product during the Delivery Term of this Agreement is limited to the Product which CCP receives from the Facility (or the Project Developer, as applicable); (ii) the obligation of CCP to pay any amount to Project Participants hereunder or to give credits against amounts due from Project Participants hereunder is limited to amounts CCP receives in connection with the transaction to which the payment or credit relates (or is otherwise available to CCP in connection with this Agreement for which such payment or credit relates); (iii)



any purchase costs, operating costs, energy costs, capacity costs, Facility costs, environmental attribute costs, transmission costs, tax costs, insurance costs, indemnifications, other costs or other charges for which CCP is responsible under the PPA shall be considered purchase costs, operating costs, energy costs, capacity costs, Facility costs, environmental attribute costs, transmission costs, tax costs, insurance costs, indemnifications, other costs or other charges incurred by CCP and payable by Project Participants as provided in this Agreement; (iv) CCP shall carry out its obligations and exercise its rights under the PPA in a commercially reasonable manner; (v) all remedies provided to CCP pursuant to the PPA or the Scheduling Coordinator Services Agreement shall be provided to Project Participants in accordance with Section 5.1(h); and (vi) any Force Majeure under the PPA or other event of force majeure affecting the delivery of Product pursuant to applicable provisions of the PPA shall be considered an event caused by Uncontrollable Forces affecting CCP with respect to the delivery of the Product hereunder and CCP forwarding to Project Participants notices and information from the Project Developer concerning an event of Force Majeure upon receipt thereof shall be sufficient to constitute a Notice that Uncontrollable Forces have occurred pursuant to Section 5.1 of this Agreement. Any net proceeds received by CCP from the sale of the Product by the Project Developer to any third-party as a result of a Force Majeure event or failure by CCP to accept delivery of Product pursuant to the PPA and any reimbursement received by CCP for purchase of Replacement RA shall be remitted by CCP to the Project Participants in accordance with their respective Entitlement Shares.

11.2. Obligations of CCP and Project Participants to Maximize the Economic and Compliance Value of the Project.

(a) Each Project Participant shall take all actions that are (i) reasonably necessary to maximize the economic and compliance value of the Project to the Project Participants, and (ii) only capable of being carried out by the Project Participants. Such actions include, but are not limited to, applying for and securing the import capability rights necessary to support the import of Capacity Attributes from the Project into the CAISO in an amount equal to at least its Entitlement Share of all of the import capability rights that are needed to utilize all of the Resource Adequacy Benefits from the Project.

(b) CCP shall take any actions requested by a Project Participant to support the individual Project Participant's obligation under Section 11.2(a) and any actions requested by a Project Participant that are reasonably necessary to maximize the economic and compliance value of the Project to the Project Participants, to the extent that such actions by CCP are feasible and commercially reasonable.

(c) If any individual Project Participant fails to secure import capability rights or other similar rights in an amount equal to at least its Entitlement Share of all of the import capability rights that are needed to utilize all of the Resource Adequacy Benefits available from the Project, then any resulting reduced economic or compliance value of the Project shall not reduce or otherwise modify that Project Participant's payment obligations under Section 10.1. If a Project Participant's failure to secure sufficient import capability rights or other similar rights is the result of that Project Participant not taking all actions required by Section 11.2(a) by the applicable deadline for such action, then that Project Participant's Entitlement Share of any Capacity Attributes shall be reduced by an amount equal to the reduction in total Capacity Attributes attributable to such Project Participant's failure.

(d) CCP and the Project Participants agree to take such additional actions in order to help effectuate the transfer of any import capability rights or similar rights from a Defaulting Project Participant to any Non-Defaulting Project Participants that assumes any portion of the Defaulting Project Participant's Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c). Such actions include but are not limited to executing additional agreements among the Project Participants, amending this Agreement, and/or submitting necessary documents to CAISO and participating in any CAISO process related to the transfer of import capability rights.

## **ARTICLE 12**

### **NONPERFORMANCE AND PAYMENT DEFAULT.**

12.1. Nonperformance by Project Participants. If a Project Participant fails to perform any covenant, agreement, or obligation under this Agreement or shall cause CCP to be in default with respect to any undertaking entered into for the Project or to be in default under the PPA ("**Defaulting Project Participant**"), CCP may, in the event the performance of any such obligation remains unsatisfied after thirty (30) days' prior written notice thereof to such Project Participant and a demand to so perform, take any action permitted by law to enforce its rights under this Agreement, including but not limited to termination of such Project Participant's rights under this Agreement including any rights to its Entitlement Share of the Product, and/or bring any suit, action or proceeding at law or in equity as may be necessary or appropriate to recover damages and/or enforce any covenant, agreement or obligation against such Project Participant with regard to its failure to so perform. Any Project Participant that is not the Defaulting Project Participant ("**Non-Defaulting Project Participant**") may submit Notice directly to the CCP Board, if such Non-Defaulting Project Participant determines that CCP is or may not be fully taking appropriate actions to enforce CCP's rights under this Agreement against a Defaulting Project Participant. The CCP Board shall consider such Notice and direct CCP to take appropriate action, if any.

12.2. Payment Default. If either of the following occurs, then such occurrence shall constitute a "**Payment Default**":

(a) any Project Participant fails to deposit the Invoice Amount into the Project Participant's Operating Account by the deadline specified in Section 9.5, and if such Participant has not deposited the Invoice Amount plus the Late Payment Charge into such Project Participant's Operating Account within ten (10) calendar days of the issuance of the Late Payment Notice to such Project Participant by CCP; or

(b) any Project Participant files a petition for Bankruptcy or has a petition for Bankruptcy filed against it, and such Project Participant has not shown that it is able to comply with its obligations under this Agreement to the reasonable satisfaction of Project Developer within sixty (60) days of such Bankruptcy filing, in which case a Payment Default shall occur upon the date that CCP receives a notice regarding such determination from Project Developer.

12.3. Payment Default Notice. Upon the occurrence of a Payment Default, CCP shall issue a Notice of Payment Default to the Project Participant notifying such Project Participant that as a result of a Payment Default, it is in default under this Agreement and has assumed the status of a Defaulting Project Participant and that such Defaulting Project Participant's Project Revenue

Rights have been suspended and that such Defaulting Project Participant's Project Rights are subject to termination and disposal in accordance with Sections 12.6 and 12.8 of this Agreement. CCP shall provide a copy of such Notice of Default to all other Project Participants within five (5) calendar days after the issuance of the written Notice of Payment Default by CCP to the Defaulting Project Participant.

12.4. Cured Payment Default. If after a Payment Default, the Defaulting Project Participant cures such Payment Default within forty-five (45) calendar days after the issuance of the Late Payment Notice by CCP, the Defaulting Project Participant's Project Revenue Rights shall be reinstated and its Project Rights shall not be subject to termination and disposal as provided for in Sections 12.6 and 12.8. In order to cure a Payment Default occurring under Section 12.2(a), the Defaulting Project Participant must deposit the full amount of any unpaid Invoice Amounts and any associated Late Payment Penalties into its Operating Account. In order to cure a Payment Default occurring under Section 12.2(b), the Bankruptcy proceeding against the Defaulting Project Participant must be dismissed or Project Developer must issue a Notice to CCP stating that Project Developer has determined that the Defaulting Project Participant has demonstrated that it is able to comply with its obligations under the Agreement.

12.5. Suspension of Project Participant's Project Revenue Rights and Treatment of Capacity Attributes and Environmental Attributes.

(i) Upon the occurrence of a Payment Default, the Defaulting Project Participant's Project Revenue Rights shall be suspended until such time as such Defaulting Project Participant cures the Payment Default pursuant to the requirements of Section 12.4. Any revenue associated with the sale of Facility Energy, Capacity Attributes, Ancillary Services, or Environmental Attributes associated with the Facility shall be deposited by CCP into the Step-Up Reserve Account, as specified in Section 12.7.

(ii) For any Month where the funds remaining in a Defaulting Project Participant's Operating Account are sufficient to pay the entire Invoice Amount, CCP shall withdraw the Invoice Amount from such Defaulting Project Participant's Operating Account and shall cause the delivery of the Defaulting Project Participant's Entitlement Share of the Product, including Capacity Attributes and Environmental Attributes, associated with the Facility or otherwise provided for pursuant to the PPA. For any Month where the funds remaining in a Defaulting Project Participant's Operating Account are less than the amount necessary to pay the entire Invoice Amount, CCP shall withdraw all remaining funds from the Defaulting Project Participant's Operating Account, and to the extent reasonably possible, in CCP's sole discretion, CCP shall cause the delivery of a quantity of Capacity Attributes and Environmental Attributes proportionate to the portion of the Invoice Amount that the remaining funds were sufficient to pay for. For any Month where the Defaulting Project Participant's Operating Account has no funds remaining, the Defaulting Project Participant shall have no right to any such Capacity Attributes or Environmental Attributes associated with the Facility or otherwise provided for under the PPA.

12.6. Termination and Disposal of Project Participant's Project Rights. If a Defaulting Project Participant has not cured a Payment Default within forty-five (45) calendar days after the payment deadline specified in Section 9.5 by CCP ("**Payment Default Termination Deadline**"), then all Project Rights and Obligations pursuant to this Agreement shall be terminated and

disposed in accordance with Sections 12.6 and 12.8 of this Agreement; provided, however, that the Defaulting Project Participant shall be liable for all outstanding payment obligations accrued prior to the Payment Default Termination Deadline and shall remain subject to all rights, obligations, and liabilities of this Agreement, including but not limited to any liabilities for Damage Payment or Termination Payment, as applicable, and any other damage payments or reimbursement amounts under the PPA. CCP shall provide to the Defaulting Project Participant a separate monthly invoice of any such payment obligations of such Defaulting Project Participant. CCP shall immediately notify the other Project Participants of such termination of the Defaulting Project Participant's Project Rights and Obligations.

#### 12.7. Step-Up Invoices.

(a) Upon the occurrence of a Payment Default, CCP shall, concurrently with the Late Payment Notice issued pursuant to Section 9.7(a), issue a Step-Up Invoice to each Non-Defaulting Project Participant that specifies such Non-Defaulting Project Participant's pro rata payment obligation, calculated based on the Entitlement Share of such Non-Defaulting Project Participant, of the amount of the Payment Default for the Defaulting Project Participant (the "**Step-Up Invoice Amount**"); provided, however, that a Non-Defaulting Project Participant's Step-Up Invoice Amount shall not exceed twenty-five percent (25%) of such Non-Defaulting Project Participant's Invoice Amount for the same month for which the Payment Default occurred (the "**Step-Up Invoice Amount Cap**").

(i) Each Non-Defaulting Project Participant shall deposit the Step-Up Invoice Amount into such Non-Defaulting Project Participant's Operating Account by the later of the twentieth (20<sup>th</sup>) calendar day of the following Month or thirty (30) days after the date on which CCP issues the Step-Up Invoice to the other Project Participants. No sooner than five (5) calendar days after CCP issues the Step-Up Invoice, CCP may withdraw the amount of the Step-Up Invoice from each Project Participant's Operating Account and deposit such funds in a separate account ("**Step-Up Reserve Account**"), which shall be accessible only by CCP, and which CCP may in its sole discretion draw upon in order to ensure that CCP can meet the payment obligations of the PPA. CCP first shall withdraw all funds from a Defaulting Project Participant's Operating Account before withdrawing funds from the Step-Up Reserve Account.

(ii) Application of Moneys Received from a Defaulting Project Participant. If a Defaulting Project Participant cures a Payment Default on or before the Payment Default Termination Deadline, any funds remaining in the Step-Up Reserve Account shall be deposited into the Operating Accounts of the other Project Participants on a pro rata share, based on the Entitlement Share of such other Project Participant. If a Defaulting Project Participant fails to cure a Payment Default and the Defaulting Project Participant's Project Rights and Obligations are terminated and disposed of in accordance with Section 12.8, any funds remaining in the Step-Up Reserve Account shall be deposited into the Operating Accounts of the Non-Defaulting Project Participants on a pro rata share, based on the Entitlement Share, subject to the Step-Up Invoice Amount Cap, of such other Project Participant. If any Non-Defaulting Project Participant has not deposited the full amount of its share of the Step-Up Invoice Amount into its Operating Account by the deadline specified in Section 12.7(a)(i), then such occurrence shall be a Late Payment as specified in Section 9.7(a) and is subject to a Late Payment Charge pursuant to Section 9.7(b), and any such Non-Defaulting Project Participant shall not be entitled to its share of any moneys

received from the Defaulting Project Participant or any funds remaining in the Step-Up Reserve Account in accordance with this Section 12.7(a)(ii) until such Non-Defaulting Project Participant has deposited the full amount of its Step-Up Invoice Amount and the Late Payment Charge into its Operating Account.

12.8. Step-Up Allocation of Project Participant's Project Rights. In the event that a Defaulting Project Participant's Project Rights are terminated pursuant to Section 12.6, then such Defaulting Project Participant's Entitlement Share shall be allocated to the other Project Participants ("**Step-Up Allocation**") pursuant to the process set forth in this Section 12.8.

(a) Step-Up Allocation Cap. If a Defaulting Project Participant's Entitlement Share is allocated to the Non-Defaulting Project Participants pursuant to this Section 12.8, no individual Non-Defaulting Project Participant shall be obligated to assume an allocation that exceeds that Project Participant's Step-Up Allocation Cap set forth in Column E of the Table in Exhibit B of this Agreement. Each Non-Defaulting Project Participant's initial Step-Up Allocation Cap shall be equal to the Non-Defaulting Project Participant Entitlement Share as of the Effective Date and set forth in Column B of the Table in Exhibit B of this Agreement, multiplied by one hundred and twenty-five percent (125%). If a Project Participant modifies its Entitlement Share pursuant to Section 4.2 of this Agreement, then that Project Participant's Step-Up Allocation Cap shall be equal to the Project Participant's Entitlement Share as modified pursuant to Section 4.2 multiplied by one hundred and twenty-five percent (125%). Upon a modification of a Project Participant's Entitlement Share pursuant to Section 4.2, the CCP Manager shall cause the Step-Up Allocation Cap specified in Column E of the Table in Exhibit B of this Agreement to be modified in accordance with this Section 12.8(a). For avoidance of doubt, if a Project Participant's Entitlement Share is increased pursuant to Section 12.8(b) or (c), then such Project Participant's Step-Up Allocation Cap shall not be modified.

(b) Step-Up Allocation Share. If a Defaulting Project Participant's Project Rights are terminated pursuant to Section 12.6, then such Defaulting Project Participant's Entitlement Share shall be allocated to each Non-Defaulting Project Participant based on such Non-Defaulting Project Participant's pro rata share, calculated based on its Entitlement Share of the entire project minus the Entitlement Share of the Defaulting Project Participant, unless such allocation would cause any individual Non-Defaulting Project Participant to exceed its Step-Up Allocation Cap, in which case Section 12.8(c) shall apply. Upon allocation of a defaulting Project Participant's Entitlement Share pursuant to this Section 12.8(b), the CCP Manager shall cause each affected Project Participant's Entitlement Share specified in Column D of the Table in Exhibit B to be modified in accordance with this Section 12.8.

(c) Voluntary Allocation of Project Rights in Excess of the Step-Up Allocation Caps. If the allocation of a Defaulting Project Participant's Entitlement Share pursuant to Section 12.8(b) would cause any Non-Defaulting Project Participant's Entitlement Share to exceed its Step-Up Allocation Cap, then no allocation shall occur pursuant to Section 12.8(b). In such case, the CCP Manager shall oversee the offering of the total amount of the Defaulting Project Participant's Entitlement Share to the Non-Defaulting Project Participants on a voluntary basis. The initial offering shall be to each Non-Defaulting Project Participant on a pro rata share, based on such Non-Defaulting Project Participant's Entitlement Share. Each Project Participant may accept or reject the portion of the Defaulting Project Participant's Entitlement Share. If any portion

of the Defaulting Project Participant's Entitlement Share remains unclaimed after the initial offering, then the remaining portion shall be offered to any Non-Defaulting Project Participant that accepted its full share of the Defaulting Project Participant's Entitlement Share in the initial offering on a pro rata share, based on such Non-Defaulting Project Participant's Entitlement Share as a percentage of the total Entitlement Shares of all Project Participants that are participating in the subsequent round of offerings. The CCP Manager shall conduct subsequent offering rounds until either the total amount of the Defaulting Project Participant's Entitlement Share is accepted by one or more of the Non-Defaulting Project Participants or some portion of the Defaulting Project Participant's Entitlement Share remains, but all Non-Defaulting Project Participants have rejected such remaining amount.

(d) Step-Up Allocation Damage Payment. A Defaulting Project Participant shall owe to each Non-Defaulting Project Participant that assumes any portion of the Defaulting Project Participant's Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c) a "**Step-Up Allocation Damage Payment**" equal to the Costs and Losses, on the one hand, netted against its Gains, on the other. If the Non-Defaulting Project Participant's Costs and Losses exceed its Gains, then the Step-Up Allocation Damage Payment shall be an amount owing to such Non-Defaulting Project Participant. If the Non-Defaulting Project Participant's Gains exceed its Costs and Losses, then the Step-Up Allocation Damage Payment shall be zero dollars (\$0). A Defaulting Project Participant shall not be entitled to any Step-Up Allocation Damage Payment or any other damages otherwise authorized under this Agreement from any other Project Participant. The Step-Up Allocation Damage Payment does not include consequential, incidental, punitive, exemplary, or indirect or business interruption damages. Each Non-Defaulting Project Participant that assumes any portion of the Defaulting Project Participant's Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c) shall calculate, in a commercially reasonable manner, the Step-Up Allocation Damage Payment for the Defaulting Project Participant's Entitlement Share assumed by the Non-Defaulting Project Participant as of the effective date of such Step-Up Allocation. Third parties supplying 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. If the Defaulting Project Participant disputes the Non-Defaulting Project Participant's calculation of the Step-Up Allocation Damage Payment, in whole or in part, the Defaulting Project Participant shall, within five (5) Business Days of receipt of the Non-Defaulting Project Participant's calculation of the Step-Up Allocation Damage Payment, provide to the Non-Defaulting Project Participant a detailed written explanation of the basis for such dispute. Disputes regarding the Step-Up Allocation Damage Payment shall be determined in accordance with Article 16. Each Party agrees and acknowledges that (i) the actual damages that the other Project Participant would incur in connection with a Step-Up Allocation would be difficult or impossible to predict with certainty, (ii) the Step-Up Allocation Damage Payment described in this Section 12.8(d) is a reasonable and appropriate approximation of such damages, and (iii) the Step-Up Allocation Damage Payment described in this Section 12.8(d) is the exclusive remedy of a Project Participant in connection with a Step-Up Allocation pursuant to the process set forth in Sections 12.8(b) or 12.8(c) against a Defaulting Project Participant but shall not otherwise act to limit any of the Non-Defaulting Project Participant's rights or remedies under this Agreement.

(e) Import Capacity Rights. If a Defaulting Project Participant's Project Rights are terminated pursuant to Section 12.6, then such Defaulting Project Participant shall transfer all

import capacity rights and other similar rights that are associated with the Project and that are held by such Defaulting Project Participant to the Non-Defaulting Project Participants that assume any portion of the Defaulting Project Participant's Entitlement Share pursuant to the process set forth in Section 12.8(b) or 12.8(c). The Defaulting Project Participant shall take all actions necessary to effectuate the transfer of such rights to the Non-Defaulting Project Participants.

(f) Remarketing of Unclaimed Defaulting Project Participant's Entitlement Share. If after the process set forth in Section 12.8(c), some portion of the Defaulting Project Participant's Entitlement Share remains unclaimed, the CCP Manager, in their discretion or as directed by the Non-Defaulting Project Participants, may take any action to generate revenue from such unclaimed Entitlement Share in order to meet CCP's payment obligation under the PPA. For avoidance of doubt, the CCP Manager shall not be limited by the requirements of Section 4.2 or 5.1(j) of this Agreement in remarketing or generating revenue base on the unclaimed share.

12.9. Elimination or Reduction of Payment Obligations. Notwithstanding anything to the contrary in this Agreement, upon termination of a Defaulting Project Participant's Project Rights pursuant to Section 12.6 and the disposal of such Defaulting Project Participant's Project Rights and Obligations pursuant to Section 12.8, such Defaulting Project Participant's obligation to make payments under this Agreement (notwithstanding anything to the contrary herein) shall not be eliminated or reduced; provided, however, such payment obligations for the Defaulting Project Participant may be eliminated or reduced to the extent permitted by law, through an amendment to this Agreement, which shall be subject to the consent and approval of all Parties to this Agreement.

## **ARTICLE 13** **LIABILITY**

13.1. Project Participants' Obligations Several. No Project Participant shall be liable under this Agreement for the obligations of any other Project Participant or for the obligations of CCP incurred on behalf of other Project Participants. Each Project Participant shall be solely responsible and liable for performance of its obligations under this Agreement, except as otherwise provided for herein. The obligation of Project Participants to make payments under this Agreement is a several obligation and not a joint obligation with those of the other Project Participants.

13.2. No Liability of CCP or Project Participants, Their Directors, Officers, Etc.; CCP, The Project Participants' and CCP Manager's Directors, Officers, Employees Not Individually Liable. Except as provided for under Section 13.5 herein, the Parties agree that neither CCP, Project Participants, nor any of their past, present or future directors, officers, employees, board members, agents, attorneys or advisors (collectively, the "**Released Parties**") shall be liable to any other of the Released Parties for any and all claims, demands, liabilities, obligations, losses, damages (whether direct, indirect or consequential), penalties, actions, loss of profits, judgments, orders, suits, costs, expenses (including attorneys' fees and expenses) or disbursements of any kind or nature whatsoever in law, equity or otherwise (including, without limitation, death, bodily injury or personal injury to any person or damage or destruction to any property of Project Participants, CCP, or third persons) suffered by any Released Party as a result of the action or inaction or performance or non-performance by the Project Developer under the PPA. Except as provided for

under Section 13.5 herein, each Party shall release each of the other Released Parties from any claim or liability that such Party may have cause to assert as a result of any actions or inactions or performance or non-performance by any of the other Released Parties under this Agreement (excluding gross negligence and willful misconduct, which, unless otherwise agreed to by the Parties, are both to be determined and established by a court of competent jurisdiction in a final, non-appealable order). Notwithstanding the foregoing, no such action or inaction or performance or non-performance by any of the Released Parties shall relieve CCP or any Project Participants from their respective obligations under this Agreement, including, without limitation, the Project Participants' obligation to make payments required under Section 9.5 of this Agreement and CCP's obligation to make payments under Section 8.2 of the PPA. The provisions of this Section 13.2 shall not be construed so as to relieve the CCP or the Project Developer from any obligation or liability under this Agreement or the PPA.

13.3. Extent of Exculpation; Enforcement of Rights. The exculpation provision set forth in Section 13.2 hereof shall apply to all types of claims or actions including, but not limited to, claims or actions based on contract or tort. Notwithstanding the foregoing, any Party may protect and enforce its rights under this Agreement by a suit or suits in equity for specific performance of any obligations or duty of any other Party, and each Party shall at all times retain the right to recover, by appropriate legal proceedings, any amount determined to have been an overpayment, underpayment or other monetary damages owed by the other Party in accordance with the terms of this Agreement.

13.4. No General Liability of CCP. The undertakings under this Agreement by CCP shall not constitute a debt or indebtedness of CCP within the meaning of any provision or limitation of the Constitution or statutes of the State of California, and shall not constitute or give rise to a charge against its general credit.

13.5. Indemnification. Each Party (an "**Indemnifying Party**") shall indemnify, defend, protect, hold harmless, and release the other Parties, their directors, board members, officers, employees, agents, attorneys and advisors, past, present or future, from and against any and all claims, demands, liabilities, obligations, losses, damages (whether direct, indirect or consequential), penalties, actions, loss of profits, judgments, orders, suits, costs, expenses (including attorneys' fees and expenses) or disbursements of any kind or nature whatsoever in law, equity or otherwise, which include, without limitation, death, bodily injury, or personal injury to any person or damage or destruction to any property of Project Participants, CCP, or third persons, that may be imposed on, incurred by or asserted against any Party arising by manner of any breach of this Agreement by the Indemnifying Party, or the negligent acts, errors, omissions or willful misconduct incident to the performance of this Agreement on the part of any such Indemnifying Party or any Indemnifying Party's directors, board members, officers, employees, agents and advisors, past, present or future.

## **ARTICLE 14**

### **NOTICES**

14.1. Addresses for the Delivery of Notices. Any Notice required, permitted, or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the



address set forth in Exhibit A or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

14.2. Acceptable Means of Delivering Notice. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, five (5) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) at the time indicated by the time stamp upon delivery and, if after 5:00 pm, on the next Business Day; or (d) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

## **ARTICLE 15**

### **ASSIGNMENT**

15.1. General Prohibition on Assignments. No Party may assign this Agreement, or its rights or obligations under this Agreement, without the prior written consent of all other Parties, in each Party's sole discretion.

## **ARTICLE 16**

### **GOVERNING LAW AND DISPUTE RESOLUTION**

16.1. Governing Law. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced, and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. To the extent enforceable at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement. The Parties agree that any suit, action, or other legal proceeding by or against any Party with respect to or arising out of this Agreement shall be brought in the federal or state courts located in the State of California in a location to be mutually chosen by all Parties, or in the absence of mutual agreement, the County of San Francisco.

16.2. Dispute Resolution. In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a Notice from either Party identifying such dispute, the Parties shall meet, negotiate, and attempt, in good faith, to resolve the dispute quickly and informally without significant legal costs. If the Parties are unable to resolve a dispute arising hereunder within thirty (30) days after Notice of the dispute, the Parties may pursue all remedies available to them at Law or in equity.

## **ARTICLE 17**

### **MISCELLANEOUS**

17.1. Entire Agreement; Integration; Exhibits. This Agreement, together with the Exhibits attached hereto constitutes the entire agreement and understanding by and among the

Parties with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. The headings used herein are for convenience and reference purposes only. This 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.

17.2. Amendments. This Agreement may only be amended, modified, or supplemented by an instrument in writing executed by duly authorized representatives of all Parties; *provided*, this Agreement may not be amended by electronic mail communications. Any revisions to the Entitlement Share specified in Exhibit B pursuant to Section 4.2. or Section 12.8 shall be considered an element of the administration of this Agreement and shall not require the consent of the Parties hereto.

17.3. No Waiver. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

17.4. Severability. In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. 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 and this Agreement as a whole.

17.5. Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original.

17.6. Electronic Delivery. This Agreement may be duly executed and delivered by a Party by electronic format (including portable document format (.pdf)). Delivery of an executed counterpart in .pdf electronic version shall be binding as if delivered in the original. The words “execution,” “signed,” “signature,” and words of like import in this Agreement shall be deemed to include electronic signatures or electronic records, each of which shall be of the same legal effect, validity, or enforceability as a manually executed signature or the use of a paper-based record keeping system, as the case may be, to the extent and as provided for in any applicable law.

17.7. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

17.8. Forward Contract. The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the U.S. Bankruptcy Code, and that the Parties are “forward contract merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the

other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.

17.9. City of San Francisco Standard Provisions.

(a) False Claims. Pursuant to San Francisco Administrative Code § 21.35, any Party to this Agreement who submits a false claim shall be liable to the City and County of San Francisco for the statutory penalties set forth in that section. A Party will be deemed to have submitted a false claim to the City and County of San Francisco if the Party: (a) knowingly presents or causes to be presented to an officer or employee of the City and County of San Francisco 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 City and County of San Francisco; (c) conspires to defraud the City and County of San Francisco by getting a false claim allowed or paid by the City and County of San Francisco; (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 City and County of San Francisco; or (e) is a beneficiary of an inadvertent submission of a false claim to the City and County of San Francisco, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City and County of San Francisco within a reasonable time after discovery of the false claim.

(b) Political Activity. In performing its responsibilities under this Agreement, CCP shall comply with San Francisco Administrative Code Chapter 12G, which prohibits funds appropriated by the City and County of San Francisco for this Agreement from being expended to participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure.

(c) Non-discrimination Requirements.

(i) Non-discrimination in Contracts. CCP shall comply with the provisions of Chapters 12B and 12C of the San Francisco Administrative Code. CCP shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 of the San Francisco Administrative Code and shall require all subcontractors to comply with such provisions. CCP is subject to the enforcement and penalty provisions in Chapters 12B and 12C.

(ii) Non-discrimination in the Provision of Employee Benefits. San Francisco Administrative Code 12B.2. CCP does not as of the date of this Agreement, and will not during the term of this Agreement, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the City 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.

(d) Consideration of Criminal History in Hiring and Employment Decisions. CCP agrees to comply fully with and be bound by all of the provisions of Chapter 12T, "City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code, including the remedies provided, and

implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to CCP's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law. MacBride Principles – Northern Ireland. Pursuant to San Francisco Administrative Code § 12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride principles.

(e) MacBride Principles – Northern Ireland. Pursuant to San Francisco Administrative Code § 12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride Principles.

(f) Tropical Hardwood and Virgin Redwood Ban. The City and County of San Francisco urges contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood product, virgin redwood or virgin redwood product. If this order is for wood products or a service involving wood products: (a) Chapter 8 of the Environment Code is incorporated herein and by reference made a part hereof as though fully set forth. (b) Except as expressly permitted by the application of Sections 802(B), 803(B), and 804(B) of the Environment Code, CCP shall not provide any items to the City in performance of this Agreement which are tropical hardwoods, tropical hardwood products, virgin redwood or virgin redwood products. (c) Failure of CCP to comply with any of the requirements of Chapter 8 of the Environment Code shall be deemed a material breach of contract.

#### 17.10. City of San José Standard Provisions.

(a) Nondiscrimination/Non-Preference. The Parties shall not, and shall not cause or allow its subcontractors to, discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing. The Parties will inform all subcontractors of these obligations. This prohibition is subject to the following conditions: (i) the prohibition is not intended to preclude Parties from providing a reasonable accommodation to a person with a disability; (ii) the City of San José's Compliance Officer may require the Parties to file, and cause any Party's subcontractor to file, reports demonstrating compliance with this section. Any such reports shall be filed in the form and at such times as the City's Compliance Officer designates. They shall contain such information, data and/or records as the City's Compliance Officer determines is needed to show compliance with this provision.

(b) Conflict of Interest. The Parties represent that they are familiar with the local and state conflict of interest laws, and agrees to comply with those laws in performing this Agreement. The Parties certify that, as of the Effective Date, are unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. The Parties shall avoid all conflicts of interest or appearances of conflicts of interest in performing this Agreement. The Parties have the obligation of determining if the manner in which it performs any part of this Agreement results in a conflict of interest or an appearance of a conflict of interest, and a Party shall immediately notify the City of San José in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest. A Party's violation of this Section 17.10(b) is a material breach.

(c) Environmentally Preferable Procurement Policy. Parties shall perform its obligations under this Agreement in conformance with San José City Council Policy 1-19, entitled "Prohibition of City Funding for Purchase of Single serving Bottled Water," and San José City Council Policy 4-6, entitled "Environmentally Preferable Procurement Policy," as those policies may be amended from time to time. The Parties acknowledge and agree that in no event shall a breach of this Section 17.10(c) be a material breach of this Agreement or otherwise give rise to an Event of Default or entitle the City of San José to terminate this Agreement.

(d) Gifts Prohibited. The Parties represent that they are familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City of San José officer or designated employee from accepting any gift. The Parties shall not offer any City of San José officer or designated employee any gift prohibited by Chapter 12.08. A Party's violation of this Section 17.10(d) is a material breach.

(e) Disqualification of Former Employees. The Parties represent that they are familiar with Chapter 12.10 of the San José Municipal Code, which generally prohibits a former City of San José officer and former designated employee from providing services to the City of San José connected with his/her former duties or official responsibilities. Parties shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10.

17.11. Further Assurances. Each of the Parties hereto agrees to provide such information, execute, and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.

*[Signatures on following page]*

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


**EXHIBIT A**  
**NOTICES**

<b>Party</b>	<b><i>All Notices</i></b>	<b><i>Invoices</i></b>
<b>California Community Power</b>	<b>California Community Power</b> _____	
<b>[Project Participants]</b>		

**EXHIBIT B**

**SCHEDULE OF PROJECT PARTICIPANT ENTITLEMENT SHARES  
AND STEP-UP ALLOCATION CAPS**

*Dated:* \_\_\_\_\_

<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>
<b>Project Participant</b>	<b>Entitlement Share <i>As of Effective Date</i></b>	<b>Entitlement Share <i>As Modified Pursuant to Section 4.2</i></b>	<b>Entitlement Share <i>As Modified Pursuant to Section 12.8(b) or 12.8(c)</i></b>	<b>Step-Up Allocation Cap <i>125% multiplied by Column B or C as applicable</i></b>
Total	100%			

**Instructions:** If the CCP Manager modifies one or more Project Participant's Entitlement Share pursuant to Section 4.2, the CCP Manager shall



prepare an updated Exhibit B that shows the prior Entitlement Share (Column B or D) in ~~strikeout~~ and specifies the new Entitlement Share values and the effective date of such modification in Column C. If the CCP Manager modifies one or more Project Participant's Entitlement Share pursuant to Section 12.8, the CCP Manager shall prepare an updated Exhibit B that shows the prior Entitlement Share (Column B or Column C) in ~~strikeout~~ and specifies the new Entitlement Share values and the effective date of such modification in Column D.

## EXHIBIT C

### PROCEDURE FOR VOLUNTARY REDUCTION OF PROJECT PARTICIPANT'S ENTITLEMENT SHARE

(a) Offer to Other Project Participants. A Project Participant proposing to reduce its Entitlement Share of the Project shall provide Notice to all other Project Participants and CCP specifying the quantity of the proposed reduction of Entitlement Share ("**Entitlement Share Reduction Amount**") and the first Month for which the Project Participant Proposes that the change of Entitlement Share would become effective (such Notice referred to as the "**Entitlement Share Reduction Notice**").

(i) Upon receiving an Entitlement Share Reduction Notice from any Project Participant, the CCP Manager shall promptly do all of the following:

(A) Establish Entitlement Share Reduction Compensation Amount. The CCP Manager shall secure at least one (1), but no more than three (3), valuations of the net present value of the Entitlement Share Reduction Amount over the remaining term of the PPA from one or more qualified firm(s) with the requisite experience to determine such valuation. The valuation, or if more than one valuation is obtained, the average of all valuations received, shall be the "**Proposed Entitlement Share Reduction Compensation Amount**." The CCP Manager shall call a meeting of the Project Committee and present the Proposed Entitlement Share Reduction Compensation Amount to the Project Committee. The Project Committee shall by a Normal Vote either approve the Proposed Entitlement Share Reduction Compensation Amount or direct the CCP Manager to secure additional valuations. The Proposed Entitlement Share Reduction Compensation Amount approved by the Project Committee shall be the "**Entitlement Share Reduction Compensation Amount**." The Project Participant proposing to reduce its Entitlement Share may modify the quantity of the Entitlement Share Reduction Amount associated with its proposal or withdraw its proposal at any time prior to the initiation of the process set forth in paragraph (a)(i)(B).

(B) Oversee the Offering of the Entitlement Share Reduction Amount to Other Project Participants. The CCP Manager shall facilitate the offering of the Entitlement Share Reduction Amount to the other Project Participants through multiple rounds of offerings.

a) The initial offering shall be to each Project Participant on a pro rata share, based on such Project Participant's Entitlement Share. Each Project Participant may accept or reject the portion of the Entitlement Share Reduction Amount offered to the Project Participant through this process. If any portion of the Entitlement Share Reduction Amount remains after the initial offering, then the remaining portion shall be offered to any Project Participant that accepted the share of the Entitlement Share Reduction Amount offered in the initial offering on a pro rata share, based on such Project Participant's Entitlement Share as a percentage of the total Entitlement Shares of all Project Participants that accepted the portion of the Entitlement Share Reduction Amount offered to them in the initial offering.

b) The CCP Manager shall conduct subsequent offering rounds until either the total Entitlement Share Reduction Amount is accepted by one or more of the other Project Participants or some portion of the Entitlement Share Reduction Amount remains, but all Project Participants have rejected such amount.

c) Any Project Participant accepting a share of the offered Entitlement Share Reduction Amount shall either pay the offering Project Participant or be compensated by the offering Project Participant at the Entitlement Share Reduction Compensation Amount multiplied by the quantity of the portion being accepted.

d) Before a transfer of all or a portion of any Project Participant's Entitlement share to another Project Participant can become effective, the proposed transfer must be submitted to and approved by the Project Committee through a Normal Vote.

e) After acceptance and payment for such portion of the Entitlement Share Reduction Amount, and upon approval of such transfer by the Project Committee, the CCP Manager shall cause the Entitlement Share specified in Exhibit B to be modified accordingly, and such modification shall be considered an element of the administration of this Agreement and shall not require the consent of the Parties hereto.

(C) Oversee the Offering of the Entitlement Share Reduction Amount to CCP Members that are not Project Participants. If there is any portion of the Entitlement Share Reduction Amount that remains unaccepted after the process specified in paragraph (a)(i)(B) is complete, then the Project Participant proposing to reduce its Entitlement Share may request that the CCP Manager offer the remaining portion of the Entitlement Share Reduction Amount to CCP Members that are not Project Participants. If any CCP Member wishes to accept any or all of the remaining portion of the Entitlement Share Reduction Amount, such action shall require the CCP Member to become a Project Participant through an amendment to this Agreement, which shall be subject to the consent and approval of all Parties to this Agreement and the CCP Member becoming a Project Participant. The compensation amount associated with the CCP Member accepting the remaining portion of the Entitlement Share Reduction Amount shall be negotiated between the CCP Member and the offering Project Participant.

(D) Oversee the Offering of the Entitlement Share Reduction Amount to a Community Choice Aggregator that is not a CCP Member. If there is any portion of the Entitlement Share Reduction Amount that remains unaccepted after the process specified in both paragraphs (a)(i)(B) and (a)(k)(C) is complete, then the Project Participant proposing to reduce its Entitlement Share, may request that the CCP Manager offer the remaining portion of the Entitlement Share Reduction Amount to a community choice aggregator that is not a CCP Member. If any community choice aggregator wishes to accept any or all of the remaining portion of the Entitlement Share Reduction Amount, such action shall require the community choice aggregator to become a CCP Member, and subsequent to becoming a CCP Member, to become a Project Participant through an amendment to this Agreement that is subject to the consent and approval of all Parties to this Agreement and the community choice aggregator becoming a Project Participant. The compensation amount associated with the community choice aggregator accepting the remaining portion of the Entitlement Share Reduction Amount shall be negotiated between the community choice aggregator and the offering Project Participant.

## EXHIBIT D

### PROJECT COMMITTEE OPERATIONS, MEETINGS, AND VOTING

(a) Chairperson of Project Committee. The chairperson of the Project Committee (“**Chairperson**”) shall be the CCP Manager. The Chairperson shall be responsible for calling and presiding over meetings of the Project Committee in a manner and to the extent permitted by law.

(b) Conducting Meetings. Conducting of Project Committee meetings and actions taken by the Project Committee may be taken by vote given in an assembled meeting, by telephone, by video conferencing, or by any combination thereof, to the extent permitted by law.

(c) Calling of Meetings.

(i) The Chairperson may call a meeting of the Project Committee at their discretion.

(ii) The Chairperson shall promptly call a meeting of the Project Committee at the request of any representative of a Project Participant.

(d) Unanimous Votes. Certain actions, as designated in Section 6.4(c), require a unanimous affirmative vote by all Project Participants (“**Unanimous Vote**”). No such vote may be taken unless a representative from every Project Participant is present at the meeting of the Project Committee. If any Project Participant’s Entitlement Share is reduced to zero through the process specified in Exhibit C, such Project Participant shall not be required to be present or be entitled to vote in order for such vote to be a Unanimous Vote.

(e) Normal Votes. All actions not designated as requiring unanimous vote, shall proceed pursuant to the “**Normal Vote**” process set forth in this paragraph (e).

(i) Quorum. No Normal Vote of the Project Committee shall be taken unless a representative is present for at least fifty percent (50%) of the total number of Project Participants, without regard to each Project Participant’s Entitlement Share.

(ii) Initial Normal Vote. Unless a representative requests an Alternate Normal Vote, pursuant to paragraph (e)(iii), all actions requiring a Normal Vote, as specified in Section 6.4(b) or 6.4(d), shall require an affirmative vote of at least fifty-one percent (51%) of the total number of Project Participants, without regard to each Project Participant’s Entitlement Share.

(iii) Alternate Normal Vote. Any representative may request that any Normal Vote be taken on an Entitlement Share basis (referred to as an “**Alternate Normal Vote**”). If a representative requests an Alternate Normal Vote, then the following vote requirements shall apply:

(A) If any individual Project Participant has an Entitlement Share exceeding fifty percent (50%), then all actions for which an Alternate Normal Vote is taken shall require that the Project Participant with an Entitlement Share exceeding fifty percent (50%) plus any other Project Participant vote in the affirmative.

(B) If no individual Project Participant has an Entitlement Share exceeding fifty percent (50%), then all actions for which an Alternate Normal Vote is taken shall require an affirmative vote of Project Participants having Entitlement Shares aggregating at least fifty-one percent (51%) of the total Entitlement Shares.



## SMALL RENEWABLE POWER PURCHASE AGREEMENT

### COVER SHEET

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

**Seller:**

**Facility:** [Name, location, size]

#### A. Transaction

Product: PCC 1 Energy and associated Environmental Attributes and Capacity Attributes

Guaranteed Installed Capacity:

Guaranteed Construction Start Date:

Guaranteed Commercial Operation Date:

Contract Price:

Delivery Term:

Deliverability:

☐ Full Capacity Delivery Service

☐ Energy only

#### B. Milestones

Site Control:

Permitting:

Phase I and II Interconnection study results:

Executed Interconnection Agreement:

Financial Close:

Construction Start:

Mechanical Completion:

Initial Synchronization:

Network Upgrades completed:

Commercial Operation Date:

#### C. Seller Collateral:

Development Assurance: \$[ ]/kW of Guaranteed Capacity

Performance Assurance: \$[ ]/kW

**D. Notices:**

<b>Buyer:</b> City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF	<b>Seller:</b>
<b>All Notices:</b> 525 Golden Gate Ave, 7th Floor San Francisco, CA, 94102 Attn: Contract Administration Phone: Email:	<b>All Notices:</b>  Phone: Email:
<b>Federal Tax ID Number:</b>	<b>Federal Tax ID Number:</b> <b>DUNS Number:</b>
<b>Invoices:</b> Attn: Phone: Email:	<b>Invoices:</b> Attn: Phone: Email:
<b>Scheduling:</b> Attn: Phone: Email:	<b>Scheduling:</b> Attn: Phone: Email:
<b>Payments:</b> Attn: Phone: Email:	<b>Payments:</b> Attn: Phone: Email:
<b>Wire Transfer:</b> BNK: ABA (ACH): ACCT:	<b>Wire Transfer:</b> BNK: ABA: ACCT:
<b>Credit and Collections:</b> Attn: Phone: Email:  <b>With additional Notices of an Event of Default or Potential Event of Default to:</b>  Attn: Phone: Email:	<b>Credit and Collections:</b> Attn: Phone: Email:  <b>With additional Notices of an Event of Default or Potential Event of Default to:</b>  Attn: Phone: Email:

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## **EXHIBITS**

The follows Exhibits constitute a part of this Agreement and are incorporated into the Agreement by reference.

<b>EXHIBIT A</b>	SELLER DOCUMENTATION OF CONDITIONS PRECEDENT
<b>EXHIBIT B</b>	FACILITY DESCRIPTION AND SITE DRAWINGS
<b>EXHIBIT C</b>	CONTRACT QUANTITY
<b>EXHIBIT D</b>	INSURANCE COVERAGES
<b>EXHIBIT E</b>	CONSTRUCTION START CERTIFICATION
<b>EXHIBIT F</b>	PROGRESS REPORT
<b>EXHIBIT G-1</b>	COMMERCIAL OPERATION CERTIFICATION
<b>EXHIBIT G-2</b>	CERTIFICATE OF INSTALLED CAPACITY
<b>EXHIBIT H-1</b>	FORM OF LETTER OF CREDIT
<b>EXHIBIT H-2</b>	FORM OF SIGHT DRAFT
<b>EXHIBIT I</b>	FORM OF REPLACEMENT RA

## RENEWABLE POWER PURCHASE AGREEMENT

This Renewable Power Purchase Agreement (“Agreement”) is entered into between the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF (“Buyer”) and \_\_\_\_\_, a \_\_\_\_\_ (“Seller”), as of \_\_\_\_\_ (the “Execution Date”). The Agreement shall include the exhibits, attachments, any written and fully executed supplements hereto, and any designated collateral, credit support, or similar arrangement between the Parties.

### RECITALS

1. Seller intends to develop, finance, build, own and operate a \_\_\_\_\_ powered generating facility located in \_\_\_\_\_; and,
2. Buyer operates CleanPowerSF, a community choice aggregator that serves retail customers in the City and County of San Francisco; and,
3. Buyer is willing to purchase, and Seller is willing to sell, the Product of the Facility, on the terms and conditions and at the prices set forth in this Agreement.

**NOW THEREFORE**, in consideration of the recitals above and the following covenants, terms and conditions, the Parties agree as follows:

### ARTICLE 1: DEFINITIONS

**AC:** Alternating current.

**Affiliate:** 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 preamble.

**Ancillary Services:** Has the meaning set forth in the CAISO Tariff.

**Annual Forecast:** Has the meaning set forth in Section 5.7(a)(i).

**Applicable Laws:** 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, 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.

**Availability Standards:** Has the meaning set forth in the CAISO Tariff.

**Bankrupt:** With respect to any entity, such entity (a) 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 and such case filed against it is not dismissed within sixty (60) calendar days, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) 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 (e) is generally unable to pay its debts as they fall due.

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

**Business Day:** Any day except a Saturday, Sunday, a Federal Reserve Bank holiday, or a City and County of San Francisco holiday, between the hours of 8:00 a.m. and 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:** The City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF.

**Buyer Bid Curtailment:** An event in which an Economic Bid or Self-Schedule for Energy or Ancillary Services submitted for a Settlement Interval in accordance with this Agreement results in a Real Time Energy Production Schedule awarded or deployed by the CAISO that fails to provide for the delivery of the full quantity of Energy that could have been delivered as determined by the Final Output Estimate for that Settlement Interval.

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

**Buyer's WREGIS Account:** Has the meaning set forth in Section 3.5(c)(i).

**CAISO:** The California Independent System Operator Corporation, or its functional successor.

**CAISO Charges Invoice:** Has the meaning set forth in Section 5.5(c).

**CAISO Tariff:** The California Independent System Operator Corporation, Fifth Replacement FERC Electric Tariff, Business Practices Manuals (BPMs), and Operating Procedures as may be amended, supplemented, or replaced (in whole or in part) from time to time.

**Capacity Attributes:** Any current or future defined characteristic (including the ability to generate at a given capacity level, provide Ancillary Services, and ramp up or ramp down at a given rate), certificate, tag, credit, flexibility, or dispatchability attribute, whether general in nature or specific as to the location or any other attribute of the Facility, intended to value any aspect of the capacity of the Facility to produce energy, including any accounting construct, or any other measure by the CPUC, the CAISO, the FERC, or any other Governmental Authority with jurisdiction, including Resource Adequacy Benefits.

**Capacity Procurement Mechanism (CPM) Soft Offer Cap:** Has the meaning set forth in the CAISO Tariff.

**CEC:** The California Energy Commission or any successor agency.

**CEC Certification:** Means that the CEC has certified, or pre-certified, that the Facility is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Energy produced by the Facility qualifies as generation from an ERR for purposes of the RPS.

**CEQA:** The California Environmental Quality Act, California Public Resources Code Sections 21000, et. seq., as it may be amended from time to time.

**Change in Law:** Has the meaning set forth in Section 11.5(f).

**City:** The City and County of San Francisco.

**CleanPowerSF:** Buyer's community choice aggregation program.

**Commercial Operation:** The condition of the Facility existing when Seller has fulfilled all of the conditions set forth in Section 2.2(b)(ii) and Seller has provided notice to Buyer in the form of the Commercial Operation Certification set forth in Exhibit G-1.

**Commercial Operation Certification:** Seller's certification of Commercial Operation in the form set forth as Exhibit G-2, duly executed by a Licensed Professional Engineer.

**Commercial Operation Date or COD:** The date upon which Commercial Operation is achieved as specified in the Commercial Operation Certification.

**Commercial Operation Date Delay Damages or COD Delay Damages:** An amount equal to the Development Assurance divided by ninety (90).

**Compliance Cost Cap:** Has the meaning set forth in Section 3.7.

**Compliance Costs:** Has the meaning set forth in Section 3.7(a).

**Confidential Information:** Has the meaning set forth in Section 11.2.

**Construction Start:** Has the meaning set forth in Section 5.3(a)(i).

**Construction Start Date:** Has the meaning set forth in Exhibit E.

**Construction Start Delay Damages:** An amount equal to the Development Assurance divided by one hundred twenty (120).

**Contract Price:** Has the meaning set forth in Section 3.2.

**Contract Quantity:** The annual expected Energy production set forth in Exhibit C.

**Contract Year:** A period of twelve (12) consecutive months, commencing at 12:00 a.m. on the COD, and each subsequent Contract Year commencing on the twelve (12) month anniversary of the COD.

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

**Costs:** With respect to a 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 entered into pursuant to this Agreement or entering into new arrangements which replace this Agreement and (b) all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of this Agreement.

**Cover Sheet:** The cover sheet to this Agreement.

**CPUC:** The California Public Utilities Commission or any successor entity.

**CPUC System RA Penalty:** The CPUC-adopted penalty imposed on load serving entities for system RA deficiencies as that penalty may be updated or revised from time to time.

**Credit Rating:** 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 unsecured senior long-term debt, then the rating assigned to such entity as an issuer rating by Standard & Poor's Financial Services and/or Moody's Investors Service. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

**Curtailment Order:** An order, direction, alert, or notice of the CAISO, Transmission Provider (whether directly or through a Scheduling Coordinator or the Transmission Provider), to curtail deliveries of Energy for any reason, including, but not limited to, any System Emergency, any warning of an anticipated System Emergency, or any warning of an imminent condition or situation which could jeopardize the CAISO's or Transmission Provider's electric system integrity or the integrity of other systems to which the CAISO or the Transmission Provider is connected, including curtailment in accordance with Seller's obligations under its Interconnection Agreement with the Transmission Provider.

**Curtailment Period:** The period of time, measured using Settlement Intervals, during which Seller reduces generation from the Facility pursuant to a Curtailment Order, including the time required for the Facility to ramp down and ramp up.

**Damage Payment:** Development Assurance less any Construction Start Delay Damages or Commercial Operation Delay Damages paid and not refunded.

**Day-Ahead Market or DAM:** Has the meaning set forth in the CAISO Tariff.

**Deemed Delivered Energy:** Means the amount of Energy expressed in MWh that the Facility could have produced and delivered to the Delivery Point, adjusted for Station Uses and Electrical Losses, but was not produced solely due to a Buyer Bid Curtailment, as adjusted pursuant to Section 5.6(c)(iv). Deemed

Delivered Energy shall be calculated as the difference in MWh between the Final Output Estimate and Delivered Energy.

**Defaulting Party:** The Party that has caused an Event of Default.

**Delivered Energy:** Means Energy, net of Electrical Losses and Station Uses, as measured by the Facility Meter.

**Delivery Point:** \_\_\_\_\_.

**Delivery Term:** Has the meaning set forth in Section 2.2(b)(i).

**Development Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(a) of this Agreement.

**Disadvantaged Community or DAC:** Census tracts that either: (1) have a CalEnviroScreen 3.0 or latest version score at or above the 75th percentile, or (2) a census tract that scores in the 95th percentile of the CalEnviroScreen pollution burden, but does not have an overall CalEnviroScreen score due to unreliable health or socioeconomic data.

**Early Termination Date:** Has the meaning set forth in Section 8.2(a)(i).

**Economic Losses:** With respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from the termination of this Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c)(ii). Factors used in determining the loss of economic benefit may include reference to information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including Environmental Attributes and Capacity Attributes. The Non-Defaulting Party shall not be required to enter into replacement transactions to establish Economic Losses. Economic Losses shall exclude any (1) associated loss of investment tax credits and other lost tax benefits, (2) any costs, penalties, fees, or charges associated with the termination of related financing agreements or similar obligations, and (3) consequential, incidental, punitive, exemplary, indirect, or business interruption damages.

**Effective Date:** The date on which all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties.

**Effective FCDS Date:** The date identified in Seller's notice to Buyer (along with a Full Capacity Deliverability Status Finding from CAISO) as the date that the Facility has attained Full Capacity Deliverability Status.

**Electric System Upgrades:** Any Network Upgrades, distribution upgrades, or Interconnection Facilities that are determined to be necessary by the CAISO or Transmission Provider, as applicable, to physically and electrically interconnect the Facility to the Transmission Provider's electric system for receipt of Energy at the Point of Interconnection.

**Electrical Losses:** All transmission and transformation losses between the Facility and the Delivery Point.

**Eligible Intermittent Resources Protocol:** Has the meaning set forth in the CAISO Tariff.

**Eligible LC Bank:** 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 with an outlook designation as "stable", or A- from S&P with an outlook designation as "stable".

**Eligible Renewable Energy Resource or ERR:** Has the meaning set forth in California Public Utilities Code Section 399.12(e) and California Public Resources Code Section 25741(a), as either code provision is amended or supplemented from time to time.

**Energy:** Three-phase, 60-cycle alternating current electric energy measured in kilowatt hours or megawatt hours. Energy shall include without limitation, reactive power and any other electrical energy products that may be developed or evolve from time to time during the Term.

**Environmental Attributes:** Any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to generation from the Facility or Expansion Facility(ies) and its avoided emission of pollutants. Environmental Attributes include, without limitation, Renewable Energy Credits as well as:

- (a) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants;
- (b) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by Applicable Law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and
- (c) the reporting rights to these avoided emissions such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser's discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tag are accumulated on a MWh basis and one Green Tag represents the Environmental Attributes associated with one (1) MWh of Energy.

Environmental Attributes do not include:

- (i) any Energy, capacity, reliability or other power attributes from the Facility,
- (ii) production tax credits associated with the construction or operation of the Facility and other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation,
- (iii) fuel-related subsidies or "tipping fees" that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or
- (iv) emission reduction credits encumbered or used by a Facility for compliance with local, state, or federal operating and/or air quality permits. If the Facility is a biomass or biogas facility and Seller receives any tradable Environmental Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Environmental Attributes to ensure that there are zero net emissions associated with the production of electricity from the Facility.

**Environmental Costs:** Means all costs, taxes, charges, and fees pertaining to, or incurred in connection with: acquiring and maintaining all environmental permits and licenses for the Facility and the Product; the Product's and Facility's compliance with all applicable environmental laws, rules, and regulations; all costs of permits and licenses; costs associated with the storage, use, disposal, transportation, and clean-up of Hazardous Substances introduced to the Site, and; the decontamination or remediation, on or off the Site, necessitated by the introduction of such hazardous substances on the Site.

**EPC Contractor:** An engineering, procurement, and construction contractor, or if not utilizing an engineering, procurement, and construction contractor, the entity having lead responsibility for the management of overall construction activities, selected by Seller, with substantial experience in the engineering, procurement, and construction of utility-scale renewable generating projects.

**Event of Default:** Has the meaning set forth in Section 8.1.

**Excess Quantity:** Has the meaning set forth in Section 3.2(a).

**Execution Date:** Has the meaning set forth in the preamble.

**Facility:** The power generation facility, interconnection facilities, and associated facilities and equipment to be constructed, owned and operated by Seller located on the Site for the generation and delivery of electricity as described in the Cover Sheet and Exhibit B.

**Facility Meter:** The CAISO-approved, revenue quality meter or meters dedicated solely to the Facility, that meet all applicable CAISO metering requirements, along with a CAISO-approved compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Energy delivered to the Delivery Point. The Facility may contain multiple measurement devices that will make up the Facility Meter, and, unless otherwise indicated, references to the Facility Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

**FERC:** The Federal Energy Regulatory Commission and any successor organization.

**Fifteen Minute Market or FMM:** Has the meaning set forth in the CAISO Tariff.

**Final Output Estimate:** The final estimate of the quantity of Energy the Facility reasonably could have generated based on Facility availability, insolation, and other relevant meteorological conditions. The Final Output Estimate shall be equal to the RTM Forecast initially and may be replaced pursuant to Section 5.7(a).

**Financial Close:** Seller and/or one of its Affiliates has obtained debt and/or equity financial commitments from one or more Lenders or Seller's owners sufficient to construct the Facility.

**Fiscal Year:** The period commencing on July 1 and ending on June 30 in the following calendar year.

**Flexible Capacity:** With respect to any particular Showing Month, the number of MWs of Product which are eligible to satisfy Flexible RAR.

**Flexible RAR:** The flexible capacity requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff or the Resource Adequacy Rulings.

**Force Majeure Event:** An event or circumstance, including without limitation, a natural disaster, war, riot, act of terrorism, sabotage, destruction by a third party, or civil disturbance, which prevents one Party ("Claiming Party") from performing all or a portion of 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 (whether direct or indirect), 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 Transmission Provider and/or the CAISO in entering into, or performing under, any agreements with Seller contemplated by this Agreement, including a failure to complete, or a delay in completing, interconnection or Electric System Upgrades by the Commercial Operation Date 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 Agreement;
- (d) Seller's inability to obtain Permits of any type, except where such failure is solely caused by a Force Majeure event;
- (e) Seller's inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, except to the extent such inability is caused by a Force Majeure event;
- (f) any equipment failure, except to the extent such inability is caused by a Force Majeure event;
- (g) a Forced Outage except where such Forced Outage is caused by a Force Majeure event;
- (h) a Curtailment Order, to the extent such inability is caused by a Force Majeure event; or



- (i) economic conditions that render a Party's performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs), including Buyer's ability to buy Product at a lower price, or Seller's ability to sell Product at a higher price.

**Forced Labor:** Has the meaning set forth in Section 5.1(i).

**Forced Outage:** Any unplanned reduction or suspension of the operation of the Facility or unavailability of the Product in whole or in part caused by a mechanical, electrical, or equipment malfunction and any other unavailability of the Facility, in whole or in part, for maintenance or repair that is not a Planned Outage and not the result of Force Majeure.

**Forward Certificate Transfers:** Has the meaning set forth in Section 3.5(c)(i).

**Full Capacity Deliverability Status or FCDS:** Has the meaning set forth in the CAISO Tariff.

**Full Capacity Deliverability Status or FCDS Finding:** A written or electronic confirmation from the CAISO that the Facility is eligible for FCDS.

**Gains:** With respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of the Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c) and 8.3. Factors used in determining economic benefit may include information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including the value of Environmental Attributes and Capacity Attributes.

**GEP Liquidated Damages or GEP LDs:** Has the meaning set forth in Section 3.4(a)(i).

**GEP Period:** Successive periods consisting of two (2) consecutive Contract Years with the first GEP Period commencing on the COD, and with each subsequent GEP Period commencing on the twelve (12) month anniversary of the commencement of the prior GEP Period.

**GEP Shortfall:** Has the meaning set forth in Section 3.4(a)(i).

**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.

**Guaranteed Commercial Operation Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Construction Start Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Energy Production, or GEP:** Has the meaning set forth in Section 3.4(a).

**Guaranteed Installed Capacity:** Has the meaning set forth on the Cover Sheet.

**Hazardous Substance:** (a) any chemical, material or substance that is listed or regulated under Applicable Laws as a "hazardous" or "toxic" substance or waste, or as a "contaminant" or "pollutant" or words of similar import, (b) any petroleum or petroleum products, flammable materials, explosives, radioactive materials, asbestos, urea formaldehyde foam insulation, and transformers or other equipment that contain polychlorinated biphenyls, and (c) any other chemical or other material or substance for which exposure to or release of such substance is prohibited, limited, or regulated by Applicable Laws.

**Indemnified Party:** Has the meaning set forth in Section 9.2.

**Indemnifying Party:** Has the meaning set forth in Section 9.2.

**Initial Synchronization:** The initial delivery of Energy from the Facility to the Delivery Point.

**Installed Capacity:** The maximum dependable generating capacity of the Facility that achieves Commercial Operation, as measured by the Facility Meter and adjusted for ambient conditions on the date of the performance test and as set forth in the Installed Capacity Certificate substantially in the form set forth in Exhibit G-2.

**Interconnection Agreement:** The agreement and associated documents (or any successor agreement and associated documentation) by and among Seller, the Transmission Provider, and the CAISO governing the terms and conditions of the Facility's interconnection with the CAISO grid, including any description of the plan for interconnection of the Facility to the Transmission Provider's system.

**Interconnection Facilities:** The interconnection facilities, control and protective devices and metering facilities required to connect the Facility to the transmission or distribution system as set forth in the Interconnection Agreement.

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

**kW:** Kilowatt.

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

**Lender(s):** Any Person(s) providing money or extending credit (including any capital lease) to Seller, including in the form of debt or tax equity, for (a) the construction of the Facility, (b) the term or permanent financing of the Facility, or (c) working capital or other ordinary business requirements for the Facility. "Lender(s)" shall not include any trade creditor(s) of Seller.

**Letter of Credit or LC:** An irrevocable, non-transferable standby letter of credit issued by an Eligible LC Bank in a form that is substantially similar to the form contained in Exhibit H-1. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.

**Licensed Professional Engineer:** A third party acceptable to Buyer in its reasonable judgment who (a) is licensed to practice engineering in California, (b) has training and experience in the power industry specific to the technology of the Facility, (c) has no economic relationship, association, or nexus with Seller or Buyer, other than to meet the obligations of Seller pursuant to this Agreement, (d) is not a representative of a consultant, engineer, contractor, designer or other individual involved in the development of the Facility or of a manufacturer or supplier of any equipment installed at the Facility, and (e) is licensed in an appropriate engineering discipline for the required certification being made.

**Local Area Requirements or LAR:** The local area reliability requirements established for load serving entities by the CPUC pursuant to the Resource Adequacy Rulings, by CAISO pursuant to the Tariff, or by other Governmental Authority having jurisdiction. LAR may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirement in other regulatory proceedings or legislative actions.

**Locational Marginal Price, or LMP:** Has the meaning set forth in the CAISO Tariff.

**Master File:** Has the meaning set forth in the CAISO Tariff.

**Mechanical Completion:** The condition of the Facility existing when (i) all components and systems of the Facility have been properly constructed, installed and functionally tested according to Seller's EPC contract requirements in a safe and prudent manner that does not void any equipment or system warranties or violate any permits, approvals or Applicable Laws; (ii) the Facility is ready for startup testing and commissioning; (iii) Seller has provided written acceptance to the EPC Contractor of mechanical completion as that term is specifically defined in the EPC contract.

**Milestones:** The key development activities required for the construction and operation of the Facility, as set forth more particularly in Section 5.2.

**Monthly Forecast:** Has the meaning set forth in Section 5.7(a)(ii).

**Monthly Payment:** Has the meaning set forth in Section 4.1(a)(i).

**Moody's:** Moody's Investors Service, Inc.

**MW:** Megawatt.

**MWh:** Megawatt hour.

**Negative LMP:** In any Settlement Interval, whether in the Day-Ahead Market or Real-Time Market, the LMP at the Delivery Point is less than zero dollars (\$0).

**NERC:** Means the North American Electric Reliability Corporation or a successor organization.

**Net Qualifying Capacity or NQC:** Has the meaning set forth in the CAISO Tariff.

**Network Upgrades:** Has the meaning set forth in the CAISO Tariff.

**Non-Defaulting Party:** Has the meaning set forth in Section 8.2(a).

**Notice to Proceed:** The full notice to proceed provided by Seller to the EPC Contractor following execution of the EPC contract between Seller and such EPC Contractor and satisfaction of all conditions to performance of such contract, by which Seller authorizes such EPC Contractor to begin construction of the Facility without any delay or waiting periods.

**Outage Schedule:** Has the meaning set forth in Section 5.8(a)(i).

**Parties:** Buyer and Seller, and their respective successors and permitted assignees.

**Party:** Buyer or Seller, and each such Party's respective successors and permitted assignees.

**Performance Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(b) of this Agreement.

**Permits:** All material federal, state or local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, ownership, operation and maintenance of the Facility, including any such permits or approvals required under CEQA or the National Environmental Policy Act, 42 U.S.C. Sections 4321 et. seq.

**Permitted Extensions:** Has the meaning set forth in Section 5.3(c).

**Person:** An individual, partnership, corporation, business trust, limited liability company, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity.

**Planned Outage:** The removal of equipment from service availability for inspection and/or general overhaul of one or more major equipment groups. To qualify as a Planned Outage, the maintenance (a) must actually be conducted during the Planned Outage, and in Seller's sole discretion must be of the type that is necessary to reliably maintain the Facility, (b) cannot be reasonably conducted during Facility operations, and (c) causes the generation level of the Facility to be reduced by at least ten percent (10%) of the Installed Capacity.

**PNode:** Has the meaning set forth in the CAISO Tariff.

**Point of Interconnection or POI:** The point on the electrical system where the Facility is physically interconnected with the Transmission Provider's system as further described in the Interconnection Agreement.

**Product:** The Energy, Environmental Attributes, Capacity Attributes, Ancillary Services, and any and all other reliability, power, or environmental attributes which are or can be produced by or associated with the Facility.

**Product Content Category 1, or PCC 1 Energy:** Means any Renewable Energy Credit and associated generation of electricity from an Eligible Renewable Energy Resource that meets the criteria set forth in California Public Utilities Code Section 399.16(b)(1), as may be amended from time to time or as further defined or supplemented by Applicable Laws.

**Progress Report:** A report containing the information set forth in Exhibit F.

**Prudent Operating Practice:** Means (a) the applicable practices, methods and acts required by or consistent with Applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric utility industry during the relevant time period with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States, or (b) any of the practices, methods and acts which, in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States. Prudent Operating Practice includes compliance with Applicable Laws, applicable reliability criteria, and the criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules and standards of any successor organizations.

**Public Records Laws:** The California Public Records Act, California Government Code Sections 6250 et seq., and the San Francisco Sunshine Ordinance, San Francisco Administrative Code, Chapter 67, the Ralph M. Brown Act, California Government Code Sections 54950, et seq., and any other applicable law regarding public records as may be amended from time to time.

**Qualifying Capacity:** Has the meaning set forth in the CAISO Tariff.

**RA Deficiency Amount:** The liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month as calculated in accordance with Section 3.6(d)(i).

**RA Guarantee Date:** The date set forth in the Cover Sheet which is the date the Facility is expected to achieve Full Capacity Deliverability Status.

**RA Shortfall:** Has the meaning set forth in Section 3.6(d)(i).

**RA Shortfall Month:** Commencing on the RA Guarantee Date, any month during which (a) the Facility has not achieved FCDS, or (b) the Net Qualifying Capacity of the Facility for such month was either (i) not published by the Notification Deadline, or (ii) was less than the Qualifying Capacity of the Facility for such month.

**Real-Time Market or RTM:** Has the meaning set forth in the CAISO Tariff.

**Reliability Coordinator:** Has the meaning set forth in the CAISO Tariff.

**Renewable Energy Credit or REC:** Has the meaning set forth in California Public Utilities Code Section 399.12(h) and CPUC Decision 08-08-028, as may be amended from time to time or as further defined or supplemented by Applicable Laws.

**Renewable Portfolio Standard or RPS:** The California Renewable Portfolio Standard as set forth in California Public Utilities Code Sections 399.11 et. seq. and California Public Resources Code Sections 25740, et. seq., as such provisions are amended or supplemented from time to time.

**Replacement Price:** In dollars per MWh (\$/MWh), Buyer's actual, reasonable and reasonably documented cost of Replacement Product purchased by Buyer pursuant to Section 3.4(a)(i) provided, however, that if Buyer did not purchase Replacement Product during such period, then the Replacement Price shall be calculated as the sum of (1) the price of Energy based on the hourly Day-Ahead Market price at the NP 15 EZ Gen Hub for hours ending 7 through 22 during the applicable period, and (2) the price of Environmental Attributes and Capacity Attributes, if applicable, based on information either available to Buyer internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product.

**Replacement Product:** Energy produced from a facility other than the Facility that at the time of delivery to Buyer qualifies as an ERR and which (1) has the same or similar Environmental Attributes, including

PCC 1 Renewable Energy Credits, that would have been generated by the Facility during the Contract Year for which the Replacement Product is provided, and (2) equivalent Capacity Attributes that would have been provided by the Facility during the Contract Year for which the Replacement Product is provided.

**Replacement RA:** Resource Adequacy provided by Seller to Buyer from a facility other than the Facility which pursuant to Section 3.6(d)(ii) has the same flexible attributes and local, zonal or other locational attributes associated with the Facility.

**Resource Adequacy Benefits:** The rights and privileges attached to the Facility that satisfy any entity's resource adequacy obligations, as those obligations are set forth in any Resource Adequacy Rulings and shall include Flexible Capacity, and any local, zonal or otherwise locational attributes associated with the Facility.

**Resource Adequacy Requirements or RAR:** the resource adequacy capacity requirements, including LAR and Flexible RAR, for load serving entities established by the Resource Adequacy Rulings.

**Resources Adequacy Rulings:** The CPUC's existing or subsequent decisions, resolutions, or rulings addressing resource adequacy issues, or any other resource adequacy laws, rules or regulations enacted, adopted, or promulgated by any other Governmental Authority having jurisdiction, including the CAISO, as those decisions, resolutions, rulings, laws, rules, or regulations may be amended or modified from time to time.

**RTM Forecast:** The final forecast of the Energy to be produced by the Facility prepared by the CAISO or its designee in accordance with the Eligible Intermittent Resources Protocol and communicated to the Scheduling Coordinator for the Facility for use in submitting bids in the Real-Time Market.

**Schedule:** Has the meaning set forth in the CAISO Tariff.

**Scheduled Energy:** The Energy economically bid or Self-Scheduled by the SC that clears the applicable CAISO market.

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

**Self-Schedule:** Has the meaning set forth in the CAISO Tariff.

**Seller:** Has the meaning in the Preamble, and any successor or permitted assignee.

**Seller Day-Ahead Forecast:** Has the meaning set forth in Section 5.7(a)(iv).

**Seller Excused Product:** For any period of time, an amount of Energy expressed in MWh, equal to the Final Output Estimate, that could have been produced but which was not produced as a result of Curtailment Orders, Buyer Bid Curtailment, Force Majeure events, System Emergencies, or forced outages to the transmission or distribution system that prevents delivery of Energy from the Facility from and after the Delivery Point.

**Seller's WREGIS Account:** Has the meaning set forth in Section 3.5(c)(i).

**Settlement Interval:** Has the meaning set forth in the CAISO Tariff.

**SFPUC:** The San Francisco Public Utilities Commission.

**Showing Month:** The calendar month that is the subject of the RA compliance showing as set forth in the Resource Adequacy Ruling and CAISO Tariff.

**Site:** The location of the Facility as described on Exhibit B.

**Standard & Poor's or S&P:** Standard & Poor's Financial Services, LLC (a subsidiary of S&P Global, limited liability company).

**Station Use:** The Energy used within the Facility to power the lights, motors, control systems and other electrical loads that are necessary for operation of the Facility.

**Surplus Energy:** Has the meaning set forth in Section 3.2(b).

**System Emergency:** Has the meaning set forth in the CAISO Tariff.

**Taxes:** Means all federal, state, local, or foreign taxes, levies, assessments, surcharges, duties, and other fees and charges of any nature imposed by a Governmental Authority whether currently in effect or adopted during the Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any related items of withholding, deficiency, penalty, additions, interests, or assessments.

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

**Termination Payment:** With respect to the Non-Defaulting Party, the sum of (a) the Economic Losses and Costs, minus the Gains, which the Non-Defaulting Party incurs as a result of the termination of this Agreement, subject to Sections 8.2(c) and 8.3, provided that if such amount is negative, then the amount determined pursuant to this clause (a) of the definition of Termination Payment will be deemed to be zero dollars (\$0), plus (b) the net of all amounts then owed to the Non-Defaulting Party by the Defaulting Party, or to the Defaulting Party by the Non-Defaulting Party, determined as of the Early Termination Date.

**Test Energy:** Product (to the extent available) including Environmental Attributes generated by the Facility and delivered to the Point of Interconnection prior to the COD.

**Transmission Provider:** Any entity or entities that owns, operates and maintains transmission or distribution lines and associated facilities used for the purpose of transmitting Energy from the Facility to or from the Delivery Point.

**WECC:** The Western Electricity Coordinating Council or successor agency.

**Weekly Forecast:** Has the meaning set forth in Section 5.7(a)(iii).

**WREGIS:** The Western Renewable Energy Generation Information System, or any successor renewable energy tracking program.

**WREGIS Certificate:** Has the meaning set forth in the WREGIS Operating Rules and are designated as eligible for compliance with the California RPS.

**WREGIS Certificate Deficit:** Any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Delivered Energy for the same calendar month, after taking into account applicable delays in the issuance of WREGIS Certificates or otherwise arising under WREGIS Operating Rules.

**WREGIS Operating Rules:** Those operating rules and requirements adopted by WREGIS as of May 2018, as subsequently amended, supplemented, or replaced from time to time.

## **ARTICLE 2: CONDITIONS PRECEDENT AND TERM**

### **2.1 Conditions Precedent to Term of Agreement**

- (a) Conditions Precedent. The Term of this Agreement shall not commence until the occurrence of all of the following:
  - (i) Buyer receives all necessary approvals from the SFPUC and the Board of Supervisors;
  - (ii) Buyer receives from Seller the conditions precedent documentation listed in Part I of Exhibit A; and
  - (iii) Buyer receives from Seller the Development Assurance; and
  - (iv) The Controller has certified in accordance with the City's Charter that sufficient unencumbered balances are available in the proper fund.
- (b) Effective Date. The Effective Date of this Agreement shall be the date that all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing

by both Parties. Buyer will notify Seller promptly in writing when the condition in Section 2.1(a)(i) has been met.

- (c) Failure to Meet All Conditions Precedent. If the Conditions Precedent set forth in Section 2.1(a) are not satisfied or waived in writing by both Parties within ninety (90) days of full execution of this Agreement, then either Party may terminate this 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 and Buyer shall return all Development Assurance to Seller.

## 2.2 Term, Delivery Term, and Extension

- (a) Term. The term of this Agreement shall commence, and this Agreement shall be effective, upon the Effective Date and, unless earlier terminated pursuant to an express provision of this Agreement, shall remain in effect until delivery to Buyer of all of the Environmental Attributes associated with Energy delivered under this Agreement subject to Section 11.5(v) ("Term").
- (b) Delivery Term.
  - (i) The delivery term shall commence on the Commercial Operation Date and continue for \_\_\_\_\_ years ("Delivery Term"), unless terminated as provided by the terms of this Agreement.
  - (ii) The Delivery Term shall not commence until Seller has completed to Buyer's reasonable satisfaction each of the following conditions:
    - (A) Seller has delivered to Buyer the Commercial Operation Certification in substantially the form set forth at Exhibit G-1 and the Installed Capacity Certification in substantially the form set forth at Exhibit G-2;
    - (B) equipment for the Facility with a capacity of no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Capacity has been installed;
    - (C) Seller has obtained the precertification approval component of the CEC Certification requirement for the Facility;
    - (D) The Facility has successfully completed all testing required by Prudent Operating Practice and any applicable requirement to operate the Facility;
    - (E) Seller has secured and maintained in full force and effect all necessary approvals, authorizations, and permits from CAISO and any other Governmental Authority with jurisdiction to enable Seller to operate the Facility and deliver Product to Buyer and all conditions thereof that are capable of being satisfied on the COD have been satisfied and are in full force and effect;
    - (F) Seller has delivered to Buyer a fully executed Interconnection Agreement between Seller and the Transmission Provider for the Facility, which agreement shall be in full force and effect;
    - (G) Seller has delivered to Buyer a fully executed Participating Generator Agreement and Meter Services Agreement between Seller and the CAISO for the Facility, which agreements shall be in full force and effect;
    - (H) Seller has taken all necessary steps to allow the RECs from the Facility to be tracked in WREGIS and transferred to Buyer and all other requirements applicable to Seller to enable Buyer to use such RECs for its RPS requirements;

- (I) Seller has taken all actions and executed all documents required to authorize Buyer or its designee to act as Scheduling Coordinator for the Facility and Buyer or its designee is authorized to act as SC;
  - (J) Seller has demonstrated satisfaction of all requirements under this Agreement that commence prior to or as of the Delivery Term, including payment of all amounts owed to Buyer under this Agreement, if any; and
  - (K) Seller has delivered Performance Assurance to Buyer.
- (c) The Parties agree that, in order for Buyer to dispatch the Facility as of the Commercial Operation Date, the Parties must perform certain of their Delivery Term obligations in advance of the Commercial Operation Date. The Parties shall cooperate with each other in order for Buyer to be able to dispatch the Facility as of the Commercial Operation Date.

### ARTICLE 3: PURCHASE AND SALE OF PRODUCT

**3.1 Purchase and Sale.** During the Delivery Term, subject to the terms and conditions of this Agreement, Buyer will purchase all of the Product produced by or associated with the Facility and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility.

- (a) Exclusive Right. Buyer shall have the exclusive right to all Product associated with the Facility. Buyer shall have the exclusive right to use, market, or resell the Product and the right to all revenues generated from the use, resale, or remarketing of the Product. Seller shall take all commercially reasonable actions and execute all documents or instruments reasonably necessary to facilitate a resale of Product by Buyer and to allow subsequent purchasers to use such resold Product.
- (b) No Substitution. Except as otherwise set forth in this Agreement, Seller shall not substitute or purchase any element of the Product from sources other than the Facility or sell Product from the Facility to a third party.
- (c) Title to Product. Commencing on the Commercial Operation Date through the end of the Delivery Term, Seller shall supply and deliver Energy to Buyer at the Delivery Point, and Buyer shall take delivery of and title to the Energy at the Delivery Point in accordance with the terms of this Agreement. Title to and risk of loss as to Environmental Attributes shall pass from Seller to Buyer upon transfer of such Environmental Attributes in WREGIS. Seller represents and warrants that it shall deliver all Product to Buyer free and clear of all liens, security interests, claims and encumbrances or any interest created by any Person other than Buyer. Subject to Section 5.5(b), Seller shall be responsible for any costs, fees, Taxes, assessments, or charges imposed on or associated with the Product or the delivery of the Product up to the Delivery Point and Buyer shall be responsible for any costs, fees, Taxes, assessments, or charges imposed on or associated with the Product or the delivery of the Product at and from the Delivery Point (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees). If a Party is required to remit or pay Taxes that are the other Party's responsibility, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other for such Taxes.

**3.2 Contract Price.** Buyer shall pay Seller \_\_\_\_\_ dollars per MWh (\$ /MWh) for Product delivered pursuant to this Agreement and Deemed Delivered Energy as adjusted pursuant to Section 3.2 ("Contract Price"). The Contract Price shall be the total compensation owed by Buyer for the Product, adjusted as follows:

- (a) Excess Quantity. Buyer has the right, but not the obligation, to purchase any Product in excess of one hundred and fifteen percent (115%) of the Contract Quantity for the then-current Contract Year ("Excess Quantity"). Buyer shall pay Seller the lesser of fifty



percent (50%) of the Contract Price or the LMP, but not less than zero dollars per MWh, for Excess Quantity. In each Contract Year, if the Facility achieves ninety percent (90%) of the Contract Quantity, Seller shall (i) provide notice to Buyer, and (ii) request written confirmation from Buyer that Buyer intends to purchase any Excess Quantity. If Buyer does not respond within ten (10) Business Days, Seller shall have the right to sell any Excess Quantity that Buyer does not elect to purchase to a third party; provided that if Buyer is SC and does not elect to purchase the Excess Quantity, the Parties shall cooperate on settlements such that Buyer passes through to Seller any applicable CAISO costs and revenues.

- (b) Surplus Energy Price. If during any Settlement Interval, Seller delivers Product amounts in excess of the quantity of Energy that would be delivered consistent with the power rating of the Installed Capacity (“Surplus Energy”), then the price applicable to all such MWh or Surplus Energy shall be zero dollars (\$0). If the real-time LMP at the Delivery Point during any Settlement Interval is less than zero dollars (\$0), Seller shall pay to Buyer an amount equal to the absolute value of the LMP multiplied by the amount of Surplus Energy in MWh.

### 3.3 Contract Quantity.

- (a) Contract Quantity. The Contract Quantity is set forth in Exhibit C.
- (b) Test Energy. Buyer may elect to purchase Test Energy for a period of up to ninety (90) days prior to the Commercial Operation Date and up to the commencement of the Delivery Term pursuant to the terms of this Agreement, provided that the decision to produce and deliver Test Energy shall be at the sole discretion of Seller. Buyer shall provide notice to Seller of its election at least sixty (60) days prior to the start of Facility testing. If Buyer does not elect to purchase Test Energy, Seller may sell the Test Energy and associated Environmental Attributes to a third party and Buyer shall facilitate interactions with CAISO regarding Test Energy as necessary in accordance with Seller’s directions. If Buyer elects to purchase Test Energy, Seller’s full compensation for Test Energy sold to Buyer shall be the net amount resulting from (i) the CAISO revenues and other payments for the Test Energy from the Facility, including revenues associated with CAISO dispatches, and (ii) the debits, costs, penalties and interest that are directly assigned by the CAISO to the Facility for, or attributable to, scheduling and deliveries of Test Energy from the Facility under this Agreement, which amount may be a negative or positive value.

### 3.4 Guaranteed Energy Production. For each GEP Period throughout the Term, Seller shall deliver no less than eighty (80%) of (i) the sum of the Contract Quantities for the GEP Period, minus (ii) the Seller Excused Product (“Guaranteed Energy Production” or “GEP”).

- (a) GEP Shortfall. If Seller fails to meet the GEP, then within sixty (60) days after the end of the relevant GEP Period, Buyer shall notify Seller of the quantity of the shortfall calculated for the relevant GEP Period as: eighty percent (80%) of (A) the sum of the Contract Quantities for the GEP Period minus (B) the sum of (1) Delivered Energy quantities, plus (2) Seller Excused Product, plus (3) the MWh equivalent of any Replacement Product or Minimum Deliveries Liquidated Damages that Seller provided to Buyer for any Three-Month Shortfalls within the GEP Period (“GEP Shortfall”) and the amount of liquidated damages owned under this Section 3.4(a). Within ten (10) Business Days after the receipt of notice of the GEP Shortfall, Seller shall either (C) offer to provide Replacement Product in accordance with the procedures set forth in Section 3.4(e) in the amount of the GEP Shortfall, or (D) pay Buyer liquidated damages calculated as: the positive difference obtained by subtracting the (i) Contract Price from (ii) the Replacement Price; multiplied by the GEP Shortfall (“GEP LDs”). Buyer shall not be obligated to purchase Replacement Product.

- (b) Payment. If within ten (10) Business Days of receipt of notice of a GEP Shortfall, Seller does not either provide an offer to Buyer to provide Replacement Product or deliver payment of the GEP LD amount to Buyer, Buyer shall be entitled to collect the GEP LDs by electing, in its sole discretion, one or more of the following, (1) to draw upon the Performance Assurance; and/or (2) netting under Section 4.1(c).
- (c) As set forth in Section 8.1(b)(iii), Seller's failure to deliver in any two (2) consecutive Contract Years at least seventy percent (70%) of the sum of the expected Contract Quantities for the relevant Contract Years, excluding Seller Excused Hours, shall constitute a default of this Agreement.
- (d) No less frequently than quarterly during each year, Seller shall calculate and provide notice to Buyer of the then-cumulative amount of the Seller Excused Product for such year, along with an explanation in reasonable detail of the calculation based on historical Facility data, meteorological data, Product projections (including by the CAISO, if applicable) and other relevant data. The calculation shall be subject to Buyer's reasonable review and approval.
- (e) Replacement Product and Cure.
  - (i) If Seller provides an offer to Buyer to provide Replacement Product pursuant to Sections 3.4(a), then Buyer shall have fifteen (15) days after receipt of Seller's notice to confirm whether it will accept Replacement Product from Seller. If Buyer agrees to accept the Replacement Product, the Parties shall mutually agree upon a delivery schedule. All Replacement Product shall be delivered to Buyer at the NP 15 EZ Gen Hub. Buyer will pay Seller for all such Replacement Product provided pursuant to this Section 3.4(e) at the Contract Price. If Buyer rejects the offer of Replacement Product, Seller shall pay the GEP LDs to Buyer.
  - (ii) Buyer's receipt of Replacement Product or GEP Liquidated Damages shall cure the performance issue that triggered such remedy as follows:
    - (A) The MWhs of Replacement Product delivered and the MWhs used in the calculation of GEP LDs or Minimum Deliveries LDs which were paid to Buyer pursuant to Section 3.4(a) shall be treated as actual deliveries in the most recent month in which the applicable shortfall occurred when assessing Seller's compliance with its obligations under this Agreement including delivery obligations under Section 3.4(a).
    - (B) The quantities of Energy for which Seller paid GEP LDs or delivered Replacement Product in the second Contract Year of a GEP Period shall be included in the calculation of the GEP Shortfall for the first Contract Year of the following GEP Period.

### 3.5 Environmental Attributes.

- (a) Purchase and Sale of Environmental Attributes. During the Term, Seller shall transfer to Buyer, and Buyer shall receive from Seller, all right, title and interest in and to the Environmental Attributes associated with Delivered Energy, whether now existing or subsequently created by a Governmental Authority after the Execution Date. Seller shall, at its sole expense, take all actions and execute all documents or instruments necessary to transfer all rights, title, and interest in and to the Environmental Attributes, whether now existing or that come into existence in the future, associated with the Delivered Energy. Seller shall transfer and make such Environmental Attributes available to Buyer as soon as practicable upon Seller's production of the Environmental Attributes.
- (b) Buyer's Right to Report Ownership of Environmental Attributes. Seller shall not report to any Person or entity that the Environmental Attributes belong to anyone other than Buyer, and Buyer may report under any program that such Environmental Attributes purchased hereunder belong to it.

- (c) Renewable Energy Credits. Seller shall, at its sole expense take all actions and execute all documents or instruments necessary to ensure that all WREGIS Certificates associated with all Renewable Energy Credits corresponding to all Delivered Energy are issued and tracked for purposes of satisfying the applicable requirements of the California RPS and transferred within three (3) months of creation to Buyer for Buyer's sole benefit. Seller shall comply with all Applicable Laws, including, without limitation, the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. In addition:
- (i) Prior to the Commercial Operation Date, Seller shall register the Facility with WREGIS and establish an account with WREGIS ("Seller's WREGIS Account"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS Certificates using "Forward Certificate Transfers" (as described in the WREGIS Operating Rules) from Seller's WREGIS Account to the WREGIS account(s) of Buyer or another account identified by Buyer ("Buyer's WREGIS Account"). Seller shall be responsible for all expenses associated with registering the Facility with WREGIS, establishing and maintaining Seller's WREGIS Account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS Account to Buyer's WREGIS Account.
  - (ii) Seller shall cause Forward Certificate Transfers to occur on a monthly basis in accordance with the certification procedure established by the WREGIS Operating Rules. Any fractional MWh amounts shall be carried forward until sufficient generation is accumulated for the creation of a WREGIS Certificate.
  - (iii) Due to the delay in the creation of WREGIS Certificates relative to the timing of the monthly invoice payment under this Agreement, Buyer may make an invoice payment for a given month before the WREGIS Certificates for such month are formally transferred to Buyer in accordance with the WREGIS Operating Rules and this Section 3.5(c). Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller.
  - (iv) Seller shall, at its sole expense, ensure that the WREGIS Certificates for a given calendar month correspond with the Delivered Energy for such calendar month. If any WREGIS Certificate Deficit is caused by, or the result of any action or inaction, by Seller, then the amount of Delivered Energy in such calendar Month shall be reduced by the amount of the WREGIS Certificate Deficit for the purposes of calculating Buyer's payment(s) to Seller under Article 4 and the Guaranteed Energy Production for the applicable GEP Period. Any amount owed by Seller to Buyer because of a WREGIS Certificate Deficit shall be made as an adjustment to Seller's next monthly invoice to Buyer in accordance with Article 4, and Buyer shall net such amount against Buyer's subsequent payment(s) to Seller.
  - (v) Without limiting Seller's obligations, to the extent a WREGIS Certificate Deficit is caused by an error or omission of WREGIS, the Parties shall cooperate in good faith to cause WREGIS to correct its error or omission.
  - (vi) If WREGIS changes the WREGIS Operating Rules after the Execution Date or applies the WREGIS Operating Rules in a manner inconsistent with this Agreement, the Parties shall promptly modify this Agreement as reasonably required (A) to cause and enable Seller to transfer to Buyer's WREGIS Account a quantity of WREGIS Certificates for each given calendar month that corresponds to the Delivered Energy in the same calendar month, or (B) as may otherwise be reasonably appropriate to address such inconsistency.

- 3.6 Capacity Attributes and Resource Adequacy.** Throughout the Delivery Term, Seller grants, pledges, assigns, and otherwise commits to Buyer all of the Installed Capacity, including the Capacity Attributes, from the Facility for any purpose, including to enable Buyer to meet its Resource Adequacy Requirements or successor program requirements as the CPUC, CAISO, and/or other Governmental Authority may prescribe.
- (a) Full Capacity Deliverability Status. **[IF APPLICABLE]** Seller shall be solely responsible for and take all necessary actions to obtain Full Capacity Deliverability Status for the Facility by the RA Guarantee Date and to maintain FCDS throughout the Delivery Term.
  - (b) Resource Adequacy. From the Execution Date and throughout the Delivery Term, Seller shall perform all actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits from the Facility to Buyer. Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing any and all documents or instruments necessary to enable Buyer to use or resell all of the Resource Adequacy Benefits committed to Buyer under this Agreement.
  - (c) NQC. Seller shall take all commercially reasonable actions as necessary for Buyer to obtain and maintain an NQC value that is equal to the Qualifying Capacity for the Facility.
  - (d) Resource Adequacy Guarantee. **[IF APPLICABLE]** For each RA Shortfall Month, Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages and/or provide Replacement RA as the sole remedy for the Capacity Attributes that Seller failed to convey to Buyer.
    - (i) For any RA Shortfall Month, Seller shall pay liquidated damages to Buyer in an amount equal to the product of (A) the Qualifying Capacity minus the NQC, as the NQC may be adjusted by the CAISO to reflect the CAISO's capacity evaluations of the Facility (including for Forced Outages) for the RA Shortfall Month ("RA Shortfall"), multiplied by (B) the sum of (1) the CPM Soft Offer Cap, or any successor value adopted or implemented by the CAISO for procurement of backstop capacity resources and (2) the applicable CPUC System RA Penalty, or any successor value adopted or implemented by the CPUC and imposed on load-serving entities for RA deficiencies ("RA Deficiency Amount"). If a RA Shortfall Month occurs during the period between the COD and the Effective FCDS Date, for the purpose of this Section 3.6(d)(i), the Qualifying Capacity shall be the amount of Qualifying Capacity the Facility would reasonably be estimated to qualify for, based on the CPUC-adopted qualifying capacity methodologies then in effect, provided, the amount shall be deemed to be zero (0) if the NQC has not been published by the CAISO by the Notification Deadline for the RA Shortfall Month.
    - (ii) Seller may offer to provide Replacement RA to Buyer in the amount of the Qualifying Capacity of the Facility minus the Net Qualifying Capacity for the applicable RA Shortfall Month. Seller shall provide notice to Buyer of the offer of Replacement RA substantially in the form of Exhibit I at least ninety (90) days prior to the applicable Showing Month for the purpose of monthly RAR reporting. Buyer may elect to accept some or all of the Replacement RA by providing notice to Seller of its election within fifteen (15) days of Seller's offer. If Buyer rejects the offer of Replacement RA, Seller shall pay to Buyer the RA Deficiency Amount for the RA Shortfall for the RA Shortfall Month.
    - (iii) If within ten (10) Business Days of the end of a RA Shortfall Month, Seller does not either provide an offer to Buyer to provide Replacement RA or deliver payment of the RA Deficiency Amount to Buyer, Buyer shall be entitled to collect the RA Deficiency Amount by electing, in its sole discretion, one or more of the following,

(A) to draw upon the Performance Assurance; and/or (A) netting under Section 4.1(c).

**3.7 Compliance Cost Cap.** If Seller establishes to Buyer's reasonable satisfaction that a change in Applicable Law has occurred after the Effective Date that results in Compliance Costs as defined in Section 3.7(a), then Seller's Compliance Costs during the Delivery Term shall be capped in the aggregate throughout the Delivery Term at twenty-five thousand dollars (\$25,000.00) per MW of Installed Capacity ("Compliance Cost Cap").

- (a) Compliance Costs. This Section shall apply to Seller's additional, reasonable out-of-pocket costs paid to applicable Governmental Authorities for obtaining, maintaining, conveying, or complying with: (i) CEC Certification, (ii) Environmental Attributes including WREGIS certificates, (iii) Capacity Attributes, and (iv) Sections 10.1(g) through 10.1(j) ("Compliance Costs"). Compliance Costs includes only those new costs associated with the change in Applicable Law after the Execution Date that are in excess of the reasonably anticipated compliance costs as of the Execution Date.
- (b) Reimbursement. In the event that the Compliance Costs exceed the Compliance Cost Cap, Buyer shall either reimburse Seller for such Compliance Costs that exceed the Compliance Cost Cap, or excuse Seller from performing those obligations that cause the Compliance Costs to exceed the Compliance Cost Cap. If Buyer agrees to reimburse Seller, Seller shall perform the additional compliance actions and shall include the Compliance Costs in the monthly invoice.
- (c) Notice. Seller shall notify Buyer within sixty (60) calendar days after the change in Applicable Law if it anticipates that its Compliance Costs will exceed the Compliance Cost Cap and provide an estimate of the Compliance Costs. Buyer shall notify Seller within ninety (90) calendar days of receipt of the notice whether Buyer (i) agrees to reimburse Seller for the additional costs, or (ii) waives Seller's performance of such obligations.

**3.8 Tax Credits and Incentives.** Buyer acknowledges and agrees that all federal, state, or local tax credits, deductions, subsidies, and incentives related to the construction, ownership, or production of electricity from the Facility shall be owned by Seller, including tax credits available under Sections 38, 45, 46, and 48 of the Internal Revenue Code of 1986 as amended or any successor law. Notwithstanding the foregoing, Seller's rights under this section shall not include anything that qualifies as Product (including any Environmental Attributes).

## ARTICLE 4:

### BILLING, PAYMENT, AND CERTIFICATION

#### 4.1 Billing and Payment.

- (a) Monthly Invoices. Seller shall provide to Buyer no sooner than the tenth (10th) calendar day of each month an invoice for the Product and Deemed Delivered Energy for the prior month based upon meter data for Energy delivered in such calendar month, and for other amounts due to or from Seller hereunder. Each invoice shall be in a form reasonably specified by Buyer and shall include sufficient data as is reasonably necessary to verify each element of the calculation of the Monthly Payment and other charges and credits as set forth in this Agreement. Except for Deemed Delivered Energy and Replacement Product, all Energy purchased under this Agreement must be measured by the Facility's CAISO revenue meter to be eligible for payment under this Agreement.
  - (i) The "Monthly Payment" for each month will be an amount equal to the summation of the following for each Settlement Interval in such month:
    - (A) the product of (1) the Delivered Energy for such Settlement Interval, multiplied by (2) the Contract Price, plus

- (B) the product of (1) the Deemed Delivered Energy for such Settlement Interval, multiplied by (2) the Contract Price, plus
    - (C) credits for any amounts owed from Seller to Buyer under Section 5.6(b); plus
    - (D) any other amounts netted against the monthly invoice pursuant to Section 4.1(c).
  - (ii) The Invoice shall include:
    - (A) the hourly quantities of Delivered Energy delivered in the prior month;
    - (B) a calculation of the Monthly Payment as set forth in Section 4.1(a)(i);
    - (C) credits for WREGIS Certificate Deficits pursuant to Section 3.5(c)(iv), if any;
    - (D) the quantity of Replacement Product provided by Seller in such month;
    - (E) a calculation of the Deemed Delivered Energy for such month; and
    - (F) the calculation of any other amounts due to or from Seller hereunder.
  - (iii) Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.
- (b) Payment. Unless otherwise specified under this Agreement, all payments shall be due and payable on or before the thirtieth (30th) calendar day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Any amount not paid when due shall be considered late and the Party owing the payment shall pay a Late Payment Fee equal to a daily rate of five dollars and fifty cents (\$5.50) per one hundred thousand dollars (\$100,000) on the unpaid balance for a maximum period of ninety (90) days after the due date of the payment ("Late Payment Fee") shall be added to the outstanding amount.
- (c) Netting. Except as otherwise set forth in this Agreement, the Parties shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting. All amounts owed by each Party to the other Party under this Agreement, including for the purchase and sale of Product during the monthly billing period, any damages set forth under this Agreement, CAISO Charges Invoices, Late Payment Fees, and payments or credits, shall be netted so that only the excess amount remaining shall be paid by the Party who owes it.
- (d) City Vendor Requirements. Notwithstanding any other provision of this Agreement, Buyer shall not be deemed to be in default of this Agreement and no Late Payment Fee shall be assessed if an invoice under this Agreement cannot be processed by Buyer due to Seller's failure to comply with all applicable City requirements for City 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, insurance requirements, registration in the City's vendor payment processing system, or any other current or future City 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.
- (e) 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 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 Fee from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Buyer from subsequent payments. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 4.1(d) 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 delivery of Product occurred, the right to payment for such delivery is waived.

- (f) CAISO Adjustments. If the CAISO makes any adjustment to any CAISO meter data or applicable market prices for a given time period, the Parties shall share information necessary to revise the monthly invoices pursuant to Section 4.1 and Seller agrees that it shall submit revised monthly invoices 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 Seller receives such binding adjustment to the meter data.

#### **4.2 Designated Fund/Limited Obligations.**

- (a) Auto-Appropriating Designated Fund. Buyer's payment obligations under this 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 obligations under this Agreement. Buyer agrees to establish CleanPowerSF rates and charges that are sufficient to maintain revenues necessary to pay its obligations under this Agreement 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 upon request during the Delivery Term.
- (b) Limited Obligations. Buyer's payment obligations are special limited obligations of the Buyer payable solely from the revenues of CleanPowerSF. Buyer's payment obligations under this Agreement are not a charge upon the revenues or general fund of the SFPUC or the City and County of San Francisco or upon any non-CleanPowerSF moneys or other property of the SFPUC or the City.

#### **4.3 Guaranteed Maximum Costs.**

- (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 Buyer are not authorized to request, and Buyer is not required to reimburse Seller for, commodities or services beyond the agreed upon Agreement scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of Buyer are not authorized to offer or promise, nor is 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) Biennial Budget Process. For each City biennial budget cycle during the term of this Agreement, Buyer agrees to take all necessary action to include the Buyer's payment obligations under this Agreement in its budget submitted to the Board of Supervisors for that budget cycle.

## ARTICLE 5:

### FACILITY DEVELOPMENT, OPERATION, AND MAINTENANCE

**5.1 General Obligations.** Seller covenants that at its sole cost and expense, unless otherwise specifically stated in this Agreement, it shall:

- (a) Records. Seller shall keep complete and accurate design, operating, and other records and all other data for the purposes of proper administration of this Agreement, including such records as may be required by any Governmental Authority or Prudent Operating Practice;
- (b) Further Development Information. Seller shall provide to Buyer such other information regarding the permitting, engineering, construction, or operations of the Facility as Buyer may from time to time reasonably request, subject to licensing or other restrictions of Seller or a third party with respect to confidentiality, disclosure or use; provided, nothing herein shall limit Buyer's right to obtain such information upon agreeing to confidentiality or signing a confidentiality agreement with regard to such information;
- (c) Insurance. Seller shall obtain and maintain the policies of insurance in the amounts and with the coverages as set forth on Exhibit D;
- (d) Vendor Certification. Seller shall obtain, renew, and maintain, all City required vendor certifications and requirements during the Term of this Agreement;
- (e) Construction. Design, develop, finance, and construct the Facility;
- (f) Prevailing Wages. Pay any person performing labor in the construction of the Facility not less than the applicable prevailing wage rate for the county in which the Facility will be located, as determined by the California Department of Industrial Relations. Seller shall require in any contract related to the construction of the Facility the payment of the prevailing wage rate for the work to be performed. Seller shall provide to Buyer upon request, certified payroll reports with respect to all persons performing labor in the construction of the Facility;
- (g) Local Workforce Development. Maximize participation of local workers (including workers from any DAC located within the City, the southeast sector of the City, or the DAC where the Facility is located) in the development and construction of the Facility. Prior to the Guaranteed Construction Start Date, Seller shall provide a local workforce development plan to Buyer for Buyer's review and approval
- (h) Forced Labor. Not knowingly utilize equipment or resources for the construction, operation or maintenance of the Facility that rely on work or services exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily ("Forced Labor"). Consistent with the business advisory jointly issued by the U.S. Departments of State, Treasury, Commerce and Homeland Security on July 1, 2020, equipment or resources sourced from the Xinjiang region of China are presumed to involve Forced Labor.
- (i) Interconnection and Transmission. Take all necessary actions, including arranging and paying for any and all necessary Electric System Upgrades, obtaining all required regulatory approvals, and executing and maintaining in full force and effect all necessary agreements sufficient to allow Seller to interconnect the Facility to the CAISO grid or distribution system, and deliver the Product to the Delivery Point by the Commercial



Operation Date in accordance with this Agreement. Seller shall comply with all applicable requirements, rules, contractual obligations, and Prudent Operating Practice to maintain any Interconnection Facilities and to cause delivery of the Product to Buyer;

- (j) RPS and Green-e® Certification. Prior to the Commercial Operation Date and throughout the Delivery Term, take all actions necessary to obtain and maintain for the Facility (A) CEC Certification, (B) tracking and transfer of RECs associated with the Product in WREGIS, and (C) Green-e® Energy eligibility for renewable energy and greenhouse gas emissions as administered by the Center for Resource Solutions;
- (k) Battery Storage. At the request of Buyer at any time during the Term, Seller shall in good faith evaluate and consider proposals for adding a battery storage unit(s) to the Facility, provided that Seller shall not be required to add any such storage unit(s) to the Facility unless and until Seller, Buyer and any Lenders each (in their sole and absolute discretion) approves the technical details of such unit(s) and appropriate amendments to this Agreement related to such unit(s), including additional compensation related to such unit(s). Seller shall use commercially reasonable efforts to reserve land at the project substation and/or project site for the inclusion of up to \_\_\_\_\_ MWh of storage;
- (l) CEC Certification. Take all necessary steps including, but not limited to, making or supporting timely filings with the CEC to obtain and maintain CEC Certification for the Facility throughout the Delivery Term, including compliance with all applicable requirements for certified facilities set forth in the current version of the RPS Eligibility Guidebook (or its successor). Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the Commercial Operation Date, Seller shall apply with the CEC for final CEC Certification. Within one hundred eighty (180) days after the Commercial Operation Date, Seller shall obtain and maintain throughout the remainder of the Delivery Term the final CEC Certification. Seller shall take all necessary action to cause the creation of retroactive WREGIS Certificates for the period prior to the final CEC Certification. Seller must promptly notify Buyer and the CEC of any changes to the information included in Seller's application for CEC Certification for the Facility;
- (m) Environmental Costs. Be solely responsible for all Environmental Costs; and
- (n) Compliance with Laws. Seek, obtain, maintain, and comply with all Applicable Laws, Permits, certificates, agreements, or other authorizations or approvals which are required for the ownership, construction, operation, and maintenance of the Facility and the generation, delivery, and sale of the Product pursuant to this Agreement.

## 5.2 Facility Construction and Milestones.

- (a) Time is of the Essence. The Parties agree that time is of the essence in the performance of this Agreement. Seller covenants that it shall diligently pursue to completion each of the following Milestones:
  - (i) Site control: [\_\_\_\_\_];
  - (ii) Final and non-appealable discretionary authorizations, Permits, and approvals: [\_\_\_\_\_];
  - (iii) Phase I and II Interconnection study results: [\_\_\_\_\_];
  - (iv) Executed Interconnection Agreement: [\_\_\_\_\_];
  - (v) Financial Close: [\_\_\_\_\_];
  - (vi) Construction Start: [\_\_\_\_\_] (“Guaranteed Construction Start Date”);
  - (vii) Mechanical Completion: [\_\_\_\_\_] ;
  - (viii) Initial Synchronization: [\_\_\_\_\_];

- (ix) Network Upgrades completed (evidenced by a permission to parallel letter from the Transmission Provider): [ ]; and,
- (x) Commercial Operation: [ ] (“Guaranteed Commercial Operation Date”).
- (b) Progress Report. Seller shall provide to Buyer a Progress Report concerning the progress towards construction and completion of the each of the Milestones (including whether Seller has met or is on target to meet each of the Milestones), which shall be substantially similar in form and substance to that attached as Exhibit F, and include such additional information as reasonably required by Buyer. Commencing on the Effective Date, Seller shall provide Progress Reports every three (3) months prior to the Guaranteed Construction Start Date and monthly Progress Reports thereafter. Seller agrees to meetings between representatives of Buyer and Seller to review such Progress Reports and discuss Seller’s construction progress, as Buyer may request from time to time.
- (c) Certification of Completion of Milestones. Within five (5) Business Days of the completion of each Milestone, Seller shall provide a certification to Buyer (along with any relevant supporting documentation), stating Seller’s achievement or satisfaction of each such Milestone.
- (d) Notice of Failure to Achieve Milestone. Upon becoming aware that it shall, or is reasonably likely to, fail to achieve any Milestone by the required date for any reason, Seller shall notify Buyer in writing as soon as is reasonably practical but no later than thirty (30) days prior to the Milestone date. If the delay is caused by a Force Majeure event and thirty (30) days’ notice is not feasible, Seller shall notify Buyer in writing as soon as reasonably practical. The notice shall provide information regarding the cause of the delay, provide a revised estimated date for achievement of the Milestone(s), and describe Seller’s plan for meeting the Milestone(s) in sufficient detail to enable Buyer to reasonably assess the sufficiency of the plan to remedy the delay and achieve the Milestone. Seller’s notice shall also explain any impact such delay may or shall have on any other Milestone, and measures to be taken to mitigate such impact. Subject to the provisions of Section 5.3, Seller shall not be considered in default of this Agreement for failure to meet a Milestone if Seller complies with its obligations under this Section 5.2(d).

### **5.3 Guaranteed Construction Start Date and Guaranteed Commercial Operation Date.**

- (a) Construction Start.
  - (i) “Construction Start” will occur when Seller has (i) obtained all necessary approvals, Permits, and authorizations for the construction of the Facility, (ii) executed an EPC contract and engaged all necessary contractors, (iii) ordered all essential equipment and supplies that are necessary to commence physical construction of the Facility and to proceed to completion without a foreseeable interruption of material duration, (iv) issued a final Notice to Proceed to the EPC Contractor, and (v) commenced mobilization at the Site by Seller or its agents, including site preparation at a sufficient level to reasonably demonstrate that Seller has commenced preparations for construction of the Facility, and (vi) delivered to Buyer the Construction Start Certification substantially in the form set forth in Exhibit E. Seller shall cause the Construction Start to occur no later than the Guaranteed Construction Start Date.
  - (ii) Seller may extend the Guaranteed Construction Start Date by paying Construction Start Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Construction Start Date, not to exceed a total of one hundred twenty (120) days. At least ten (10) Business Days prior to the Guaranteed Construction Start Date, Seller shall provide notice and payment to Buyer of the Construction Start Delay Damages for the number of days of extension to the Guaranteed Construction Start

Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions to such date resulting from Seller's payment of Commercial Operation Date Damages, but as may be extended pursuant to a Permitted Extension), Buyer shall refund to Seller all Construction Start Delay Damages.

(b) Commercial Operation.

- (i) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date.
- (ii) Seller may extend the Guaranteed Commercial Operation Date by paying COD Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Construction Start Date, not to exceed a total of ninety (90) days. At least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall provide notice and payment to Buyer of the COD Delay Damages for the number of days of extension to the Guaranteed Commercial Operation Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions resulting from Seller's payment of COD Delay Damages, but as may be extended pursuant to a Permitted Extension), then Buyer shall refund to Seller all COD Delay Damages.

(c) Permitted Extensions. The following events constitute "Permitted Extensions":

- (i) A Force Majeure event occurs and Seller works diligently to resolve the effect of the Force Majeure event;
- (ii) Seller has used commercially reasonable efforts to obtain Facility interconnection but the Electric System Upgrades are not complete and ready for the Facility to connect and deliver and sell Product at the Delivery Point by the Guaranteed Commercial Operation Date; or
- (iii) Buyer has not made all necessary arrangements to receive Energy from the Facility at the Delivery Point by the Guaranteed Commercial Operation Date.

(d) Notice. If Seller claims a Permitted Extension, Seller shall provide Buyer with sixty (60) days' notice prior to the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date which notice shall clearly identify the grounds for the requested extensions and include information necessary for Buyer to verify the length of and grounds for the extension. If the delay is due to Force Majeure and sixty (60) days' notice is impracticable or impossible, Seller shall provide notice as soon as possible after the occurrence of the Force Majeure event.

(e) Maximum Delay.

- (i) The combined Permitted Extensions under this Section 5.3 (other than the extensions under Section 5.3(c)(iii)) for the Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date combined shall not exceed one hundred twenty (120) days in the aggregate.
- (ii) The cumulative extensions of the Guaranteed Commercial Operation Date for Permitted Extensions (other than the extensions under Section 5.3(c)(iii)) and by payment of Commercial Operation Delay Damages shall not exceed two hundred and ten (210) days.

(f) No Limitation of Damages. The Parties agree that Buyer's receipt of the Construction Start Delay Damages or COD Delay Damages shall (i) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Article 8, and (ii) not limit Buyer's right to receive a Termination Payment or Damage Payment, as applicable, upon exercise of Buyer's termination rights pursuant to Section 5.3(h) or Article 8.

- (g) Development Assurance. If Seller fails to timely pay any Construction Start Delay Damages or COD Delay Damages, Buyer may draw upon the Development Assurance to satisfy Seller's payment obligations under this Section 5.3.
- (h) Termination of Agreement. Buyer may terminate this Agreement by written notice to Seller if:
  - (i) Seller fails to achieve Construction Start on or before the Guaranteed Construction Start Date and the combined extensions to the Guaranteed Construction Start Date exceed the limits under Sections 5.3(a)(ii) and 5.3(e); or
  - (ii) Seller fails to achieve COD on or before the Guaranteed COD Date and the combined extensions to the Guaranteed COD Date exceed the limits under Sections 5.3(b)(ii) and 5.3(e); or
  - (iii) Seller fails to pay, or discontinues paying, any or all of the Construction Delay Damages or COD Delay Damages when due and Buyer cannot obtain such amounts by drawing upon the Development Assurance and/or setting off against any amounts owed to Seller by Buyer under this Agreement.
- (i) Additional Extension. Notwithstanding the foregoing, the Parties may mutually agree in writing to an extension of the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date of up to ninety (90) days beyond the maximum extensions set forth under Sections 5.3(e) with payment of the Construction Start Delay Damages or COD Delay Damages, as applicable, by Seller. Buyer may not terminate this Agreement for failure to achieve the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date during the mutually agreed upon extension period so long as Seller continues to pay the Construction Start Delay Damages or COD Delay Damages.

#### **5.4 Operation and Maintenance.**

- (a) Operation and Maintenance. Seller shall be solely responsible for the ownership, operation, maintenance, and repair of the Facility in compliance with this Agreement, all Applicable Laws, the requirements of the California general safety orders, CAISO, NERC and WECC, all applicable contractual obligations and Permits, and in accordance with Prudent Operating Practice, and shall be solely responsible for all associated costs and expenses. In the event Seller requires any data or information from Buyer in order to comply with any Applicable Law, including the requirements of CAISO, NERC and WECC, relating to the Facility, then Seller shall request in writing such data from Buyer no less than forty-five (45) calendar days prior to Seller's requested date of Buyer's response; provided that if Seller has less than forty-five (45) calendar days prior notice of the need for such data, Seller shall request in writing such data from Buyer as soon as reasonably practicable. Buyer shall make a good faith effort to provide such data and/or information within the timeframe specified in writing by Seller or as soon thereafter as reasonably practicable.
- (b) Maintenance of Health and Safety. Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair, and replacement of the Facility. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt, reasonable action to prevent such damage or injury and shall give Buyer's emergency contact identified in the Cover Sheet notice of such condition. Such action may include disconnecting and removing all or a portion of the Facility, or suspending the supply of Energy to the Delivery Point.
- (c) Start-ups and Shut-downs. Seller shall coordinate all Facility start-ups and shut-downs, in whole or in part, with Buyer in accordance with CAISO scheduling protocols and the

reasonable protocols established by Buyer that are not inconsistent with the CAISO Tariff and CAISO procedures.

(d) Metering.

- (i) All Energy from the Facility must be delivered through the Facility Meter, which shall be subject to adjustment in accordance with applicable CAISO meter requirements and Prudent Operating Practices, including to account for Electrical Losses. Seller shall separately meter all Station Uses. Each meter shall be kept under seal which may be broken only when the Facility Meters are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable.
- (ii) The meter data will account for transformer losses and will be programmed to reflect Electrical Losses to the Delivery Point, consistent with CAISO requirements. Seller shall bear all costs relating to all metering equipment installed to accommodate the Facility. Seller shall grant Buyer (and Buyer's Scheduling Coordinator) read-only rights to retrieve all data, including the meter reads, directly from the CAISO meter(s) at the Facility site through both (A) physical access and (B) remote electronic read-only access as necessary for the Scheduling Coordinator to meet its obligations under the CAISO Tariff and other applicable rules. Seller shall maintain an updated record of programmed meter parameters (such as channel configuration and other relevant settings) that is accessible and reasonably acceptable to Buyer. In addition, Seller shall provide all meter data to Buyer in a form reasonably acceptable to Buyer and consents to Buyer obtaining from CAISO the CAISO meter data directly related to the Facility and all inspection, testing, and calibration data and reports.
- (iii) If Seller has reason to believe there may be a Facility Meter malfunction, or upon Buyer's reasonable request, Seller shall test the Facility Meter(s) at its sole cost and expense. The tests shall be conducted by independent third-parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a meter is inaccurate, Seller shall promptly repair or replace the meter at its sole cost and submit corrected meter data in compliance with CAISO requirements. Seller shall be responsible for and shall reimburse Buyer for all CAISO costs, penalties, and charges related to the inaccuracy of the Facility Meter.
- (iv) Upon Buyer's request, Seller shall take all commercially reasonable actions to become, as specified by Buyer, either a CAISO Metered Entity or a Scheduling Coordinator Metered Entity (as those terms are defined in the CAISO Tariff).

(e) Shared Facilities. The Parties acknowledged and agree that the Facility may share the Interconnection Facilities and other assets, including the Interconnection Agreement and transmission service agreements. Seller agrees that such joint ownership or arrangements shall permit Seller to perform or satisfy, and shall not limit, Seller's obligations under this Agreement and providing for separate metering of the Facility.

(f) Refurbishment of the Facility. During the Term, Seller may not refurbish the Facility, alter components of the Facility, or replace major components of the Facility where such action results in a total increased capacity higher than the Guaranteed Installed Capacity, without the prior written consent of Buyer. Buyer shall have the right, in its sole discretion, to accept or decline to permit any such refurbishment or alteration that may increase capacity of the Facility above the Guaranteed Installed Capacity. Nothing in this Section 5.4 is intended to limit Seller's ability to refurbish, repair, maintain, or replace any portion of the Facility where such actions will not increase the Facility's total generating capacity above the Guaranteed Installed Capacity.

## 5.5 Scheduling.

### (a) Scheduling Coordinator.

- (i) Upon Initial Synchronization, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for the delivery and the receipt of the Product at the Delivery Point. At least thirty (30) days prior to Initial Synchronization, (A) Seller shall take all actions and execute and deliver to Buyer and the CAISO all documents necessary to authorize or designate Buyer or Buyer's designee as Scheduling Coordinator for the Facility effective as of the date of Initial Synchronization and (B) Buyer shall, and shall cause its designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Buyer or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization. On and after Initial Synchronization, Seller shall not authorize or designate any other party to act as Seller's Scheduling Coordinator, nor shall Seller perform for its own benefit the duties of Scheduling Coordinator, and Seller shall not revoke Buyer's authorization to act as Seller's Scheduling Coordinator unless agreed to by Buyer. Buyer or its designee shall submit Schedules and updates to Schedules consistent with the requirements of the CAISO Tariff and CAISO protocols and scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute, or real time basis, as determined by Buyer in its sole discretion.
- (ii) At any time during the Term of this Agreement, Buyer may elect to require Seller or Seller's designee to become the Scheduling Coordinator for the Facility. Buyer shall provide one hundred twenty (120) days prior notice to Seller and the Parties shall promptly enter into good faith negotiations on necessary amendments to this agreement to reflect the transfer of Scheduling Coordinator responsibilities to Seller. The negotiations shall be limited to necessary amendments that are solely related to the Scheduling Coordinator services for the Facility.
- (iii) Buyer shall provide Seller with access to a web-based system through which Seller shall submit to Buyer and the CAISO all notices and updates required under the CAISO Tariff regarding the Facility's status, including but not limited to, all outage requests, forced outages, forced outage reports, clearance requests, or must offer waiver forms. Seller shall cooperate with Buyer to provide such notices and updates. If the web-based system is not available, Seller shall promptly submit such information to Buyer and the CAISO (in order of preference) telephonically and by electronic mail to the personnel designated to receive such information.
- (iv) At least thirty (30) days prior to the expiration of the Delivery Term or the date that Seller assumes SC services under Section 5.5(a)(ii), or as soon as reasonably practicable upon an early termination of this Agreement, the Parties will take all actions necessary to terminate the designation of Buyer as Scheduling Coordinator for the Facility as of 11:59 p.m. on the designated expiration, termination, or transfer date.
- (v) Prior to the COD, the Parties shall cooperate to develop protocols as necessary to implement scheduling and settlements procedures consistent with this Agreement and the CAISO Tariff.

### (b) CAISO Costs and Revenues.

- (i) Except as otherwise set forth in this Section 5.6(b), Buyer (as Scheduling Coordinator for the Facility) shall be responsible for CAISO costs and shall be entitled to all CAISO revenues or credits related to the Product Scheduled or delivered from the Delivery Point.

- (ii) Seller shall be responsible for and reimburse Buyer for all CAISO costs, charges, costs, and penalties which are related to (A) the unavailability of the Facility, (B) Seller's default, breach, or other failure to perform as required by this Agreement, (C) any failure by Seller to comply with the CAISO Tariff, any requirements imposed on it as the Facility owner, or the outage notification requirements set forth in the CAISO Tariff and this Agreement (except to the extent such non-compliance is caused by Buyer's failure to perform its duties as Scheduling Coordinator for the Facility), (D) any failure by Seller to comply with any Buyer Bid Curtailment, CAISO dispatch instruction, or Curtailment Order, (E) Facility Meter inaccuracies, and (F) penalties related to non-performance with respect to Ancillary Services and Residual Unit Commitment (as defined in the CAISO Tariff) awards due to conditions within Seller's control. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be Seller's responsibility. Notwithstanding the foregoing, Buyer shall be responsible for any non-performance penalties due solely to decreases in solar irradiance.
  - (iii) Seller shall be entitled to any Availability Incentive Payments (as defined in the CAISO Tariff) and shall be responsible for any Non-Availability Charges (as defined in the CAISO Tariff).
  - (iv) Seller shall be responsible for all CAISO fees, charges, and penalties imposed as a result of deviations between RTM Scheduled Energy and Delivered Energy during any Settlement Interval, except for those charges due solely to real-time uninstructed Energy caused by decreases in solar irradiance.
  - (v) Each Party shall use commercially reasonable efforts to cooperate with the other Party to allow that Party to comply with any obligations, and minimize any potential liability, it may have under the CAISO Tariff in relation to Product under this Agreement.
- (c) CAISO Settlements. Buyer (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties ("CAISO Charges Invoice") for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer shall review, validate, and if requested by Seller under paragraph (d) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer's existing settlement processes for charges that are Buyer's responsibilities. Subject to Seller's right to dispute and to have Buyer pursue the dispute of any such invoices, Seller shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller's receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for such CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.
- (d) CAISO Charges Disputes. Seller may require Buyer (as the Facility's SC) to dispute CAISO settlements related to any costs or revenues for which Seller is responsible under

this Agreement. Seller agrees to pay Buyer's costs and expenses (including reasonable attorneys' fees) associated with CAISO charges that Seller has directed Buyer to dispute.

- (e) Master File. Seller shall provide the data to the CAISO (and to Buyer) that is required for the CAISO's Master File (or successor data systems) for the Facility consistent with this Agreement. Neither Party shall change such data without the other Party's prior written consent.
- (f) Seller Equipment for Operating Instruction Communications. Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement such protocols and practices, as necessary to respond to and follow operating instructions from the CAISO and Buyer's SC.

## **5.6 Dispatch Down/Curtailment of Facility.**

- (a) Curtailment.
  - (i) Seller shall reduce generation from the Facility by the amount and for the period required by the Reliability Coordinator, CAISO, Transmission Provider, or any successor thereto pursuant to a Curtailment Order. Buyer shall not be required to pay Seller for the Product that Seller could have delivered to Buyer but for such Curtailment Order.
  - (ii) Seller shall reduce the generation from the Facility by the amount and for the period set forth in any CAISO notice related to a Buyer Bid Curtailment.
- (b) Failure to Comply. If Seller fails to comply with a Buyer Bid Curtailment or Curtailment Order, then, for each MWh of Delivered Energy that the Facility generated in contradiction to the Buyer Bid Curtailment or Curtailment Order, Seller shall pay Buyer for each such MWh at an amount equal to the sum of (A) + (B) + (C), where: (A) is the amount, if any, paid to Seller by Buyer for delivery of such MWh and, (B) is the sum, for all Settlement Intervals with a Negative LMP during the Buyer Bid Curtailment period or Curtailment Period, of the absolute value of the product of such excess MWh in each Settlement Interval and the Negative LMP for such Settlement Interval, and (C) is any penalties or other charges resulting from Seller's failure to comply with the Buyer Bid Curtailment or Curtailment Order.
- (c) Deemed Delivered Energy.
  - (i) If a Buyer Bid Curtailment occurs, Buyer shall pay Seller for Deemed Delivered Energy at the Contract Price.
  - (ii) In Seller's monthly invoice, Seller will reasonably calculate, consistent with this Agreement and Prudent Utility Practice the amount of Deemed Delivered Energy for the applicable month. The Parties shall share any documentation necessary to create or support such calculation. Seller shall include supporting documentation and calculations for the determination of Deemed Delivered Energy with the monthly invoice.
  - (iii) If either Party believes that the Final Output Estimate is an inaccurate estimate of the quantity of Energy the Facility reasonably could have generated based on Facility availability, insolation, and other relevant meteorological conditions, the Parties will mutually agree upon the use of (1) the Seller Day-Ahead Forecast, (2) the Day-Ahead forecast of the Facility's output from the CAISO's independent forecast provider, or (3) another mutually agreed upon methodology to determine the Final Output Estimate.
  - (iv) In the event of an overlapping Buyer Bid Curtailment and a Curtailment Order, Forced Outage, system emergency, or transmission outage, Seller shall exclude



Energy curtailed during such Curtailment Order time period from the calculation of Deemed Delivered Energy.

## **5.7 Forecasts.**

- (a) Forecasts. Seller shall use generally accepted industry standards consistent with the forecasting requirements of the CAISO Tariff to produce the forecasts described in this Section 5.7. All forecasts shall be based on P-90 values. If Seller does not follow Section 4.8.2 of the CAISO Tariff with respect to forecasting, then upon Buyer's written request, Seller shall also retain, at Seller's expense, a third-party forecasting service reasonably acceptable to Buyer to produce such forecasts, in addition to those forecasts produced by Seller. Seller shall provide identical input data to such third-party service provider as are used to produce Seller's own forecast. Such forecast(s) shall be provided to Buyer and Buyer's SC in a manner reasonably acceptable to Buyer. If, during any given calendar month, the forecast error of such third-party service is larger than the forecast error of the forecasts produced by the Seller, determined as the sum of squared errors between the Seller Day-Ahead Forecast, for each respective forecast, and actual hourly production, then Buyer shall reimburse Seller for such third-party forecasting service costs.
- (i) No later than thirty (30) calendar days prior to the end of each Contract Year, Seller will provide a forecast of available capacity and production ("Annual Forecast") detailing hourly expected available generation and monthly capacity and all proposed Planned Outages for the next Contract Year. Within five (5) Business Days following any change to the Planned Outage schedule for such Contract Year, Seller will provide notice to Buyer and Buyer's SC with an updated Annual Forecast reflecting the updated Planned Outage schedule, which will automatically supersede the prior Annual Forecast for such Contract Year.
  - (ii) No later than ten (10) calendar days prior to the first day of each month of the Delivery Term, Seller shall provide an electronic update to the Annual Forecast for that calendar month ("Monthly Forecast"). The Monthly Forecast shall include hourly available capacity and expected generation and all Planned Outages.
  - (iii) No later than seven (7) calendar days prior to the first day of each week of the Delivery Term, Seller shall provide a weekly forecast of available capacity and production and any changes in Planned Outages ("Weekly Forecast"). The Weekly Forecast shall include hourly available capacity and generation and all Planned Outages.
  - (iv) By 5:30 PM Pacific Time on the Business Day immediately preceding the date of delivery, Seller shall provide a forecast of available capacity and production for each hour of the date of delivery ("Seller Day-Ahead Forecast"). The Seller Day-Ahead Forecast shall include hourly available capacity and generation and all Planned Outages.

## **5.8 Outages.**

- (a) Planned Outages.
- (i) No later than January 15 of each Contract Year, and at least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall submit to Buyer the schedule of proposed Planned Outages ("Outage Schedule") for the following twelve (12) month period in a form reasonably specified by Buyer. The schedule of Planned Outages shall be subject to Buyer's review and approval.
  - (ii) Seller shall not schedule Planned Outages during the period of reliability accounting, initially the period between June 1st and October 31 of each year; however, such period shall be subject to changes at Buyer's discretion in order to conform to the CAISO's Availability Assessment procedures. In the event that

Seller has a previously Planned Outage that becomes coincident with a System Emergency, Seller shall make all reasonable efforts to reschedule such Planned Outage.

- (iii) If replacement capacity is required by the CAISO for the period of any Planned Outage, Seller shall provide the replacement capacity in the amount and for the duration specified by the CAISO pursuant to the CAISO Tariff.
  - (iv) If reasonably required in accordance with Prudent Operating Practices, Seller scheduled shall have the right, on no less than sixty (60) days advance notice to Buyer, to propose changes to the Outage Schedule. Buyer may provide comments no later than ten (10) days after receiving Seller's notice of proposed changes to the Outage Schedule and Buyer shall permit any changes if doing so would not have a material adverse impact on Buyer and Seller agrees to reimburse Buyer for any costs and charges associated with such changes.
- (b) Forced Outages. Seller shall notify Buyer by telephoning Buyer's Scheduling Coordinator as soon as reasonably possible but no later than ten (10) minutes following the occurrence of a Forced Outage, or if Seller has knowledge that a Forced Outage will occur, within twenty (20) minutes of determining that such Forced Outage will occur. Seller shall relay outage information to Buyer as required by the CAISO Tariff within twenty (20) minutes of the Forced Outage. Seller shall communicate to Buyer the estimated time of return of the Facility as soon as practical. Seller shall promptly prepare and provide to Buyer, all reports of Forced Outages or Planned Outages that Buyer may reasonably require for the purpose of enabling Buyer to comply with CAISO requirements or any Applicable Laws.

## **ARTICLE 6: DEVELOPMENT AND PERFORMANCE ASSURANCE**

### **6.1 Grant of Security Interests/Remedies.**

- (a) First Priority Security Interest. To secure its obligations under this Agreement hereunder, Seller hereby grants to Buyer, as the secured party, a first priority security interest in, and lien on (and right of setoff against), and assignment of, all such Development Assurance and Performance Assurance posted with Buyer 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, Buyer. Within thirty (30) calendar days of the delivery of the Development Assurance or Performance Assurance, as applicable, Seller agrees to take such action as Buyer reasonably requires in order to perfect a first-priority security interest in, and lien on (and right of setoff against), such Development Assurance or Performance Assurance and any and all proceeds resulting therefrom or from the liquidation thereof, respectively.
- (b) Rights and Remedies. Upon or any time after the occurrence and during the continuation of an Event of Default by Seller or an Early Termination Date or the occurrence of any event under this Agreement where Buyer is entitled to draw upon the Development Assurance or Performance Assurance, Buyer may do any one or more of the following:
  - (i) exercise any of the rights and remedies of a secured party with respect to all Development Assurance or Performance Assurance, as applicable, including any such rights and remedies under Applicable Law;
  - (ii) draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Assurance or Performance Assurance; and
  - (iii) liquidate all Development Assurance or Performance Assurance, as applicable, then held by or for the benefit of Buyer free from any claim or right of any nature

whatsoever of Seller, including any equity or right of purchase or redemption by Seller.

- (c) Application of Proceeds. Buyer shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller's obligations under the Agreement (Seller remaining liable for any amounts owing to Buyer after such application), subject to the Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

## **6.2 Development Assurance and Performance Assurance.**

### **(a) Development Assurance.**

- (i) Seller shall post Development Assurance in the amount of \_\_\_ dollars per kilowatt (\$\_\_\_/kW) multiplied by the Guaranteed Installed Capacity in the form of cash or a Letter of Credit within ten (10) calendar days following the Execution Date and maintain the Development Assurance in full force and effect until such time as Seller posts the Performance Assurance pursuant to Section 6.2(b) below with Buyer. Seller shall replenish the Development Assurance within five (5) Business Days of any draw down of any portion of the Development Assurance for any reason permitted under this Agreement other than to satisfy a Damage Payment.
- (ii) Buyer shall be entitled to draw upon the Development Assurance posted by Seller for any reason permitted under this Agreement. Buyer shall also be entitled to draw upon the Development Assurance for any Damage Payment arising upon Buyer's declaration of an Early Termination Date prior to the Commercial Operation Date.
- (iii) Buyer shall return to Seller the Development Assurance less any amounts drawn in accordance with this Agreement: (A) within thirty (30) days after Seller posts Performance Assurance with Buyer, or (B) within sixty (60) days after the following have occurred: (1) early termination of the Agreement; (2) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Damage Payment, indemnification payments, or other damages, (whether directly or indirectly such as through set-off or netting). With Buyer's consent, Seller may elect to apply the Development Assurance (or a portion thereof) toward the Performance Assurance.

### **(b) Performance Assurance.**

- (i) Seller shall post Performance Assurance in an amount equal to the product of \_\_\_ dollars per kilowatt (\$\_\_\_/kW) multiplied by the Installed Capacity in the form of cash or a Letter of Credit before the COD. Seller shall replenish the Performance Assurance within five (5) Business Days of any draw down of any portion of the Performance Assurance for any reason permitted under this Agreement other than to satisfy a Termination Payment.
- (ii) Buyer shall be entitled to draw upon the Performance Assurance posted by Seller for any reason permitted under this Agreement, including Buyer's declaration of an Early Termination Date after the Commercial Operation Date.
- (iii) Seller shall maintain Performance Assurance from the Commercial Operation Date until the following have occurred: (a) the Delivery Term has expired or terminated early, and; (b) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Termination Payment, indemnification payments, or other damages (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security.

- (c) No Limitation of Damages. The amount of Development Assurance and Performance Assurance required under this Agreement shall not be deemed a limitation of damages.

**6.3 Letter of Credit.** Development Assurance or Performance Assurance provided in the form of a Letter of Credit shall be substantially in the form set forth in Exhibit H-1, or another form reasonably acceptable to Buyer, subject to the following provisions:

- (a) Renewal of Letter of Credit. If Seller has provided a Letter of Credit pursuant to any of the applicable provisions in this Article 6, then Seller shall renew or cause the renewal of each outstanding Letter of Credit on a timely basis.
- (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 ten (10) 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); or
- (ii) 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 Agreement, then Seller shall be deemed to have failed to meet the collateral requirements of Section 6.2 and Buyer may declare an Event of Default as set forth in Article 8.
- (d) Letter of Credit Costs. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Seller.

## ARTICLE 7: FORCE MAJEURE

- 7.1 Remedial Action.** Subject to the limitation on extensions of Milestones set forth in Section 5.3(e), 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 Claiming Party shall take all action necessary to remove such inability with all due speed and diligence. The Claiming 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 the Claiming 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 Claiming Party 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. The Claiming Party's failure to give timely notice shall not affect such Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving notice materially prejudices the other Party.
- 7.3 Termination Due to Force Majeure Event.** Subject to the provisions of Section 5.3(e) on extensions of Milestones, if the Claiming Party is prevented in any material respect from performing any material obligations under this Agreement solely due to a Force Majeure Event

lasting for a period of twelve (12) consecutive months or longer, either Party may terminate this 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. In such event, Buyer shall promptly return to Seller all Development Assurance or Performance Assurance, as applicable, less any damages due and payable by Seller prior to the date of such termination for reasons unrelated to this Section 7.3. This Section 7.3 shall not affect the rights and remedies associated with any other termination rights set forth in this Agreement.

## **ARTICLE 8: DEFAULT, REMEDIES, AND TERMINATION**

### **8.1 Events of Default.**

- (a) Events of Default. The occurrence of any of the following shall constitute an Event of Default by a Party:
  - (i) the breach of any material obligation or covenant of this Agreement and such Party fails to cure such breach within sixty (60) days after written notification of default by the other Party; however, the Parties may mutually agree upon a longer period for cure if the breach cannot reasonably be cured within sixty (60) days, provided that the extended cure period will only continue for so long as the Party in breach is pursuing a cure with reasonable diligence;
  - (ii) subject to Sections 4.1(d) and 4.1(e), failure to make any payment when due under this Agreement within fifteen (15) Business Days after written notice that such payment is due;
  - (iii) 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 neither such circumstance nor the adverse effects of such circumstance are cured or remedied within thirty (30) days after written notice;
  - (iv) such Party becomes Bankrupt;
  - (v) subject to Section 11.1(d), 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 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.
- (b) Seller Events of Default. The following shall constitute additional Events of Default by Seller:
  - (i) subject to Section 5.3(i), the occurrence of any of the events set forth in Section 5.3(h);
  - (ii) Seller fails to satisfy any of the credit requirements of Article 6;
  - (iii) notwithstanding any other provision of this Agreement and subject to Section 3.4(c), Seller fails to deliver in any two (2) consecutive Contract Years, at least seventy percent (70%) of the sum of the expected Contract Quantities for the relevant Contract Years minus Seller Excused Hours;
  - (iv) notwithstanding any other provision of this Agreement and subject to Section 3.4(c), Seller fails to deliver at least fifty percent (50%) of the expected monthly quantities as set forth in the Annual Forecast minus Seller Excused Hours in any consecutive twelve (12) month period; or

- (v) except for Replacement Product, Seller delivers or attempts to deliver Energy to the Delivery Point that was not generated by the Facility.

## 8.2 Termination for Default.

- (a) Declaration of 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) send notice, designating a day, no earlier than ten (10) calendar days and no later than sixty (60) days after the day such notice is deemed to be received, as the date on which this Agreement will terminate (the “Early Termination Date”);
  - (ii) accelerate all amounts owing between the Parties, terminate this Agreement and end the Delivery Term effective as of the Early Termination Date;
  - (iii) collect as of the Early Termination Date, (A) the Damage Payment in the case of a Seller Event of Default arising at any time prior to the Commercial Operation Date, including an Event of Default pursuant to Section 8.1, or (B) the Termination Payment in the case of an Event of Default by either Party arising after the Commercial Operation Date or in the case of a Buyer Event of Default arising prior to the Commercial Operation Date;
  - (iv) withhold any payments due to the Defaulting Party under this Agreement;
  - (v) suspend performance;
  - (vi) exercise its rights pursuant to Article 6 of this Agreement to draw upon and retain Development Assurance or Performance Assurance, as applicable; and
  - (vii) exercise any other right or remedy available at law or in equity to the extent otherwise permitted under this Agreement.
- (b) Calculation of Damage Payment. If the Early Termination Date occurs prior to the Commercial Operation Date due to a Seller Default, the Damage Payment shall equal the entire Development Assurance amount and any accrued interest. Buyer shall be entitled to retain for its own benefit those funds held as Development Assurance and any accrued interest, and any amount of Development Assurance that Seller has not yet posted with Buyer shall be immediately due and payable by Seller to Buyer. There will be no amounts owed to Seller.
- (c) Calculation of Termination Payment. The Termination Payment shall be calculated by the Non-Defaulting Party as follows:
  - (i) The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Termination Payment as of the Early Termination Date.
  - (ii) If the Non-Defaulting Party’s aggregate Gains exceed its aggregate Economic Losses and Costs, if any, resulting from such termination of this Agreement, the amount of the Termination Payment shall be limited to the amounts set forth in clause (b) of the definition of Termination Payment.
  - (iii) The Non-Defaulting Party is not required to enter into replacement transactions to establish a Termination Payment.
  - (iv) The Termination Payment shall not include consequential, incidental, punitive, exemplary, indirect, or business interruption damages.
- (d) Notice of Damage Payment or Termination Payment. As soon as practicable after declaration of an Early Termination Date, the Non-Defaulting Party shall give notice to the Defaulting Party of the amount of the Damage Payment or Termination Payment due to or from the Defaulting Party to the Non-Defaulting Party, as applicable. The notice shall

include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Damage Payment or Termination Payment shall be made to the Non-Defaulting Party fifteen (15) Business Days after such termination payment notice is effective.

- (e) Disputes Regarding Damage Payment or Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Following delivery of such a notice, disputes regarding the Damage Payment or Termination Payment shall be resolved in accordance with Section 11.3.
- (f) Rights and Remedies are Cumulative. Except where this Agreement explicitly states that liquidated damages or another remedy is the exclusive remedy, the rights and remedies in this Agreement, including this Article 8, are cumulative.
- (g) Mitigation. The Non-Defaulting Party shall use commercially reasonable efforts to mitigate its Costs, Economic Losses, and damages resulting from any Event of Default.

### **8.3 Limitation of Liability/Liquidated 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 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, UNLESS THE PROVISION PROVIDES THAT THE EXPRESS REMEDIES ARE IN ADDITION TO OTHER REMEDIES THAT MAY BE AVAILABLE. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, 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 SUCH OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED UNLESS EXPRESSLY HEREIN PROVIDED. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY UNDER THIS AGREEMENT FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF USE, LOSS OF REVENUES, LOSS OF PROFIT, OR OTHER BUSINESS INTERRUPTION DAMAGES, INTEREST CHARGES, OR COST OF CAPITAL; PROVIDED HOWEVER, NOTHING IN THIS SECTION SHALL AFFECT THE ENFORCEABILITY OF THE PROVISIONS OF THIS AGREEMENT RELATING TO EXPRESS REMEDIES OR MEASURE OF DAMAGES. THE PARTIES ACKNOWLEDGE AND AGREE THAT TO THE EXTENT THAT ANY DAMAGES SET FORTH IN THIS AGREEMENT ARE LIQUIDATED, INCLUDING PAYMENTS SET FORTH IN SECTIONS 3.4, 3.6, 5.3, 5.6, AND 8.2, SUCH DAMAGES ARE EACH REASONABLE AND REPRESENT A FAIR AND GENUINE ESTIMATE OF THE HARM OR LOSS THAT WOULD OCCUR RELATED TO THE EVENTS DESCRIBED THEREIN. THE PARTIES ACKNOWLEDGE AND AGREE THAT THE DAMAGES FOR THE**

CIRCUMSTANCES SET FORTH ABOVE WOULD BE IMPOSSIBLE OR DIFFICULT TO MEASURE, 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 AND THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

- (c) **BUYER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, THE COMPENSATION PROVIDED FOR IN ARTICLE 3, AND SECTIONS 5.6 AND 8.2.**
- (d) **EXCEPT AS OTHERWISE PROVIDED HEREIN, THE RIGHTS AND REMEDIES OF A PARTY PURSUANT TO THIS ARTICLE 8 SHALL BE CUMULATIVE AND IN ADDITION TO THE RIGHTS OF THE PARTIES OTHERWISE PROVIDED IN THIS AGREEMENT.**

#### **ARTICLE 9: INDEMNIFICATION**

- 9.1 Seller Indemnification Prior to Commercial Operation Date.** Up to and including the Commercial Operation Date, Seller shall indemnify, defend, and hold harmless Buyer, and its officials, directors, agents and employees ("Buyer Indemnified Party"), from any claim, liability, loss, injury or damage arising out of, or in connection with, the negligence, willful misconduct or violation of Applicable Law by Seller and/or its agents, employees or sub-contractors, excepting only loss, injury or damage caused by the active negligence, willful misconduct or violation of Applicable Law by a Buyer Indemnified Party.
- 9.2 Seller and Buyer Indemnification after Commercial Operation Date.** After the Commercial Operation Date, each Party ("Indemnifying Party") shall defend, indemnify and hold harmless the other Party and its elected officials, officers, directors, employees, agents, affiliates and representatives (each, an "Indemnified Party") from and against any and all losses, including but not limited to losses arising from personal injury or death, or damage to property, but only to the extent such losses result from or arise out of the negligence, willful misconduct or violation of Applicable Law by the Indemnifying Party.
- 9.3 Environmental Indemnity.** Seller shall indemnify, defend, and hold harmless the Buyer Indemnified Parties, from any claim, liability, loss, injury or damage arising out of, or in connection with Environmental Costs and any environmental matters associated with the Facility, including the disposal and transportation of Hazardous Substances by or on behalf of the Seller or at the Seller's direction or agreement.
- 9.4 Notice.** If an Indemnified Party determines that it is entitled to defense and indemnification under this Article 9, 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 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 the State of \_\_\_\_\_, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this 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 Agreement 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 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 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 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;
- (g) Throughout the Delivery Term of this Agreement that: (i) the Facility qualifies and is pre-certified or certified by the CEC as an Eligible Renewable Energy Resource ("ERR") as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Facility's output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law;
- (h) Throughout the Delivery Term of this Agreement the Renewable Energy Credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard, as set forth in California Public Utilities Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law;
- (i) All necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in the Western Renewable Energy Generation Information System will be taken prior to the first delivery under this Agreement; and
- (j) It will provide and convey all Environmental Attributes associated with all electricity generation from the Project to Buyer as part of the Product being delivered, it holds the rights to all Environmental Attributes from the Facility, and it agrees to convey and hereby conveys all such Environmental Attributes to Buyer as included in the delivery of the Product from the Facility.

- (k) As of the Effective Date, Seller represents and warrants to Buyer that it has not received notice from or been advised by any existing or potential supplier or service provider that the disease designated COVID-19 or the related virus designated SARS-CoV-2 have caused, or are reasonably likely to cause, a delay in the construction of the Facility or the delivery of materials necessary to complete the Facility, in each case that would cause the Commercial Operation Date to be later than the Guaranteed Commercial Operation Date.

**10.2 Buyer's 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 Agreement;
- (b) Buyer has the legal power and authority to make and carry out this Agreement 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 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 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 Agreement; and
- (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.

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

- (a) It shall continue to be duly organized, validly existing and in good standing under the 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 Agreement; and
- (c) It shall perform its obligations under this 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) General Assignment. Except as provided in Sections 11.1(b) and 11.1(c), neither Party shall assign this 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 Agreement, (ii) the assignee agrees in writing to be bound by the terms and conditions of this Agreement, (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 to Financing Providers. Notwithstanding any provision to the contrary in this Section 11.1, Buyer hereby consents to assignment of this Agreement by Seller as collateral for any financing or refinancing of the Facility to a Lender. Seller's obligations under this Agreement shall continue in their entirety in full force and effect. Promptly after granting such interest, Seller shall notify Buyer in writing of the name, address, and telephone and facsimile numbers of any Lender to which the Seller's interest under this Agreement has been assigned. The notice shall include the names of the Lender's primary contact(s) to whom all communications may be addressed. Seller shall promptly notify Buyer of any changes to the information contained in the notice. As a condition to Buyer's consent to assignment, the following provisions shall apply to any assignment under this Section 11.1(b):
- (i) Lender shall have the right, but not the obligation, to perform any act required to be performed by Seller under this Agreement to prevent or cure a default by the Seller and such act performed by Lender shall be as effective to prevent or cure a default as if done by Seller.
  - (ii) Buyer shall cooperate with Seller or a Lender to execute or arrange for the delivery of certificates, consents, opinions, estoppels, amendments, and other documents reasonably requested by Seller or Lender in order to complete any financing or refinancing and shall enter into reasonable agreements as necessary to provide for recognition by Buyer of the Lender's security interest in this Agreement and such other provisions as may be reasonably requested by Seller or any Lender, so long as the terms and conditions of such agreements are consistent with this Agreement and such amendments or agreements are reasonably acceptable to both Parties. All costs and expenses (including reasonable attorney's fees) incurred by Buyer in connection with an assignment of this Agreement to a Lender shall be borne by Seller.
  - (iii) In the event of a Default under this Agreement, Buyer shall provide a copy of the notice of Default to the Lender pursuant to Section 8.2(a) at the same time as the notice is provided to Seller. Buyer shall accept a cure performed by a Lender and shall negotiate in good faith with the Lender as to the cure period(s) allowed for the Lender to cure any Event of Default. Buyer shall accept a cure by Lender so long as the cure is accomplished within the applicable cure period. Notwithstanding any Lender cure, Seller shall not be released and discharged from, and shall remain liable for, any and all obligations to the Buyer arising or accruing hereunder.
  - (iv) If Lender, directly or indirectly, takes possession of, or title to the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), Lender must (i) assume all of Seller's obligations arising under this Agreement, and (ii) shall cure all defaults under this Agreement existing as of the date of change of title or control as required under this Agreement.
- (c) Assignment in Connection with a Change in Control. Notwithstanding any provision to the contrary in this Section 11.1, any direct or indirect change of control of Seller (whether voluntary or by operation of Law) shall not require the prior written consent of Buyer.

Seller shall promptly notify Buyer of any direct or indirect change in control and shall provide any information reasonably requested by Buyer regarding the change in control, provided that this obligation does not apply to any direct or indirect owners of Seller's Parent. Seller acknowledges that its obligations under this Agreement remain in full force and effect notwithstanding such change in control and that Seller is solely responsible for ensuring that all required changes to its vendor certifications are promptly implemented.

- (d) Unauthorized Assignment. Any assignment or purported assignment in violation of this Section 11.1 is void.

## **11.2 Proprietary or Confidential Information.**

- (a) Confidential Information. Each Party understands and agrees that, in the performance of this Agreement or in contemplation thereof, the other Party may have access to private or confidential information and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the Party that owns or controls the Confidential Information. Each Party agrees that all private and confidential information disclosed by one Party to the other Party shall be held in confidence and used only in performance of the Agreement; however, a Party may disclose the Confidential Information of the other Party to its officers, employees, agents, consultants, and contractors as necessary for the performance of its obligations under this Agreement and as necessary to comply with any applicable requirements or orders of a Governmental Authority. Each Party 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 Laws).
- (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 11.2 nothing shall restrict any Party from using or disclosing information related to this 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, or to the auditors, attorneys, advisors, or actual or potential lenders or investors of the non-disclosing Party and/or its Affiliates which are required to keep the information that is disclosed in confidence.

- (e) Nondisclosure of Private Information. If this 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 Agreement and only as necessary in performing this Agreement. Seller is subject to the enforcement and penalty provisions in Chapter 12M.

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

- (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 Agreement by negotiation. The status of any dispute or controversy notwithstanding, each Party shall proceed diligently with the performance of its obligations under this Agreement in accordance with and subject to the terms of this 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) Governing Law; Venue. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. Venue shall be in the County of San Francisco, 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 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 Agreement or until after final audit has been resolved, whichever is later.

### **11.5 General.**

- (a) Entire Agreement. This Agreement, the exhibits, attachments, and any written and fully executed supplements hereto, any designated collateral, credit support, or similar arrangement between the Parties constitute the entire agreement between the Parties relating to the subject matter.
- (b) Construction. This 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 Agreement shall be enforceable unless reduced to writing and executed by both Parties.
- (d) No Third-Party Beneficiaries. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this 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 Agreement is rendered unlawful by action by any Governmental Authority, or any change in Applicable Law including the CAISO Tariff (a "Change in Law") occurring after the Execution Date, the remaining lawful obligations that arise under this 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 so that the performance of this Agreement becomes impossible or impracticable, the Parties shall work in good faith to revise this Agreement so that the Parties may perform their obligations in a manner that maintains to the greatest extent practicable the original intent of the Parties and the benefits, burdens, and obligations under this Agreement. A change in cost shall not in and of itself be deemed to render this Agreement or any provision of this Agreement impossible or impracticable.

- (g) Headings. The headings used herein are for convenience and reference purposes only.
- (h) Assigns. This Agreement shall be binding on each Party's successors and assigns.
- (i) No Dedication. No undertaking by one Party to the other under any provision of the 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. The 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 the Facility or any business related to the Facility.
- (k) Limitations on Contributions. By executing this Agreement, Seller acknowledges its obligations under Section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with, or is seeking a contract with, any department of the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, for a grant, loan or loan guarantee, or for a development agreement, from making any campaign contribution to (i) a City elected official if the contract must be approved by that official, a board on which that official serves, or the board of a state agency on which an appointee of that official serves, (ii) a candidate for that City elective office, or (iii) a committee controlled by such elected official or a candidate for that office, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve months after the date the City approves the contract. The prohibition on contributions applies to each prospective party to the contract; each member of Seller's board of directors; Seller's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Seller; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Seller. Seller certifies that it has informed each such person of the limitation on contributions imposed by Section 1.126 by the time it submitted a proposal for the contract, and has provided the names of the persons required to be informed to the City department with whom it is contracting.
- (l) 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 in the performance of this Agreement. Seller agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the Controller. 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 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.

(m) Nondiscrimination 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 Agreement, and will not during the term of this 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.

(n) Consideration of Salary History. Seller shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or "Pay Parity Act." Seller is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant to the extent that such applicant is applying for employment to be performed on this Agreement or in furtherance of this Agreement, and whose application, in whole or part, will be solicited, received, processed or considered, whether or not through an interview, in the City or on City property. Seller is subject to the enforcement and penalty provisions in Chapter 12K.

(o) Consideration of Criminal History in Hiring and Employment Decisions. Seller agrees to comply fully with and be bound by all of the provisions of Chapter 12T, "City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code, including the remedies provided, and implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to Seller's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

(p) Submitting False Claims. Pursuant to San Francisco Administrative Code Section 21.35, any contractor or subcontractor who submits a false claim shall be liable to Buyer for the statutory penalties set forth in that section. A contractor or subcontractor will be deemed to have submitted a false claim to Buyer if the contractor or subcontractor: (a) knowingly presents or causes to be presented to an officer or employee of 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 Buyer; (c) conspires to defraud Buyer by getting a false claim allowed or paid by 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 Buyer; or (e) is a beneficiary of an inadvertent submission of a false claim to Buyer, subsequently discovers the falsity of the claim, and fails to disclose the false claim to Buyer within a reasonable time after discovery of the false claim.

- (q) Local Business Enterprise and Non-Discrimination in Contracting Ordinance. Seller shall comply with all applicable provisions of the Local Business Enterprise Ordinance, Chapter 14B of the San Francisco Administrative Code, and Seller is subject to the enforcement and penalty provisions in Chapter 14B.
- (r) First Source Hiring Program. Seller shall comply with all applicable provisions of the First Source Hiring Program, Chapter 83 of the San Francisco Administrative Code, and Seller is subject to the enforcement and penalty provisions in Chapter 83.
- (s) Use of City 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 Buyer.
- (t) Business License Taxes. Seller agrees that it is obligated to pay all amounts due to the City under the San Francisco Business and Tax Regulations Code during the Term of this Agreement. Pursuant to Section 6.10-2 of the San Francisco Business and Tax Regulations Code, Seller further acknowledges and agrees that City may withhold any payments due to Seller under this Agreement if Seller is delinquent in the payment of any amount required to be paid to the City under the San Francisco Business and Tax Regulations Code. Any payments withheld under this Section 11.5(r) shall be made to Seller, without interest, upon full payment of all taxes owed by Seller and reinstatement of Seller's vendor certification
- (u) Conflict of Interest. Through its execution of this Agreement, Seller acknowledges that it is familiar with the provision of Section 15.103 of the 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 Buyer if it becomes aware of any such fact during the term of this Agreement.
- (v) City Requirements. Seller shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of City and of all state, and federal laws in any manner affecting the performance of the Agreement, and must at all times materially comply with such local codes, ordinances, and regulations as they may be amended from time to time. Buyer shall use best efforts to provide notice to Seller of any such amendment to the City's Charter, codes, ordinances and regulations of which it becomes aware; however, Seller's obligations under this Section shall not be contingent on notice from Buyer.
- (w) Severability. Should any provision of the Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of the 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.
- (x) Survival. All rights pursuant to Section 3.5 (Environmental Attributes); Section 4.1(e) (Disputes and Adjustment of Invoices); Section 5.6(c) (CAISO Charges Invoices); Article 8 (Default; Remedies; and Termination), Article 9 (Indemnification), Section 11.2 (Proprietary or Confidential Information); Section 11.3 (Dispute Resolution; Choice of Law), Section 11.4 (Audit); Section 11.5(l) (Prohibition on Political Activity with City Funds); and Section 11.5(q) (City Opinion) shall also survive termination of this Agreement.

**11.6 Mobile Sierra.** Absent the prior written agreement of all Parties, the standard of review for changes to any rate, charge, term, or condition of service of this Agreement, whether proposed by a 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).



- 11.7 Forward Contract.** The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code and Buyer and Seller are “forward merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.
- 11.8 Notices.** Unless otherwise stated in this Agreement, any notice, demand, request, or communication required or authorized by this Agreement shall be delivered either by hand, 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 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.
- 11.9 Counterparts.** This 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 Agreement by fax or other electronic means shall be deemed as effective as delivery of an originally executed counterpart. Any Party delivering an executed counterpart of this 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 Agreement shall not affect the validity or effectiveness of this Agreement.

*[Signature page follows on next page.]*

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

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

**Seller**

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

General Manager  
San Francisco Public Utilities Commission

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

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

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

Approved as to Form:

City Attorney

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

Deputy City Attorney

## **EXHIBIT A**

### **SELLER DOCUMENTATION OF CONDITIONS PRECEDENT**

#### **Part I:**

Seller shall provide to Buyer all of the following documentation at least five (5) Business Days prior to the Execution Date:

1. A copy of each of (a) the articles of incorporation, certificate of incorporation, operating agreement or similar applicable organizational document of Seller and (b) the by-laws or other similar document of Seller as in effect, or anticipated to be in effect, on the Execution Date.
2. 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.
3. Evidence of Site control (e.g. lease with redacted price terms).
4. Evidence of CEC Certification or pre-certification received, as applicable.
5. A copy of the Interconnection Agreement, if any.
6. Insurance documentation as required in Exhibit D.
7. A copy of the most recent financial statements (which may be unaudited) from Seller's Parent.

#### **Part II:**

Seller shall provide to Buyer all of the following documentation in a timely manner following the Execution Date:

1. Evidence of all Permits received, as applicable, including but not limited to, any copies of all final environmental review documents.
2. A copy of the agreement for the Facility specified in Section 5.1(g).
3. A copy of the plan specified in Section 5.1(h).

## **EXHIBIT B**

### **FACILITY DESCRIPTION AND SITE DRAWINGS**

#### **I. Facility Description**

Facility name:

Facility physical address:

Technology type (including any applicable model):

Interconnection Point of Facility:

Interconnection Agreement Name/Number:

Assessor's Parcel No:

#### **II. Operational Characteristics / Limitations**

PMax of the Facility:

PMin of the Facility:

#### **III. Site Drawings**

A. Site Map

B. Single Line Diagram.

**EXHIBIT C**  
**CONTRACT QUANTITY**

<b>Contract Year</b>	<b>Contract Quantity (in MWh)</b>
1	
2	
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## EXHIBIT D

### INSURANCE COVERAGES

1. **Liability Coverages.** Without in any way limiting Seller's liability pursuant to the "Indemnification" section of this Agreement, Seller must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages and be responsible for its subcontractors, including Seller's EPC Contractors, maintaining sufficient limits of the appropriate insurance:
  - (a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; and include a blanket waiver of subrogation; and
  - (b) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
  - (c) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence, "Combined Single Limit" for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
  - (d) Employer's Liability Insurance. Employers' Liability insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.
  - (e) Construction All-Risk Insurance. Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming Seller (and Lender if any) as the loss payee.
2. **Additional Coverages**
  - (a) Property insurance, on an all-risk form, including earthquake and flood, for one hundred percent (100%) of the full replacement value of the Site and Facility or 125% of the Loss Limit of the 1/500 year earthquake/flood event as established by a Maximum Foreseeable Loss earthquake and flood study prepared by the applicable insurer in accordance with current industry standard. Such insurance shall, include Business Interruption coverage in an amount equal to twelve months of revenue from this Agreement.
3. **Endorsements.**
  - (a) Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide include blanket endorsements:
    - (i) Name as Additional Insured, the City and County of San Francisco, its Officers, Agents, and Employees.
    - (ii) The certificate of insurance shall state that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.
  - (b) All policies shall provide thirty (30) days' advance written notice of cancellation for any reason, intended non-renewal, or reduction in coverages, except ten (10) days' notice for non-payment of premiums.
4. **Length of Coverage.** Should any of the required insurance be provided under a claims-made form, Seller shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three years beyond the expiration of this Agreement, to the effect that,

should occurrences during the Term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.

5. **Maintenance of Coverage.** Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Buyer receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, Buyer may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

**Certificates.** Prior to commencement of the Term, Seller shall furnish to Buyer certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A- , VII or higher, that are authorized to do business in the State of California, and that are satisfactory to Buyer, in form evidencing all coverages set forth above. Approval of the insurance by Buyer shall not relieve or decrease Seller's liability hereunder.

**EXHIBIT E**

**CONSTRUCTION START  
CERTIFICATION**

\_\_\_\_\_(Date)\_\_\_\_\_

This certification (“Certification”) of the Construction Start Date is delivered by \_\_\_\_\_ (“Seller”) to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (“Buyer”) in accordance with the terms of that certain Renewable Power Purchase Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement. Seller hereby certifies and represents to Buyer that Construction Start has occurred and:

- a) the Construction Start Date occurred on \_\_\_\_\_. (“Construction Start Date”);
- b) the Notice to Proceed was issued by Seller to the EPC Contractor, [EPC Contractor Name] on \_\_\_\_\_ (attached), and;
- c) mobilization at the Facility Site commenced on \_\_\_\_\_.

IN WITNESS WHEREOF, the undersigned has executed this certificate on behalf of the Seller as of the \_\_\_\_ day of \_\_\_\_\_.

**Seller:**

**[Licensed Professional Engineer]**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

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

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

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

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

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

License Number and LPE Stamp: \_\_\_\_\_



**EXHIBIT F**  
**PROGRESS REPORT**

Each Progress Report must include the following items:

1. Executive Summary.
  2. Gantt chart schedule showing progress on achieving each of the Milestones.
  3. Description of any material planned changes to the Facility or the Project Site.
  4. Financing activities. Provide a summary of the status and progress of each major financing activity, including the date of execution of significant documents, and information on the expected timing of future significant activities.
  5. Major equipment procurement activities. For each type of equipment, list the number of each major item to be procured, the manufacturer, model number (if applicable), and rating. List the delivery schedule (expected or actual as applicable), breaking out the number of each item to be procured or delivered in each Calendar Quarter.
  6. Construction Activities. Include information on the status of any construction-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the Facility infrastructure, generating equipment, and major auxiliary equipment. Also include information on the substations, switchyards, gen-ties, telecommunications equipment or other Interconnection Facilities that are the direct responsibility of the Facility.
  7. Interconnection Activities. Include information on interconnection-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the status of interconnection studies, Interconnection Agreements, design and construction of Interconnection Facilities (e.g., substations, switchyards, gen-ties, system protection schemes, telecommunications equipment to the extent not already covered in the Facility construction information), Network Upgrades, and grid outage and/or interconnection schedules.
  8. Startup. Include information on the status of activities related to preparation for Commercial Operation, including progress towards the items set forth in Exhibit H-2, the requirements and notifications of the grid operator and Transmission Provider, and any other activities that must be conducted before the Facility may deliver Energy to the grid and/or declare Commercial Operation.
- For items 4 through 8, include the progress and schedule of all major agreements, contracts, permits, approvals, technical studies, financing agreements, and major equipment purchase orders showing the start dates, completion dates, and completion percentages. 8. Forecast of activities scheduled for the current calendar quarter.
9. List of issues that are likely to potentially affect Seller's Milestones.
  10. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and startup progress of the Facility, the interconnection into the Transmission System and all other interconnection utility services.
  11. CPUC General Order 156 supplier diversity reporting. Format to be provided by Buyer.
  12. Any other documentation reasonably requested by Buyer.

## EXHIBIT G-1

### FORM OF COMMERCIAL OPERATION CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by [LICENSED PROFESSIONAL ENGINEER] ("Engineer") to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF ("Buyer") in accordance with the terms of that certain Energy Storage Agreement dated \_\_\_\_\_ ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined in this Exhibit G-1 shall have the meanings assigned to these terms in the Agreement.

Engineer hereby certifies and represents to Buyer the following:

1. The Facility is fully operational, reliable, and interconnected.
2. The Facility is fully integrated and synchronized with the Transmission System.
3. The Facility's Installed Capacity is no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Capacity.
4. The Facility has met all Interconnection Agreement requirements and is capable of delivering Energy to the CAISO Balancing Authority up to the Guaranteed Installed Capacity.
5. The commissioning of all equipment for the Facility has been completed in accordance with the applicable manufacturer's specifications.
6. The Facility's testing included a performance test demonstrating peak electrical output of no less than ninety-five (95%) of the Guaranteed Initial Capacity for the Facility at the Delivery Point, as adjusted for ambient conditions on the date of the Facility testing, and such peak electrical output, as adjusted, was [*peak output in MW*].
7. Authorization to parallel the Facility was obtained by the Transmission Provider on \_\_\_\_[DATE]\_\_\_\_.
8. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Transmission Owner] on \_\_\_\_[DATE]\_\_\_\_.
9. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO tariff on \_\_\_\_[DATE]\_\_\_\_.

EXECUTED by ENGINEER this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Licensed Professional Engineer:**

Signature:\_\_\_\_\_

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

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

**EXHIBIT G-2**  
**FORM OF INSTALLED CAPACITY CERTIFICATION**

This certification of the Installed Capacity is delivered by [licensed professional engineer] to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, in accordance with the terms of the Renewable Power Purchase Agreement dated \_\_\_\_\_, (“Agreement”) by and between Buyer and Seller. All capitalized terms used in this certification but not otherwise defined herein shall have the meanings set forth in the Agreement.

I hereby certify the following:

The initial Facility performance test under Seller’s EPC contract for the Facility demonstrated peak Facility electrical output of [ ] MW AC to the Delivery Point, as adjusted for ambient conditions on the date of the performance test (“Installed Capacity”).

EXECUTED BY [LICENSED PROFESSIONAL ENGINEER]

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**[Licensed Professional Engineer]**

Signature:\_\_\_\_\_

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

**EXHIBIT H-1**  
**LETTER OF CREDIT**

**[Issuing Bank Letterhead and Address]**

STANDBY LETTER OF CREDIT NO. XXXXXXXX

**Date:** **[Insert issue date]**

**Beneficiary:** City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF  
525 Golden Gate Avenue  
San Francisco, CA 94102  
Attn:

**Applicant:** **[Insert name and address of Applicant]**

**Letter of Credit Amount:** **[insert Amount]**

**Expiry Date:** **[insert expiry date]**

Ladies and Gentlemen:

By order of **[insert name of Applicant]** ("Applicant"), we hereby issue in favor of the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (the "Beneficiary") our irrevocable standby letter of credit No. **[insert number of letter of credit]** ("Letter of Credit"), for the account of Applicant, for drawings up to but not to exceed the aggregate sum of U.S. \$ **[insert amount in figures followed by (amount in words)]** ("Letter of Credit Amount"). This Letter of Credit is available with **[insert name of issuing bank, and the city and state in which it is located]** by sight payment, at our offices located at the address stated below, effective immediately, and it shall expire at our close of business on **[insert expiry date]** (the "Expiry Date").

Funds under this Letter of Credit are available to the Beneficiary against presentation of the following documents:

1. Beneficiary's signed and dated sight draft in the form of Exhibit J-2 hereto, referencing this Letter of Credit No. **[insert number]** and stating the amount of the demand; and
2. One of the following statements signed by an authorized representative or officer of Beneficiary:
  - A. Pursuant to the terms of that certain **[insert name of the agreement]** (the "Agreement"), dated **[insert date of the Agreement]**, between Beneficiary and **[insert name of Seller under the Agreement]**, Beneficiary is entitled to draw under Letter of Credit No. **[insert number]** amounts owed by **[insert name of Seller under the Agreement]** under the Agreement; or
  - B. "Letter of Credit No. **[insert number]** shall expire in thirty (30) days or less and **[insert name of Seller under the Agreement]** has not provided replacement security acceptable to Beneficiary.

Special Conditions:

1. Partial and multiple drawings under this Letter of Credit are allowed;
2. All banking charges associated with this Letter of Credit are for the account of the Applicant;

3. This Letter of Credit is not transferable; and
4. The Expiry Date of this Letter of Credit shall be automatically extended without a written amendment for a period of one year and on each successive Expiry Date, unless at least sixty (60) days before the then current Expiry Date, we notify you by registered mail or courier that we elect not to extend the Expiry Date of this Letter of Credit for such additional period.

We engage with you that drafts drawn under and in compliance with the terms of this Letter of Credit shall be duly honored upon presentation, on or before the Expiry Date (or after the Expiry Date as provided below), at our offices at **[insert issuing bank's address for drawings]**.

All demands for payment shall be made by presentation of originals or copies of documents; or by facsimile transmission of documents to **[insert fax number]**, Attention: **[insert name of issuing bank's receiving department]**, with originals or copies of documents to follow by overnight mail. If presentation is made by facsimile transmission, you may contact us at **[insert phone number]** to confirm our receipt of the transmission. Your failure to seek such a telephone confirmation does not affect our obligation to honor such a presentation.

Our payments against complying presentations under this Letter of Credit shall be made no later than on the sixth (6th) banking day following a complying presentation.

Except as stated herein, this Letter of Credit is not subject to any condition or qualification. It is our individual obligation, which is not contingent upon reimbursement and is not affected by any agreement, document, or instrument between us and the Applicant or between the Beneficiary and the Applicant or any other party.

Except as otherwise specifically stated herein, this Letter of Credit is subject to and governed by the *Uniform Customs and Practice for Documentary Credits, 2007 Revision*, International Chamber of Commerce (ICC) Publication No. 600 (the "UCP 600"); provided that, if this Letter of Credit expires during an interruption of our business as described in Article 36 of the UCP 600, we shall honor drafts presented in compliance with this Letter of Credit within thirty (30) days after the resumption of our business and effect payment accordingly. The law of the State of New York shall apply to any matters not covered by the UCP 600.

For telephone assistance regarding this Letter of Credit, please contact us at **[insert number and any other necessary details]**.

**EXHIBIT H-2**  
**SIGHT DRAFT**

TO: [INSERT NAME AND ADDRESS OF PAYING BANK]

AMOUNT: \$

DATE:

AT SIGHT OF THIS DEMAND PAY TO THE ORDER OF \_\_\_\_\_ THE AMOUNT  
OF U.S.\$ \_\_\_\_\_ U.S. DOLLARS) DRAWN  
UNDER [INSERT NAME OF ISSUING BANK] LETTER OF CREDIT NO. XXXXXX.

REMIT FUNDS AS FOLLOWS:

[INSERT PAYMENT INSTRUCTIONS]

DRAWER

Name and Title

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

**EXHIBIT I**  
**FORM OF REPLACEMENT RA NOTICE**

This Replacement RA Notice is delivered by [SELLER ENTITY] (“Seller”) to the City and County of San Francisco acting by and through its Public Utilities Commission, CleanPowerSF in accordance with the terms of the Energy Storage Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms not otherwise defined in this RA Notice shall have the meaning set forth in the Agreement.

UNIT SPECIFIC INFORMATION	
Resource Name	
Physical Location	
CAISO Resource ID	
SCID of Resource	
Unit NQC by month	
Unit EFC by month	
Resource Type	
Minimum Qualified Flexible Capacity Category	
TAC Area	
Prorated Percentage of Unit Factor	
Prorated Percentage of Unit Flexible Factor	
Local Capacity Area	
Resource Category as defined by the CPUC	

Showing Month and Year	Quantity (MW)
[MM] [YY]	

## EXHIBIT L

### FORM OF BUYER LIABILITY PASS THROUGH AGREEMENT

This Buyer Liability Pass Through Agreement (this “**BLPTA**”) is entered into as of [\_\_\_\_], 20\_\_ (the “**BLPTA Effective Date**”) by and between [\_\_\_\_], a [\_\_\_\_] (together with its successors and permitted assigns “**Project Participant**”), California Community Power, a California joint powers authority (“**CC Power**”), and [\_\_\_\_], a [\_\_\_\_] (together with its successors and permitted assigns “**Seller**”). Seller, CC Power, and Project Participant are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.”

### RECITALS

**WHEREAS**, CC Power and Seller have entered into that certain Energy Storage Service Agreement (as amended, restated or otherwise modified from time to time, the “**ESSA**”) dated as of [\_\_\_\_], 20\_\_;

**WHEREAS**, Project Participant is entering into this BLPTA to secure, in part, California Community Power’s obligations under the ESSA;

**WHEREAS**, Project Participant is named as a Project Participant under the ESSA and will derive substantial direct and indirect benefits from the execution and delivery of the ESSA;

**WHEREAS**, Seller and CC Power will derive substantial and direct benefits from the execution and delivery of this BLPTA; and

**WHEREAS**, initially capitalized terms used but not defined herein have the meaning set forth in the ESSA.

**NOW THEREFORE**, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

### AGREEMENT

**1. Project Participant Covenants.** For value received, Project Participant does hereby unconditionally, absolutely, and irrevocably guarantee, as obligor and not as a surety, to Seller the complete and prompt payment of [X%] (the “**Liability Share**”), as the same may be adjusted pursuant to Section 4, [*Note: Insert percentage from Exhibit V*] of all obligations and liabilities for payment now or hereafter owing from CC Power to Seller under the ESSA, including liabilities for Monthly Capacity Payments, the Damage Payment or Termination Payment, as applicable, and any other damage payments or reimbursement amounts (each such obligation or liability of CC Power under the ESSA, a “**Guaranteed Amount**”). Any payment



made directly from CC Power to Seller under the ESSA shall reduce Project Participant's liability hereunder by reducing the total amount that is used to calculate the Guaranteed Amount pursuant to the preceding sentence. This BLPTA is an irrevocable, absolute, unconditional, and continuing guarantee of the punctual payment and performance, and not of collection, of Project Participant's Liability Share of the Guaranteed Amount. In the event CC Power shall fail to duly, completely, or punctually pay any amount owed by Buyer pursuant to the terms and conditions of the ESSA, and such failure is not remedied within ten (10) Business Days after Notice thereof pursuant to Sections 11.1 or 11.4, as applicable, Project Participant shall promptly pay Project Participant's Liability Share of the Guaranteed Amount, as required herein.

**2. Seller Waiver.** In consideration of the foregoing, Seller unconditionally waives:

- a) all right to recover directly from CC Power any Damage Payment or Termination Payment that is not paid by CC Power pursuant to Sections 11.3 and 11.4 of the ESSA, but the foregoing waiver does not apply to any other right or remedy of Seller under the ESSA, including the right to recover accrued Monthly Capacity Payments, other amounts payable or reimbursable under the ESSA or any other amounts incurred or accrued prior to termination of the ESSA and the right to terminate the ESSA as the result of an Event of Default by Buyer

**3. Demand Notice.** For avoidance of doubt, Seller may demand payment from Project Participant for purposes of this BLPTA only when and if a payment is not duly, completely, or punctually paid by CC Power pursuant to the terms and conditions of the ESSA and such failure is not remedied by CC Power within ten (10) Business Days after Notice thereof is issued pursuant to Sections 11.1 or 11.4, as applicable. If CC Power fails to pay any amount when due pursuant to the ESSA, and such failure is not remedied by CC Power within ten (10) Business Days after Notice thereof, then Seller may exercise its rights under this BLPTA and make a payment demand upon Project Participant to pay Project Participant's Liability Share of the unpaid Guaranteed Amount (a "**Payment Demand**"). A Payment Demand shall be in writing and shall reasonably specify (a) in what manner and what amount CC Power has failed to pay, (b) an explanation of why such payment is due and owing, (c) a calculation of the Guaranteed Amount due from Project Participant, and (d) a specific statement that Seller is requesting that Project Participant pay its Guaranteed Liability Share of the unpaid Guaranteed Amount under this BLPTA. Project Participant shall, within fifteen (15) Business Days following its receipt of the Payment Demand, pay to Seller Project Participant's Liability Share of the unpaid Guaranteed Amount.

**4. Step-Up Events.** Within thirty (30) days after the occurrence of a Step-Up Event, Project Participant and CC Power will tender to Seller a duly executed and binding replacement Buyer Liability Pass Through Agreement in the same form as this Agreement, but for a Liability Share equal to the Project Participant's Revised Liability Share. Upon receipt of such executed replacement Buyer Liability Pass Through Agreement, Seller will cancel this Buyer Liability Pass Through Agreement, effective upon the effectiveness of the replacement Buyer Liability Pass Through Agreement. For the avoidance of doubt, the cancellation of an existing Buyer Liability Pass Through Agreement shall not be effective unless and until the replacement Buyer Liability Pass Through Agreement has become effective and binding. Following delivery of

such replacement Buyer Liability Pass Through Agreement and cancellation of this Buyer Liability Pass Through Agreement, Exhibit V to the ESSA will be deemed amended to reflect the Project Participant's Revised Liability Share; *provided* that the Project Participant's Revised Liability Share shall not exceed one hundred twenty-five percent (125%) of the Project Participant's Initial Liability Share.

**5. Scope and Duration of BLPTA.** The obligations under this BLPTA are independent of the obligations of CC Power under the ESSA, and an action may be brought to enforce this BLPTA whether or not action is brought against CC Power under the ESSA. This BLPTA shall continue in full force and effect from the BLPTA Effective Date until both of the following have occurred: (a) the Delivery Term of the ESSA has expired or terminated early, and (b) either (i) all payment obligations of CC Power due and payable under the ESSA are paid in full (whether directly or indirectly such as through set-off or netting) or (ii) Project Participant has paid the maximum Guaranteed Amount (i.e. based on its maximum Revised Liability Share as provided in Section 4) in full. This BLPTA shall also continue to be effective or be reinstated, as the case may be, if at any time any payment of any Guaranteed Amount by CC Power is rescinded or must otherwise be returned by Seller upon the insolvency, bankruptcy or reorganization of CC Power or similar proceeding, all as though such payment had not been made, and Project Participant's Liability Share of such Guaranteed Amount shall be subject to payment following a Payment Demand issued pursuant to this BLPTA. Without limiting the generality of the foregoing, and to the extent that the Project Participant has not paid its maximum Guaranteed Amount in full, the obligations of the Project Participant hereunder shall not be released, discharged, or otherwise affected, and this BLPTA shall not be invalidated or impaired or otherwise affected for the following reasons:

- a) The extension of time for the payment of any Guaranteed Amount; or
- b) Any amendment, modification or other alteration of the ESSA; or
- c) Any insurance that may be available to cover any loss, except to the extent insurance proceeds are used to satisfy the Guaranteed Amount; or
- d) Any voluntary or involuntary liquidation, dissolution, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar proceeding affecting CC Power, including but not limited to any rejection or other discharge of CC Power's obligations under the ESSA imposed by any court, trustee or custodian or any similar official or imposed by any law, statute or regulation, in each such event in any such proceeding; or
- e) Any reorganization of CC Power or Project Participant, or any merger or consolidation of CC Power or Project Participant into or with any other Person; or
- f) The receipt, release, modification or waiver of, or failure to pursue or seek relief under or with respect to, any other BLPTA, guaranty, collateral, pledge or security device whatsoever; or

g) CC Power's inability to pay any Guaranteed Amount or perform its obligations under the ESSA; or

h) Any other event or circumstance that may now or hereafter constitute a defense to payment of the Guaranteed Amount, including, without limitation, statute of frauds and accord and satisfaction; *provided* that Project Participant reserves the right to assert for itself any defenses, setoffs or counterclaims that CC Power is or may be entitled to assert against Seller, including with respect to disputes regarding the calculation of a Guaranteed Amount.

**6. Waivers by Project Participant.** Project Participant hereby unconditionally waives as a condition precedent to the performance of its obligations hereunder, with the exception of the requirements in Paragraphs 2 and 3, (a) notice of acceptance, presentment or protest, notice of any of the events described in Paragraph 5, or any other notice or demand of any kind with respect to the Guaranteed Amounts and this BLPTA, (b) any requirement that Seller pursue or exhaust any right, power or remedy or proceed against California Community Power under the ESSA or against any other Person, including any obligation to pursue any other BLPTAs, or to marshal assets, (c) any defense based on any of the matters described in Paragraph 4, (d) all rights of subrogation or other rights to pursue CC Power for payments made under this BLPTA until all amounts owing under the ESSA have been paid in full, and (e) any duty of Seller to disclose any information or other matters relating to the business, operations or finances or other condition of CC Power or any other Person who has provided a BLPTA or other security or guaranty with respect to the ESSA now or hereafter known to Seller. Project Participant further acknowledges and agrees that it is and will be bound by actions taken and elections made by CC Power under the ESSA and waives any defense based on CC Power's authority or lack thereof or the validity, regularity or advisability of the actions taken or elections made.

**7. Project Participant Representations and Warranties.** Project Participant hereby represents and warrants that (a) it has all necessary and appropriate powers and authority and the legal right to execute and deliver, and perform its obligations under, this BLPTA, (b) this BLPTA constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights or general principles of equity, (c) the execution, delivery and performance of this BLPTA does not and will not contravene Project Participant's organizational documents, any applicable Law or any contractual provisions binding on or affecting Project Participant, (d) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Project Participant, threatened, against or affecting Project Participant or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Project Participant to enter into or perform its obligations under this BLPTA, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any member of the Project Participant), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this BLPTA by Project Participant.

**8. Seller Representations and Warranties.** Seller hereby represents and warrants that (a) it has all necessary and appropriate powers and authority and the legal right to execute and deliver, and perform its obligations under, this BLPTA, (b) this BLPTA constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights or general principles of equity, (c) the execution, delivery and performance of this BLPTA does not and will not contravene Seller's organizational documents, any applicable Law or any contractual provisions binding on or affecting Seller, (d) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Seller, threatened, against or affecting Seller or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Seller to enter into or perform its obligations under this BLPTA, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Seller), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this BLPTA by Seller.

**9. California Community Power Representations and Warranties.** California Community Power hereby represents and warrants that (a) it has all necessary and appropriate powers and authority and the legal right to execute and deliver, and perform its obligations under, this BLPTA, (b) this BLPTA constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights or general principles of equity, (c) the execution, delivery and performance of this BLPTA does not and will not contravene California Community Power's organizational documents, any applicable Law or any contractual provisions binding on or affecting California Community Power, (d) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the California Community Power, threatened, against or affecting California Community Power or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of California Community Power to enter into or perform its obligations under this BLPTA, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any member of California Community Power), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this BLPTA by California Community Power.

**10. Notices.** Notices under this BLPTA shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, and (ii) four (4) Business Days after mailing if sent by certified, first-class mail, return receipt requested. Any Party may change its address or facsimile to which notice is given hereunder by providing notice of the same in accordance with this Paragraph 8.

If delivered to Seller, to it at:

[\_\_\_\_]  
Attn: [\_\_\_\_]

Fax: [ ]

If delivered to Project Participant, to it at:

[ ]

Attn: [ ]

Fax: [ ]

If delivered to CC Power, to it at:

[ ]

Attn: [ ]

Fax: [ ]

**11. Governing Law and Forum Selection.** This BLPTA shall be governed by, and interpreted and construed in accordance with, the laws of the United States and the State of California, excluding choice of law rules. The Parties agree that any suit, action or other legal proceeding by or against any Party (or its affiliates or designees) with respect to or arising out of this BLPTA shall be brought in the federal courts of the United States or the courts of the State of California sitting in the county of \_\_\_\_\_.

**12. Miscellaneous.** This BLPTA shall be binding upon the Parties and their respective successors and assigns and shall inure to the benefit of the Parties and their successors and permitted assigns. No provision of this BLPTA may be amended or waived except by a written instrument executed by Seller, CC Power, and Project Participant. No provision of this BLPTA confers, nor is any provision intended to confer, upon any third party (other than the Parties' successors and permitted assigns) any benefit or right enforceable at the option of that third party. This BLPTA embodies the entire agreement and understanding of the Parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements and understandings of the Parties hereto, verbal or written, relating to the subject matter hereof. If any provision of this BLPTA is determined to be illegal or unenforceable (i) such provision shall be deemed restated in accordance with applicable Laws to reflect, as nearly as possible, the original intention of the Parties hereto, and (ii) such determination shall not affect any other provision of this BLPTA and all other provisions shall remain in full force and effect. This BLPTA may be executed in any number of separate counterparts, each of which when so executed shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. This BLPTA may be executed and delivered by electronic means with the same force and effect as if the same was a fully executed and delivered original manual counterpart.

**13. Assignment.** Except as provided below in this Paragraph 12, no Party may assign this BLPTA or its rights or obligations under this BLPTA, without the prior written consent of the other Parties, which consent shall not be unreasonably withheld, conditioned or delayed. Seller may, without the prior written consent of Project Participant and CC Power, transfer or assign this BLPTA to any Person to whom Seller may assign its rights or obligations under the ESSA, including assignments for financing purposes, including a Portfolio Financing; *provided*,

Seller shall give Project Participant and CC Power Notice at least fifteen (15) Business Days before the date of such proposed assignment and, except in the case of a collateral assignment or other assignment for financing purposes, provide Project Participant and CC Power a written agreement signed by the Person to which Seller wishes to assign its interests that provides that such Person will fully assume all of Seller's obligations and liabilities under this BLPTA, including obligations and liabilities that arose prior to the date of transfer or assignment, upon such transfer or assignment. Project Participant may, without the prior written consent of Seller and CC Power, transfer or assign this BLPTA to any member of CC Power that (A) has a Credit Rating of at least BBB- from S&P or Baa3 from Moody's, and (B) is a load serving entity; *provided*, Project Participant shall give Seller and CC Power Notice at least fifteen (15) Business Days before the date of such proposed assignment and provide to Seller and CC Power a written agreement signed by the Person to which Project Participant wishes to assign its interests that provides that such Person will fully assume all of Project Participant's obligations and liabilities, including obligations and liabilities that arose prior to the date of transfer or assignment, under this BLPTA upon such transfer or assignment.

**14. No Recourse to Members of Project Participant.** Project Participant is organized as a Joint Powers Authority in accordance with the Joint Exercise of Powers Act of the State of California (Government Code Section 6500, et seq.) pursuant to its joint powers agreement and is a public entity separate from its constituent members. Project Participant shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this BLPTA. Seller and CC Power shall have no rights and shall not make any claims, take any actions or assert any remedies against any of Project Participant's constituent members, or the officers, directors, advisors, contractors, consultants or employees of Project Participant or its constituent members, in connection with this BLPTA.

**15. No Recourse to Members of CC Power.** CC Power is organized as a Joint Powers Authority in accordance with the Joint Exercise of Powers Act of the State of California (Government Code Section 6500, et seq.) pursuant to its Joint Powers Agreement and is a public entity separate from its constituent members. Except as expressly set forth in the ESSA and this BLPTA, CC Power shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this BLPTA, and as such, Seller and Project Participant shall have no rights and shall not make any claims, take any actions or assert any remedies against any of CC Power's constituent members, or the officers, directors, advisors, contractors, consultants or employees of Project Participant or its constituent members, in connection with this BLPTA.

**16. CleanPowerSF as Project Participant.** Paragraph 14 shall not apply if CleanPowerSF is the Project Participant, but the following shall apply:

a) **Designated Fund.** CleanPowerSF payment obligations under this BLPTA are special limited obligations of CleanPowerSF payable solely from the revenues of CleanPowerSF. CleanPowerSF's payment obligations under this BLPTA are not a charge upon the revenues or general fund of the San Francisco Public Utility Commission ("**SFPUC**") or the

City and County of San Francisco or upon any non- CleanPowerSF moneys or other property of the SFPUC or the City and County of San Francisco.

b) Controller Certification. CleanPowerSF'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 CleanPowerSF are not authorized to request, and CleanPowerSF 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 CleanPowerSF are not authorized to offer or promise, nor is CleanPowerSF 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.

c) Biennial Budget Process. For each City and County of San Francisco biennial budget cycle during the term of this BLPTA, CleanPowerSF agrees to take all necessary action to include the maximum amount of its annual payment obligations under this BLPTA in its budget submitted to the City and County of San Francisco's Board of Supervisors for each year of that budget cycle.

d) Compliance with Laws. Each Party shall keep itself fully informed of all applicable federal, state, and local laws in any manner affecting the performance of its obligations under this BLPTA, and must at all times materially comply with such applicable laws as they may be amended from time to time.

e) Prohibition on Political Activity with City Funds. In performing any services required under this BLPTA, Seller shall comply with San Francisco Administrative Code Chapter 12G, which prohibits funds appropriated by the City for this BLPTA from being expended to participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure in San Francisco.

f) Non-discrimination in Contracts. Seller shall comply with the provisions of Chapters 12B and 12C of the San Francisco Administrative Code. Seller shall incorporate by reference in all subcontracts the provisions of Sections 12B.2(a), 12B.2(c)-(k), and 12C.3 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.

g) Non-discrimination in the Provision of Employee Benefits. San Francisco Administrative Code 12B.2. Seller does not as of the date of this BLPTA, and will not during the term of this BLPTA, in any of its operations in San Francisco, on real property owned by San Francisco, or where work is being performed for the City 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.

h) Submitting False Claims. Pursuant to San Francisco Administrative Code §21.35, any contractor or subcontractor who submits a false claim shall be liable to the City for the statutory penalties set forth in that section. A contractor or subcontractor will be deemed to have submitted a false claim to the City if the contractor or subcontractor: (1) knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; (2) 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 City; (3) conspires to defraud the City by getting a false claim allowed or paid by the City; (4) 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 City; or (5) is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim.

i) Consideration of Salary History. Seller shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or “Pay Parity Act.” Seller is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant to the extent that such applicant is applying for employment to be performed on this BLPTA or in furtherance of this BLPTA, and whose application, in whole or part, will be solicited, received, processed or considered, whether or not through an interview, in the City or on City property.

j) Consideration of Criminal History in Hiring and Employment Decisions. Seller agrees to comply fully with and be bound by all of the provisions of Chapter 12T, “City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions,” of the San Francisco Administrative Code, including the remedies provided, and implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to Seller’s operations to the extent those operations are in furtherance of the performance of this BLPTA, shall apply only to applicants and employees who would be or are performing work in furtherance of this BLPTA, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.

k) Conflict of Interest. By executing this BLPTA, Seller certifies that it does not know of any fact which constitutes a violation of Section 15.103 of the City’s Charter; Article III, Chapter 2 of City’s Campaign and Governmental Conduct Code; Title 9, Chapter 7 of the California Government Code (Section 87100 et seq.), or Title 1, Division 4, Chapter 1, Article 4 of the California Government Code (Section 1090 et seq.), and further agrees promptly to notify the City if it becomes aware of any such fact during the term of this BLPTA.

l) Campaign Contributions. By executing this BLPTA, Seller acknowledges its obligations under Section 1.126 of the City’s Campaign and Governmental Conduct Code, which prohibits any person who contracts with, or is seeking a contract with, any department of the City for the rendition of personal services, for the furnishing of any material, supplies or



equipment, for the sale or lease of any land or building, for a grant, loan or loan guarantee, or for a development agreement, from making any campaign contribution to (i) a City elected official if the contract must be approved by that official, a board on which that official serves, or the board of a state agency on which an appointee of that official serves, (ii) a candidate for that City elective office, or (iii) a committee controlled by such elected official or a candidate for that office, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve months after the date the City approves the contract. The prohibition on contributions applies to each prospective party to the contract; each member of Seller's board of directors; Seller's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Seller; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Seller. Seller shall inform the relevant persons of the limitation on contributions imposed by Section 1.126.

m) MacBride Principles – Northern Ireland. Pursuant to San Francisco Administrative Code § 12F.5, the City and County of San Francisco urges companies doing business in Northern Ireland to move towards resolving employment inequities, and encourages such companies to abide by the MacBride Principles. The City and County of San Francisco urges San Francisco companies to do business with corporations that abide by the MacBride principles.

n) Tropical Hardwood and Virgin Redwood Ban. The City and County of San Francisco urges contractors not to import, purchase, obtain, or use for any purpose, any tropical hardwood, tropical hardwood product, virgin redwood or virgin redwood product. If this order is for wood products or a service involving wood products: (a) Chapter 8 of the Environment Code is incorporated herein and by reference made a part hereof as though fully set forth. (b) Except as expressly permitted by the application of Sections 802(B), 803(B), and 804(B) of the Environment Code, Seller shall not provide any items to the City in performance of this BLPTA which are tropical hardwoods, tropical hardwood products, virgin redwood or virgin redwood products. (c) Failure of Seller to comply with any of the requirements of Chapter 8 of the Environment Code shall be deemed a material breach of contract.

o) Effect on Payment Obligations. The Parties agree that, although breach of an obligation set forth in Sections 16(d) through 16(n) may result in Seller incurring liability for such breach, any such liability will be independent of Project Participant's liability hereunder, and no breach of or default by Seller under Sections 16(d) through 16(n) will relieve Project Participant of its liability for its Liability Share of all Guaranteed Amounts, nor may any such breach or default, or claim of breach or default, be permitted or asserted as a defense to or offset against payment of any amounts owed by Project Participant to Seller hereunder.

17. City of San José (San José Clean Energy) as Project Participant. Paragraph 14 shall not apply if the City of San José, as administrator of San José Clean Energy ("SJCE") is the Project Participant, but the following shall apply:

a) Designated Fund. The City of San José is a municipal corporation and is precluded under the California State Constitution and applicable law from entering into obligations that financially bind future governing bodies without an appropriation for such obligation, and, therefore, nothing in the Agreement shall constitute an obligation of future legislative bodies of the City to appropriate funds for purposes of the Agreement; *provided, however*, that the City of San José has created and set aside a designated fund (being the San Jose Energy Operating Fund established pursuant to City of San Jose Municipal Code, Title 4, Part 63, Section 4.80.4050 *et. seq.*) (“**Designated Fund**”) for payment of its obligations under this BLPTA. Subject to the requirements and limitations of applicable law and taking into account other available money specifically authorized by the San José City Council and allocated and appropriated to the SJCE’s obligations, SJCE agrees to establish rates and charges that are sufficient to maintain revenues in the Designated Fund necessary to pay its obligations under this BLPTA.

b) Limited Obligations. SJCE’s payment obligations under this BLPTA are special limited obligations of the SJCE payable solely from the Designated Fund and are not a charge upon the revenues or general fund of the City of San José or upon any non- San José Clean Energy moneys or other property of the Community Energy Department or the City of San José.

c) Nondiscrimination/Non-Preference. In performing its obligations under this BLPTA, Seller shall not, and shall not cause or allow its subcontractors to, discriminate against or grant preferential treatment to any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin. This prohibition applies to recruiting, hiring, demotion, layoff, termination, compensation, fringe benefits, advancement, training, apprenticeship and other terms, conditions, or privileges of employment, subcontracting and purchasing. Seller will inform all subcontractors of these obligations. This prohibition is subject to the following conditions: (i) the prohibition is not intended to preclude Seller from providing a reasonable accommodation to a person with a disability; (ii) the City’s Compliance Officer may require Seller to file, and cause any Seller’s subcontractor to file, reports demonstrating compliance with this section. Any such reports shall be filed in the form and at such times as the City’s Compliance Officer designates. They shall contain such information, data and/or records as the City’s Compliance Officer determines is needed to show compliance with this provision.

d) Conflict of Interest. Seller represents that it is familiar with the local and state conflict of interest laws and agrees to comply with those laws in performing this BLPTA. Seller certifies that, as of the Effective Date, it was unaware of any facts constituting a conflict of interest or creating an appearance of a conflict of interest. Seller shall avoid all conflicts of interest or appearances of conflicts of interest in performing this BLPTA. Seller has the obligation of determining if the manner in which it performs any part of this BLPTA results in a conflict of interest or an appearance of a conflict of interest and shall immediately notify SJCE in writing if it becomes aware of any facts giving rise to a conflict of interest or the appearance of a conflict of interest. Seller’s violation of this subsection (ii) is a material breach.

e) Environmentally Preferable Procurement Policy. Seller shall perform its obligations under this BLPTA in conformance with San José City Council Policy 1-19, entitled “Prohibition of City Funding for Purchase of Single serving Bottled Water,” and San José City Council Policy 4-6, entitled “Environmentally Preferable Procurement Policy,” as those policies may be amended from time to time. The Parties acknowledge and agree that in no event shall a breach of this Section 13.1(g) be a material breach of this BLPTA or otherwise give rise to an Event of Default or entitle SJCE to terminate this BLPTA.

f) Gifts Prohibited. Seller represents that it is familiar with Chapter 12.08 of the San José Municipal Code, which generally prohibits a City of San José officer or designated employee from accepting any gift. Seller shall not offer any City of San José officer or designated employee any gift prohibited by Chapter 12.08. Seller’s violation of this subsection (iv) is a material breach.

g) Disqualification of Former Employees. Seller represents that it is familiar with Chapter 12.10 of the San José Municipal Code, which generally prohibits a former City of San José officer and former designated employee from providing services to the City of San José connected with his/her former duties or official responsibilities. Seller shall not use either directly or indirectly any officer, employee or agent to perform any services if doing so would violate Chapter 12.10.

h) Effect on Payment Obligations. The Parties agree that, although breach of an obligation set forth in Sections 17(d) through 17(g) may result in Seller incurring liability for such breach, any such liability will be independent of Project Participant’s liability hereunder, and no breach of or default by Seller under Sections 17(c) through 17(h) will relieve Project Participant of its liability for its Liability Share of all Guaranteed Amounts, nor may any such breach or default, or claim of breach or default, be permitted or asserted as a defense to or offset against payment of any amounts owed by Project Participant to Seller hereunder.

**IN WITNESS WHEREOF**, the Parties have caused this BLPTA to be duly executed and delivered by their duly authorized representatives on the date first above written.

**[PROJECT PARTICIPANT]:**

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

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

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

**CALIFORNIA COMMUNITY POWER, a  
California joint powers authority:**

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

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

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

**[SELLER]:**

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

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

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

**COORDINATED OPERATIONS AGREEMENT**

among

**CITY AND COUNTY OF SAN FRANCISCO ACTING BY AND THROUGH ITS  
PUBLIC UTILITIES COMMISSION - CLEANPOWERSF**

and

**[OTHER MEMBER AGENCIES]**

and

**CALIFORNIA COMMUNITY POWER**

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# COORDINATED OPERATIONS AGREEMENT

## PREAMBLE

This Coordinated Operations Agreement (“**Agreement**”) is entered into as of \_\_\_\_\_ (the “**Effective Date**”), between the City and County of San Francisco acting by and through its Public Utilities Commission - CleanPowerSF, and [other members].... (each individually an “**Operation Participant**” and collectively referred to as the “**Operation Participants**”) and California Community Power (“**CCP**”), a Joint Powers Authority. CCP and the Operation Participants are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.” All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 of this Agreement.

## RECITALS

WHEREAS, CCP is a Joint Powers Authority and was formed for the purpose of developing, acquiring, constructing, owning, managing, contracting for, engaging in, or financing electric energy generation and storage projects, and for other purposes.

WHEREAS, the Operation Participants have participated with CCP in the negotiation of an agreement for the purchase of certain energy storage products of [Name of Project] (the “**Project**” as defined in Exhibit A of the ESSA), and CCP has entered into an Energy Storage Service Agreement (“**ESSA**”), which is incorporated herein by this reference, with [Name of Project Developer] (“**Project Developer**”) providing for purchase of the energy storage products, and associated rights, benefits, and credits from the Project.

WHEREAS, the Operation Participants and CCP will enter into a Project Participation Share Agreement (“**PPSA**”) for the Project, which is incorporated herein by this reference, and which governs the administration of the ESSA and participation in the Project by each of the Project Participants (as defined in the PPSA).

WHEREAS, the Parties desire to enter into this Agreement for purposes of operating the Project in accordance with the ESSA.

WHEREAS, each Operation Participant shall cooperate and work in good faith with the other Operation Participants to achieve the full benefits of joint administration and operation of the Project for their respective customers.

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

## ARTICLE 1 **DEFINITIONS**



1.1. Definitions. The following terms, when used herein with initial capitalization, shall have the meanings set forth below:

“**Agreement**” has the meaning set forth in the Preamble and any Exhibits, schedules, and any written supplements hereto.

“**Alternate Normal Vote**” has the meaning set forth in clause (e)(iii) of Exhibit E.

“**Ancillary Services**” means frequency regulation, spinning reserve, non-spinning reserve, regulation up, regulation down, black start, voltage support, and any other ancillary services that the Facility is capable of providing consistent with the Operating Restrictions set forth in Exhibit Q of the ESSA, as each is defined in the CAISO Tariff.

“**Bankrupt**” or “**Bankruptcy**” means, with respect to any entity, such entity that (a) 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, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) 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 (f) is generally unable to pay its debts as they fall due.

“**Business Day**” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 a.m. and ends at 5:00 p.m. local time for the Party sending a Notice, or payment, or performing a specified action.

“**CAISO**” means the California Independent System Operator Corporation or any successor entity performing similar functions.

“**CAISO Certification**” means the certification and testing requirements for a storage unit set forth in the CAISO Tariff that are applicable to the Facility, including certification and testing for all Ancillary Services, PMAX, and PMIN associated with such storage units, that are applicable to the Facility.

“**CAISO Grid**” has the same meaning as “CAISO Controlled Grid” as defined in the CAISO Tariff.

“**CAISO Tariff**” means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures, and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.

“**California Renewables Portfolio Standard**” or “**RPS**” means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.

**“Capacity Attribute”** means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Facility can charge, discharge, and deliver to the Delivery Point at a particular moment and that can be purchased, sold, or conveyed under CAISO or CPUC market rules, including Resource Adequacy Benefits.

**“CCP Board”** means the Board of Directors of California Community Power.

**“CEO”** means the Chief Executive Officer for the respective Operation Participant.

**“CEO Meeting”** has the meaning set forth in Section 14.2(b).

**“Charging Energy”** means the Energy delivered to the Facility pursuant to a Charging Notice as measured at the Facility Metering Point by the Facility Meter, as such meter readings are adjusted by the CAISO for any applicable Electrical Losses.

**“Charging Notice”** means the operating instruction, and any subsequent updates, given by the Scheduling Coordinator or the CAISO to Project Developer, directing the Facility to charge at a specific MW rate for a specified period of time or amount of MWh; *provided*, any such operating instruction shall be in accordance with the Operating Restrictions.

**“Commercial Operation”** has the meaning set forth in Section 1.1 of the ESSA.

**“Confidential Information”** has the meaning set forth in Section 18.1 of the ESSA.

**“CPUC”** means the California Public Utilities Commission, or any successor entity performing similar functions.

**“Day-Ahead Market”** has the meaning set forth in the CAISO Tariff.

**“Day-Ahead Schedule”** has the meaning set forth in the CAISO Tariff.

**“Delivery Point”** means the Facility Pnode on the CAISO grid.

**“Delivery Term”** means the period of Contract Years set forth on the Cover Sheet of the ESSA beginning on the Commercial Operation Date, unless terminated earlier in accordance with the terms and conditions of the ESSA.

**“Development Security”** means (a) cash or (b) Letter of Credit in the amount set forth on the Cover Sheet of the ESSA.

**“Discharging Energy”** means the Energy delivered from the Facility to the Delivery Point pursuant to a Discharging Notice during any Settlement Interval or Settlement Period, as measured at the Facility Metering Point by the Facility Meter, as such meter readings are adjusted by the CAISO for any applicable Electrical Losses.

**“Discharging Notice”** means the operating instruction, and any subsequent updates, given by the Scheduling Coordinator or the CAISO to the Facility, directing the Facility to discharge Discharging Energy at a specific MW rate for a specified period of time or to an amount of MWh.

**“Dispatch Notice”** means any Charging Notice, Discharging Notice and any subsequent updates thereto, given by the CAISO or the Scheduling Coordinator, to the Project Developer, directing the Facility to charge or discharge Energy at a specific MWh rate to a specified Storage Level; *provided*, any such operating instruction or updates shall be in accordance with the Operating Restrictions.

**“Effective Date”** has the meaning set forth in the Preamble.

**“Electrical Losses”** means all transmission or transformation losses (a) between the Delivery Point and the Facility Metering Point associated with delivery of Charging Energy, and (b) between the Facility Metering Point and the Delivery Point associated with delivery of Discharging Energy.

**“Energy”** means electrical energy, measured in kilowatt-hours, megawatt-hours or multiple units thereof.

**“Energy Storage Service Agreement”** or **“ESSA”** means the agreement between CCP and Project Developer for the purchase of energy storage products of [Project Name], executed on [Date].

**“Entitlement Share”** means the percentage entitlement of each Operation Participant for the Project as set forth in the PPSA, as may be amended pursuant to Section 4.2 therein.

**“Environmental Attributes”** shall mean any and all attributes under the RPS regulations or under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable, now, or in the future to the Facility and its displacement of conventional energy generation.

**“Facility”** means the energy storage facility described on the Cover Sheet and in Exhibit A of the ESSA, including mechanical equipment and associated facilities and equipment required to deliver Product, as such storage facility may be expanded or otherwise modified from time to time in accordance with the terms of the ESSA.

**“Facility Meter”** has the meaning set forth in Section 1.1 of the ESSA.

**“Facility Metering Point”** means the location(s) of the Facility Meter shown in Exhibit R of the ESSA.

**“FERC”** means the Federal Energy Regulatory Commission or any successor government agency.

**“Governmental Authority”** means any federal, state, provincial, local, or municipal government, any political subdivision thereof or any other governmental, congressional, or parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau,

or entity with authority to bind a Party at law, including CAISO; *provided*, “Governmental Authority” shall not in any event include any Party.

“**kWh**” means a kilowatt-hour measured in alternating current, unless expressly stated in terms of direct current.

“**Law**” means any applicable law, statute, rule, regulation, decision, writ, order, decree or judgment, permit or any interpretation thereof, promulgated or issued by a Governmental Authority.

“**Lead Point Person**” has the meaning set forth in Section 5.4.

“**Letter(s) of Credit**” has the meaning set forth in Section 1.1 the ESSA.

“**Management Team**” means the group established in accordance with Article 5.

“**Month**” means a calendar month.

“**MW**” means megawatts in alternating current, unless expressly stated in terms of direct current.

“**MWh**” means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.

“**NERC**” means the North American Electric Reliability Corporation, or any successor entity performing similar functions.

“**Net Qualifying Capacity**” or “**NQC**” has the meaning set forth in the CAISO Tariff.

“**Normal Vote**” has the meaning set forth in Exhibit E.

“**Notice**” shall, unless otherwise specified in the Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, or electronic messaging (e-mail).

“**Operating Restrictions**” means those restrictions, rules, requirements, and procedures set forth in Exhibit Q of the ESSA.

“**Operation Participant Indemnitees**” has the meaning set forth in Section 9.5.

“**Operation Participants**” means those entities executing this Agreement, as identified in the Preamble, together in each case with each entity’s successors or assigns.

“**Party**” has the meaning set forth in the Preamble.

“**Performance Guarantees**” has the meaning set forth in Section 4.3(b) of the ESSA.

“**Performance Security**” means (i) cash or (ii) Letter of Credit in the amount set forth on the Cover Sheet of the ESSA.

**“Person”** means any individual, sole proprietorship, corporation, limited liability company, limited or general partnership, joint venture, association, joint-stock company, trust, incorporated organization, institution, public benefit corporation, unincorporated organization, government entity or other entity.

**“PNode”** has the meaning set forth in the CAISO Tariff.

**“Product”** means all of the Discharging Energy, Charging Energy, Capacity Attributes, Ancillary Services, and Environmental Attributes associated with the Facility, or otherwise provided for pursuant to the ESSA.

**“Project”** has the meaning set forth in Exhibit A of the ESSA.

**“Project Committee”** means the committee established in accordance with the PPSA.

**“Project Developer”** means [Project Name], or Assignee as permitted under the ESSA.

**“Project Participation Share Agreement”** or **“PPSA”** means the agreement between CCP and the Project Participants (as defined therein) for the administration of the ESSA with Project Developer, executed on [Date].

**“Prudent Operating Practice”** means (a) the applicable practices, methods and acts required by or consistent with applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric industry during the relevant time period with respect to grid-interconnected, utility-scale energy storage facilities in the Western United States, and (b) any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale energy storage facilities in the Western United States. Prudent Operating Practice shall include compliance with applicable Laws, applicable safety and reliability criteria, and the applicable criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules, and standards of any successor organizations.

**“Qualifying Capacity”** has the meaning set forth in the CAISO Tariff.

**“Real-Time Market”** has the meaning set forth in the CAISO Tariff.

**“Released Party”** has the meaning set forth in Section 9.2.

**“Resource Adequacy Benefits”** means the rights and privileges attached to the Facility that satisfy any entity’s Resource Adequacy Requirements, as those obligations are set forth in any ruling issued by a Governmental Authority, including the Resource Adequacy Rulings, and shall include Flexible Capacity, and any local, zonal, or otherwise locational attributes associated with the Facility.

**“Resource Adequacy Requirements”** or **“RAR”** means the resource adequacy requirements applicable to an entity as established by the CAISO pursuant to the CAISO Tariff, by the CPUC pursuant to the Resource Adequacy Rulings, or by any other Governmental Authority.

**“Resource Adequacy Resource”** has the meaning used in Resource Adequacy Rulings.

**“Resource Adequacy Rulings”** means CPUC Decisions 04-01-050, 04-10-035, 05-10-042, 06-04-040, 06-06-064, 06-07-031, 07-06-029, 08-06-031, 09-06-028, 10-06-036, 11-06-022, 12-06-025, 13-06-024, 14-06-050, 15-06-063, 16-06-045, 17-06-027, 18-06-030, 18-06-031, 19-02-022, 19-06-026, 19-10-021, 20-01-004, 20-03-016, 20-06-002, 20-06-031, 20-06-028, 20-12-006 and any other existing or subsequent ruling or decision, or any other resource adequacy laws, rules or regulations enacted, adopted or promulgated by any applicable Governmental Authority, however described, as such decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Contract Term.

**“Schedule”** has the meaning set forth in the CAISO Tariff, and **“Scheduled”** and **“Scheduling”** has a corollary meaning.

**“Scheduled Energy”** means the Discharging Energy that clears under the applicable CAISO market based on the final Day-Ahead Schedule, FMM Schedule (as defined in the CAISO Tariff), and/or any other financially binding Schedule, market instruction or dispatch for the Facility for a given period of time implemented in accordance with the CAISO Tariff.

**“Scheduling Coordinator”** or **“SC”** means an entity engaged by CCP and certified by the CAISO as qualifying as a Scheduling Coordinator pursuant to the CAISO Tariff for the purposes of undertaking the functions specified in “Responsibilities of a Scheduling Coordinator,” of the CAISO Tariff, as amended from time to time.

**“Storage Level”** means, at a particular time, the amount of electric Energy in the Facility available to be discharged as Discharging Energy, expressed in MWh.

**“Unanimous Vote”** has the meaning set forth in Exhibit E.

1.2. **Rules of Interpretation.** In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:

(a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;

(b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;

(c) the words “hereof”, “herein”, and “hereunder” and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;

(d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Article, Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;

(e) a reference to a document or agreement, including this Agreement shall mean such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation, or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;

(f) a reference to a Person includes that Person's successors and permitted assigns;

(g) the terms "include" and "including" mean "include or including (as applicable) without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;

(h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified, or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;

(i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;

(j) references to any amount of money shall mean a reference to the amount in United States Dollars;

(k) the expression "and/or" when used as a conjunction shall connote "any or all of";

(l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning in Prudent Operating Practice shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning in Prudent Operating Practice but that have well known and generally accepted technical or trade meanings, shall have such recognized meanings; and

(m) each Party acknowledges that it was represented by counsel in connection with this Agreement and that it or its counsel reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

## **ARTICLE 2**

### **EFFECTIVE DATE, TERM, AND EARLY TERMINATION**

#### **2.1. Term.**

(a) The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the conclusion of the Delivery Term of the ESSA, subject to any early termination provisions set forth herein or subject to an early termination of the ESSA (“**Term**”).

(b) Applicable provisions of this Agreement shall continue in effect after termination to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. All indemnity and audit rights shall remain in full force and effect for three (3) years following the termination of this Agreement.

### **ARTICLE 3** **AGREEMENT**

3.1. **Transaction.** The Operation Participants seek to establish Management Team to facilitate the implementation and administration of the ESSA and the operation of the Project, and to engage and coordinate with the Scheduling Coordinator.

### **ARTICLE 4** **ROLE OF PROJECT COMMITTEE**

4.1. **Role of Project Committee.** The Project Committee shall be established and governed pursuant to the PPSA. The Project Committee shall oversee and advise on the actions taken by the Management Team. To the extent that the Management Team requires decisions to be made promptly, the Management Team shall notify the Chairperson of the Project Committee and request a prompt response.

### **ARTICLE 5** **MANAGEMENT TEAM**

5.1. **Management Team.** The Management Team is authorized to (a) provide coordination among, and information to, the Operation Participants and CCP, (b) direct the daily operation of the Project, (c) make recommendations to the Project Committee regarding the administration and operation of the Project, and (d) undertake the responsibilities set forth in Section 5.5.

5.2. **Management Team Membership.** The Management Team shall consist of one representative from each Operation Participant. Within thirty (30) days after the Effective Date, each Operation Participant shall provide notice to each other of such Operation Participant’s representative to the Management Team. Alternate Management Team representatives may be appointed by written notice. An alternate representative may attend all meetings of the Management Team but may vote only if the representative for whom they serve as alternate is absent. No Operation Participant’s representative shall exercise any greater authority than permitted by the Operation Participant which they represent. The Management Team may add additional non-voting members without seeking approval from the Project Committee.

5.3. **Management Team Operations, Meetings, and Voting.** Management Team operations, meeting, and voting shall be in accordance with the procedures and requirements as set forth in Exhibit E, as may be amended from time to time.



#### 5.4. Lead Point Person; Responsibilities.

(a) Lead Point Person. The Management Team shall have a Lead Point Person (“**Lead Point Person**”) that is designated, voted on, and majority approved by the Project Committee. The Project Committee shall decide how the role of Lead Point Person is shared or rotated amongst the Operation Participants. In the event there is no Lead Point Person designated by the Project Committee, the roles and responsibilities set forth in this Section 5.4 shall be carried out by the resource manager for each of the Operation Participants rotating on a quarterly basis. The Lead Point Person shall be the voting member representing its respective Operation Participant. For the avoidance of doubt, the Lead Point Person is not an additional vote to the Management Team.

(b) Responsibilities of Lead Point Person. The Lead Point Person shall have the following responsibilities:

(i) Facilitate efficient and regular communications with the Scheduling Coordinator;

(ii) Act as a liaison between the Management Team and the Project Committee;

(iii) Provide a weekly report to the Operation Participants and the Project Committee regarding the status of the Project and any actions taken by the Management Team; and

(iv) Calling and presiding over meetings of the Management Team.

(c) Limited Autonomous Authority. The Operation Participants agree to grant the Lead Point Person limited autonomous authority to make certain operational decisions in coordination with the Scheduling Coordinator, so long as (i) it arises from an exceptional event requiring prompt decision making, and (ii) the Lead Point Person notifies the Management Team representatives via text or email promptly upon learning of the event. The Lead Point Person shall provide to all Parties and the Project Committee an email summary of the event, the options discussed with the Scheduling Coordinator, the decision made, and resolution of the event. The Parties agree that the Lead Point Person shall bear no liability for the decision so long as he or she has acted in good faith on behalf of the Parties, and the Parties shall waive any claims against the Lead Point Person.

5.5. Management Team Responsibilities. The Management Team shall have the following duties and responsibilities:

(a) Coordinate, make and review proposals and recommendations to the Project Committee with respect to the operation of the Projects;

(b) Initiate, review and make recommendations to the Project Committee with respect to proposed amendments to the scheduling and dispatch criteria set forth in Exhibit C;

(c) Coordinate communications with Project Developer with respect to the operation of each Project, including requests for operating reports and providing reasonable access to any records (e.g., invoices or settlement data from the CAISO) as may be necessary for Project Developer to prepare the invoices;

(d) To the extent CCP may claim Environmental Attributes for the Project, work with Project Developer to undertake any necessary actions;

(e) Review proposed planned outages schedules for the Project on a quarterly basis and, if applicable, provide requests for changes in accordance with the ESSA;

(f) Review and make recommendations with respect to the annual maintenance schedule for the Project for approval by the Project Committee;

(g) Review and update the Resource Specific Template set forth in Exhibit B;

(h) Coordinate monthly CAISO settlements or other administrative actions under the ESSA;

(i) Prepare (or cause to be prepared) reports relating to operation of the Project, as requested by the Project Committee;

(j) Coordinate on responses (including the provision of data) to regulatory agencies in regulatory compliance filings, as requested by the Project Committee;

(k) With respect to the Scheduling Coordinator, (i) assist the Project Committee with negotiating the form of Scheduling Coordinator Agreement and any amendments thereto; (ii) oversee the engagement of the Scheduling Coordinator and notify the Project Committee if the Scheduling Coordinator is in breach of its agreement or otherwise does not perform; and (iii) coordinate the authorization or designation of the Scheduling Coordinator for the Facility with the CAISO;

(l) Take any other action reasonably necessary pursuant to the ESSA, as directed by the Project Committee, to the extent such action is consistent with the scope of this Agreement;

(m) In the event of an Unplanned Outage, coordinate an inspection of the Facility and all records relating thereto;

(n) Approval of NQC amounts;

(o) With respect to testing of the Facility, (i) coordinate and schedule the presence of a representative of CCP to witness any Capacity Tests, (ii) coordinate the approval of requests by Project Developer to conduct additional testing, (iii) ensure payment to Project Developer of all applicable CAISO revenues received by CCP and associated with the discharge Energy associated with any testing initiated by Project Developer; (iv) coordinate with Project Developer the testing of the Facility Meter on an annual basis; (v) coordinate a request to Project Developer to undertake a Capacity Test with appropriate notice; (vi) coordinate with Project

Developer to agree on any deviations to the order of the Test Elements set forth in Exhibit O of the ESSA; (vii) coordinate the acceptance of an incomplete Capacity Test or any requests to complete or repeat any or all of a portion of the Capacity Test; (viii) coordinate the acceptance or rejection of the results of a Capacity Test as set forth in a written report from Project Developer; and (ix) coordinate the review and approval of the Supplementary Capacity Test Protocol provided by Project Developer and any updates thereto;

(p) Coordinate, schedule, and do all other things deemed necessary or appropriate, as permitted under this Agreement and the ESSA, to provide for the delivery of Charging Energy from the grid to the Point of Delivery;

(q) Coordinate with the Scheduling Coordinator to: (i) dispatch the Facilities, including the delivery of Dispatch Notices, in accordance with the Operating Restrictions and Exhibit C; (ii) charge the Facilities, including the delivery of Charging Notices, in accordance with the Operating Restrictions and Exhibit C; (iii) discharge the Facilities, including the delivery of Discharging Notices, in accordance with the ESSA and Exhibit C; (iv) provide updated Dispatch Notices during any Curtailment Period; (v) request additional CAISO Certification for provision of additional Ancillary Services (including reimbursement for any material costs); (vi) resell any part of the Product provided under the ESSA; (vii) submit Schedules to the CAISO in accordance with the ESSA and the applicable CAISO Tariff, protocols and Scheduling practices for the Product on a Day-Ahead, hour-ahead, fifteen-minute market, Real-Time or other market basis that may develop after the Effective Date, as determined by Buyer; (viii) provide Project Developer with access to a web-based system for submission of notices and updates required under the CAISO Tariff; (ix) undertake all settlement functions with the CAISO related to the Facility, including rendering an invoice to Project Developer for any CAISO payments charges or penalties for which Project Developer is responsible under the ESSA and making any adjustments thereto, in accordance with the ESSA; (x) dispute CAISO settlements as required by Project Developer; (xi) cooperate reasonably with Project Developer to the extent necessary to enable Project Developer to comply, and for Project Developer to demonstrate its compliance with, NERC reliability standards; and (x) convey any Capacity Attributes and any applicable Environmental Attributes associated with the Facility to each Operation Participant; and

(r) Exercise general supervision over any subgroup established pursuant to Section 5.9.

#### 5.6. Recommendations to the Project Committee.<sup>1</sup>

(a) Amendments. Review, modify, and approve by a Normal Vote a recommendation to the Project Committee regarding proposed amendments to the scheduling and dispatch criteria set forth in Exhibit C.

(b) \_\_\_\_\_. Review, modify, and approve by a Normal Vote a recommendation to the Project Committee regarding \_\_\_\_\_.

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<sup>1</sup> Should anything specifically be called out in making recommendations to the Project Committee?

5.7. Actions Requiring Unanimous Vote.<sup>2</sup>

- (a) [\_\_\_\_\_].

5.8. Actions Subject to a Normal Vote.<sup>3</sup>

(a) Make recommendations to the Project Committee or to Project Developer, as appropriate, with respect to the operation of the Project.

(b) Make recommendations to the Project Committee regarding rules, procedures, and protocols for the scheduling, handling, tagging, dispatching, and crediting of the Product, the handling and crediting of Environmental Attributes associated with the Facility and the control and use of the Facility.

(c) Make recommendations to the Project Committee regarding the form or content of any written operational reports, Facility-related data and storage information, technical information, facility reliability data, transmission information, forecasting, scheduling, dispatching, tagging, parking, firming, exchanging, balancing, movement, or other delivery information, and similar information and records, or matters pertaining to the Project.

(d) Make recommendations to the Project Committee regarding practices and procedures for, among other things, the production, scheduling, tagging, transmission, delivery, firming, balancing, exchanging, crediting, tracking, monitoring, remarketing, sale, or disposition of the Product, including the control and use of the Facility, and the supply, scheduling, and use of Charging Energy.

(e) Make recommendations to Project Committee regarding policies or programs formulated by CCP or Project Developer for determining or estimating storage resources or the values, quantities, volumes, or costs of the Product from the Facility.

(f) Make recommendations regarding the implementation of metering technologies and methodologies appropriate for the delivery, accounting for, transferring and crediting of the Product to the Point of Delivery (directly or through the Facility).

5.9. Subgroups. The Management Team may establish as needed subgroups including, but not limited to, engineering, mechanical, weather, geologic, diurnal, barometric, meteorological, operating, and environmental subgroups. The authority, membership, and duties of any subgroups shall be established by the Management Team; provided, however, such authority, membership or duties shall not conflict with the provisions of the ESSA. Each such subgroup shall be initially responsible to the Management Team.

5.10. Change in Representative. Each Operation Participant shall promptly give written notice concurrently to the other Operation Participants and CCP of any changes in the designation of its representative on the Management Team or any subgroup.

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<sup>2</sup> What should require a Unanimous Vote?

<sup>3</sup> What should require a Normal Vote?

5.11. Representative's Expenses. Any expenses incurred by any representative of any Operation Participant or group of Operation Participants serving on the Management Team or any other subgroup in connection with their duties on such subgroup shall be the responsibility of the Operation Participant which they represent and shall not be an expense payable under this Agreement.

5.12. Inaction by Committee. It is recognized by the Operation Participants that if the Management Team is unable or fails to agree with respect to any matter or dispute which it is authorized to determine, resolve, approve, disapprove or otherwise act upon after a reasonable opportunity to do so, or within the time specified herein or in the ESSA, then the Project Committee may take such action as in its discretion as necessary for its timely performance under any requirement pursuant to the ESSA, pending the resolution of any such inability or failure to agree, but nothing herein shall be construed to allow the Project Committee to act in violation of the express terms of the ESSA or this Agreement.

5.13. Delegation. To secure effective cooperation and decision making in a timely manner in connection with various administrative, technical, and other matters which may arise from time to time in connection with the operation of the Project, in appropriate cases, duties and responsibilities of the Management Team may be delegated to any individual in the Management Team upon notice to the Operation Participants. In addition, an Operation Participant may delegate its vote to the Lead Point Person or another Operation Participant prior to any meeting by giving notice to all of the Operation Participants.

5.14. Role of CCP Board. The rights and obligations of the Management Team under this Agreement shall be subject to the ultimate control at all times of the CCP Board.

## **ARTICLE 6**

### **SCHEDULING COORDINATOR**

6.1. Hiring of Scheduling Coordinator. The Operation Participants agree to work together to hire a qualified Scheduling Coordinator and to share the costs of such Scheduling Coordinator as set forth in Section 6.3 below. As necessary, the Operation Participants shall assist the Project Committee in the negotiation of a separate agreement between CCP and the Scheduling Coordinator to engage the services of the Scheduling Coordinator. The engagement of the Scheduling Coordinator shall require approval by the CCP Board. The Operation Participants shall coordinate the authorization or designation of the Scheduling Coordinator for the Facility with the CAISO.

6.2. Scheduling Coordinator Responsibilities. The Scheduling Coordinator shall have the duties and responsibilities set forth in Exhibit E attached hereto, as may be amended from time to time pursuant to this Agreement.

6.3. Cost Sharing. Each Operation Participant shall be responsible for the costs of the Scheduling Coordinator in accordance with its Entitlement Share. Such costs shall be included in the Annual Budget (as defined in the PPSA) and billed and paid pursuant to the PPSA. To the extent that the Operation Participants engage a consultant for purposes of this Agreement, the same requirements set forth in this Section 6.3 shall apply to such engagement.

6.4. Performance of Scheduling Coordinator. The Management Team shall oversee the performance of the Scheduling Coordinator. To the extent that the Management Team believes that the Scheduling Coordinator is in breach of its agreement with CCP or is otherwise not performing under the agreement, then the Management Team shall notify the Project Committee.

## **ARTICLE 7**

### **AUTHORIZATIONS; CONFLICTS; LITIGATION.**

7.1. Authorizations. Each Operation Participant hereby represents and warrants that no order, approval, consent, or authorization of any governmental or public agency, authority, or person, is required on the part of such Operation Participant for the execution and delivery by the Operation Participant, or the performance by the Operation Participant of its obligations under this Agreement except for such as have been obtained.

7.2. Conflicts. Each Operation Participant represents and warrants as of the Effective Date that, to the Operation Participant's knowledge, the execution and delivery of this Agreement by the Operation Participant and the Operation Participant's performance hereunder will not constitute a default under any agreement or instrument to which it is a party, or any order, judgment, decree or ruling of any court that is binding on the Operation Participant, or a violation of any applicable law of any governmental authority, which default or violation would have a material adverse effect on the financial condition of the Operation Participant.

7.3. Litigation. Each Operation Participant represents and warrants that, as of the Effective Date, to the Operation Participant's knowledge, except as disclosed, there are no actions, suits or proceedings pending against the Operation Participant (service of process on the Operation Participant having been made) in any court that questions the validity of the authorization, execution or delivery by the Operation Participant of this Agreement, or the enforceability on the Operation Participant of this Agreement.

## **ARTICLE 8**

### **NONPERFORMANCE.**

8.1. Nonperformance by an Operation Participant. If an Operation Participant fails to perform any covenant, agreement, or obligation under this Agreement or shall cause CCP to be in default under the ESSA, the remaining Operation Participants may, in the event the performance of any such obligation remains unsatisfied after thirty (30) days' prior written notice thereof to such Operation Participant and a demand to so perform, undertake the performance of the obligation without taking into account the Operation Participant's Entitlement Share for purposes of voting, if applicable.

8.2. Termination and Disposal of Operation Participant's Rights. If an Operation Participant has defaulted under the PPSA and its respective Project Rights and Obligations have been terminated and disposed of in accordance with the PPSA, then any rights and obligations of such Operation Participant under this Agreement shall also be terminated.

## **ARTICLE 9**

### **LIABILITY**

9.1. Operation Participants' Obligations Several. The Operation Participants shall be severally responsible and liable for performance under this Agreement.

9.2. No Liability of CCP or Operation Participants, Their Directors, Officers, Etc.; CCP and the Operation Participants' Directors, Officers, Employees Not Individually Liable. The Parties agree that neither CCP, the Operation Participants, nor any of their past, present or future directors, officers, employees, board members, agents, attorneys or advisors (collectively, the "**Released Parties**") shall be liable to any other of the Released Parties for any and all claims, demands, liabilities, obligations, losses, damages (whether direct, indirect or consequential), penalties, actions, loss of profits, judgments, orders, suits, costs, expenses (including attorneys' fees and expenses) or disbursements of any kind or nature whatsoever in law, equity or otherwise (including, without limitation, death, bodily injury or personal injury to any person or damage or destruction to any property of the Operation Participants, CCP, or third persons) suffered by any Released Party as a result of the action or inaction or performance or non-performance by Project Developer under the ESSA. Each Party shall release each of the other Released Parties from any claim or liability that such Party may have cause to assert as a result of any actions or inactions or performance or non-performance by any of the other Released Parties under this Agreement (excluding gross negligence and willful misconduct, which, unless otherwise agreed to by the Parties, are both to be determined and established by a court of competent jurisdiction in a final, non-appealable order). Notwithstanding the foregoing, no such action or inaction or performance or non-performance by any of the Released Parties shall relieve CCP or any Operation Participant from their respective obligations under this Agreement. The provisions of this Section 9.2 shall not be construed so as to relieve CCP or the Project Developer from any obligation or liability under this Agreement or the ESSA.

9.3. Extent of Exculpation; Enforcement of Rights. The exculpation provision set forth in Section 9.2 hereof shall apply to all types of claims or actions including, but not limited to, claims or actions based on contract or tort. Notwithstanding the foregoing, any Party may protect and enforce its rights under this Agreement by a suit or suits in equity for specific performance of any obligations or duty of any other Party, and each Party shall at all times retain the right to recover, by appropriate legal proceedings, any amount determined to have been an overpayment, underpayment or other monetary damages owed by the other Party in accordance with the terms of this Agreement.

9.4. No General Liability of CCP. The undertakings under this Agreement by CCP, shall not constitute a debt or indebtedness of CCP within the meaning of any provision or limitation of the Constitution or statutes of the State of California, and shall not constitute or give rise to a charge against its general credit.

9.5. Indemnification of Operation Participants. CCP undertakes and agrees, to the extent permitted by law, to indemnify and hold harmless each Operation Participant, their directors, board members, officers, employees, agents, attorneys and advisors, past, present or future (collectively, "**Operation Participant Indemnitees**"), from and against any and all claims, demands, liabilities, obligations, losses, damages (whether direct, indirect or consequential), penalties, actions, loss of profits, judgments, orders, suits, costs, expenses (including attorneys' fees and expenses) or disbursements of any kind or nature whatsoever in law, equity or otherwise, which include, without limitation, death, bodily injury or personal injury to any person or damage or destruction

to any property of the Operation Participants, CCP or third persons, that may be imposed on, incurred by or asserted against the Operation Participants arising by manner of any breach of this Agreement by CCP, or the negligent acts, errors, omissions or willful misconduct incident to the performance of this Agreement on the part of CCP or any of CCP's directors, board members, officers, employees, agents and advisors, past, present or future.

## **ARTICLE 10**

### **NOTICES**

10.1. Addresses for the Delivery of Notices. Any Notice required, permitted, or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the address set forth in Exhibit A or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.

10.2. Acceptable Means of Delivering Notice. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by United States mail with proper first class postage prepaid, three (3) Business Days following the date of the postmark on the envelope in which such Notice was deposited in the United States mail; (b) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; (c) if sent by electronic communication (including electronic mail or other electronic means) at the time indicated by the time stamp upon delivery and, if after 5 pm, on the next Business Day; or (d) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

## **ARTICLE 11**

### **ASSIGNMENT**

11.1. General Prohibition on Assignments. No Party may assign this Agreement, or its rights or obligations under this Agreement, without the prior written consent of all other Parties, in each Party's sole discretion.

## **ARTICLE 12**

### **GOVERNING LAW AND DISPUTE RESOLUTION**

12.1. Governing Law. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced, and performed in accordance with the laws of the state of California, without regard to principles of conflicts of Law. To the extent enforceable at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement. The Parties agree that any suit, action, or other legal proceeding by or against any Party with respect to or arising out of this Agreement shall be brought in the federal or state courts located in the State of California in a location to be mutually chosen by all Parties, or in the absence of mutual agreement, the County of San Francisco.

12.2. Dispute Resolution.



(a) In the event of any dispute arising under this Agreement, within ten (10) Business Days following the receipt of a Notice from any Party identifying such dispute, the Parties shall meet, negotiate, and attempt, in good faith, to resolve the dispute by consensus quickly and informally without significant legal costs. Such meeting may be held in person or by video conference and each Party shall have one representative attend the meeting.

(b) If the Parties are unable to resolve a dispute arising hereunder pursuant to Section 12.2(a), the respective CEOs of each Party shall designate a representative to work towards a resolution of the dispute. The Parties shall make best efforts to resolve any dispute within fifteen (15) Business Days of representatives being designated.

(c) If the Parties are unable to resolve a dispute arising hereunder within twenty (20) Business Days following the CEO Meeting, the Parties may submit the dispute to arbitration under the rules of Judicial Arbitration and Mediation Services (JAMS).

12.3. Attorneys' Fees. In any proceeding brought to enforce this Agreement or because of the breach by any Party of any covenant or condition herein contained, the prevailing Party shall be entitled to reasonable attorneys' fees (including reasonably allocated fees of in-house counsel) in addition to court costs and any and all other costs recoverable in said action.

### **ARTICLE 13** **MISCELLANEOUS**

13.1. Entire Agreement; Integration; Exhibits. This Agreement, together with the Cover Sheet and Exhibits attached hereto constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. The headings used herein are for convenience and reference purposes only. This 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.

13.2. Amendments. This Agreement may only be amended, modified, or supplemented by an instrument in writing executed by duly authorized representatives of all Parties; *provided*, this Agreement may not be amended by electronic mail communications.

13.3. No Waiver. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

13.4. Severability. In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. 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 and this Agreement as a whole.

13.5. Counterparts. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original.

13.6. Electronic Delivery. This Agreement may be duly executed and delivered by a Party by electronic format (including portable document format (.pdf)). Delivery of an executed counterpart in .pdf electronic version shall be binding as if delivered in the original. The words “execution,” “signed,” “signature,” and words of like import in this Agreement shall be deemed to include electronic signatures or electronic records, each of which shall be of the same legal effect, validity, or enforceability as a manually executed signature or the use of a paper-based record keeping system, as the case may be, to the extent and as provided for in any applicable law.

13.7. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.

13.8. Forward Contract. The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the U.S. Bankruptcy Code, and that the Parties are “forward contract merchants” within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.

13.9. Further Assurances. Each of the Parties hereto agrees to provide such information, execute, and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.

13.10. Confidentiality. Each Party agrees to maintain the confidentiality of all information exchanged amongst the Parties pursuant to this Agreement that is deemed “Confidential Information” under this Agreement (e.g., pricing, bidding strategies, resource capabilities, planned outages, etc.), subject to any required disclosures, including under the California Public Records Act. None of the Parties may disclose information deemed Confidential Information under this Agreement without the prior written consent of the other Parties.

*[Signatures on following page]*

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

<p>California Community Power</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>CleanPowerSF</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>
<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>

<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>
<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>	<p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p>Approved as to form by Counsel</p> <p>By: _____</p> <p>Name: _____</p> <p>Title: _____</p>

**EXHIBIT A**  
**NOTICES**

<b>Party</b>	<b><i>All Notices</i></b>	<b><i>Invoices</i></b>
<b>California Community Power</b>	<b>California Community Power</b> General Manager <div></div> <div></div> Email address	

**EXHIBIT B**

**RESOURCE SPECIFIC TEMPLATE**

## **EXHIBIT C**

### **SCHEDULING AND DISPATCH OPERATIONS AND ECONOMIC CRITERIA**

## **EXHIBIT D**

### **SCHEDULING COORDINATOR RESPONSIBILITIES<sup>4</sup>**

Schedule and dispatch of the Product in accordance with applicable Laws, Prudent Operating Practices, Exhibit C, and Operating Restrictions.

Submit Schedules to the CAISO in accordance with the ESSA and the applicable CAISO Tariff, protocols and Scheduling practices for the Product on a day-ahead, hour-ahead, fifteen-minute market, Real-Time or other market basis that may develop after the Effective Date.

Coordinate with the Management Team in accordance with Section 5.4(q).

Communications and reporting from the Scheduling Coordinator to the Operation Participants.

Submit Supply Plan indicating allocation of Capacity Attributes to Operation Participants.

To extent applicable, coordinate the transfer of WREGIS Certificates from Project Developer to CCP and from CCP to the Operation Participants.

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<sup>4</sup> Exhibit D require more input.



## EXHIBIT E

### PROJECT COMMITTEE OPERATIONS, MEETING, AND VOTING

(a) **Lead Point Person of Management Team.** The Lead Point Person of the Management Team shall be designated pursuant to Section 5.4(a). The Lead Point Person shall be responsible for calling and presiding over meetings of the Management Team and making limited autonomous decisions in coordination with the Scheduling Coordinator.

(b) **Meetings.** Unless otherwise directed by the Project Committee, the Management Team shall meet weekly to review operations of the Project. Conducting of Management Team meetings and actions taken by the Management Team may be taken by vote given in an assembled meeting, by telephone, by video conferencing, or by any combination thereof. At least one representative from each Operation Participant and the Lead Point Person shall be present at each meeting. To the extent an Operation Participant is unable to attend a meeting, such Operation Participant shall delegate his or her vote in accordance with Section 5.13.

(c) **Voting.** Voting by the Management Team shall be as set forth in this Exhibit E. The Operation Committee shall have the ability to amend the voting procedures subsequent to the Effective Date by a unanimous affirmative vote by all Operation Participants. The Scheduling Coordinator shall be a non-voting member of the Management Team, and if mutually agreed by the Operation Participants, a consultant may be a non-voting member of the Management Team.

(d) **Unanimous Vote.** Certain actions, as designated in Section 5.7, require a unanimous affirmative vote by all Operation Participants. No such vote may be taken unless a representative from every Operation Participant is present at the meeting of the Management Team or Operation Participant has delegated their vote in writing to another member.

(e) **Normal Vote.** All actions not designated as requiring unanimous vote, shall proceed pursuant to the “Normal Vote” process set forth in this clause (e).

(i) **Quorum.** No Normal Vote of the Management Team shall be taken unless a representative is present or vote is delegated for at least fifty percent (50%) of the total number of Operation Participants, without regard to each Operation Participant’s Entitlement Share.

(ii) **Initial Normal Vote.** Unless a representative requests an Alternate Normal Vote, pursuant to clause (e)(iii), all actions requiring a Normal Vote, as specified in Section 5.6 or 5.8, shall require an affirmative vote of at least fifty-one percent (51%) of the total number of Operation Participants, without regard to each Operation Participant’s Entitlement Share.

(iii) **Alternate Normal Vote.** Any representative may request that any Normal Vote be taken on an Entitlement Share basis (referred to as an “**Alternate Normal Vote**”). If a representative requests an Alternate Normal Vote, then the following vote requirements shall apply:

(A) If any individual Operation Participant has an Entitlement Share exceeding fifty percent (50%), then all actions for which an Alternate Normal Vote is taken, shall require that the Operation Participant with an Entitlement Share exceeding fifty percent (50%) plus any other Operation Participant vote in the affirmative.

(B) If no individual Operation Participant has an Entitlement Share exceeding fifty percent (50%), then all actions for which an Alternate Normal Vote is taken, shall require an affirmative vote of Operation Participants having Entitlement Shares aggregating at least fifty-one percent (51%) of the total Entitlement Shares.



## RENEWABLE POWER PURCHASE AGREEMENT

### COVER SHEET

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

**Seller:**

**Facility:** [Name, location, size]

#### A. Transaction

Product: PCC 1 Energy and associated Environmental Attributes and Capacity Attributes

Guaranteed Installed Capacity:

Guaranteed Construction Start Date:

Guaranteed Commercial Operation Date:

Contract Price:

Delivery Term:

Deliverability:

☐ Full Capacity Delivery Service

☐ Energy only

#### B. Milestones

Site Control:

Permitting:

Phase I and II Interconnection study results:

Executed Interconnection Agreement:

Financial Close:

Construction Start:

Mechanical Completion:

Initial Synchronization:

Network Upgrades completed:

Commercial Operation Date:

#### C. Seller Collateral:

Development Assurance: \$60/kW of Guaranteed Capacity

Performance Assurance: \$60/kW



**D. Notices:**

<b>Buyer:</b> City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF	<b>Seller:</b>
<b>All Notices:</b> 525 Golden Gate Ave, 7th Floor San Francisco, CA, 94102 Attn: Contract Administration Phone: Email:	<b>All Notices:</b>  Phone: Email:
<b>Federal Tax ID Number:</b>	<b>Federal Tax ID Number:</b> <b>DUNS Number:</b>
<b>Invoices:</b> Attn: Phone: Email:	<b>Invoices:</b> Attn: Phone: Email:
<b>Scheduling:</b> Attn: Phone: Email:	<b>Scheduling:</b> Attn: Phone: Email:
<b>Payments:</b> Attn: Phone: Email:	<b>Payments:</b> Attn: Phone: Email:
<b>Wire Transfer:</b> BNK: ABA (ACH): ACCT:	<b>Wire Transfer:</b> BNK: ABA: ACCT:
<b>Credit and Collections:</b> Attn: Phone: Email:	<b>Credit and Collections:</b> Attn: Phone: Email:
<b>With additional Notices of an Event of Default or Potential Event of Default to:</b>  Attn: Phone: Email:	<b>With additional Notices of an Event of Default or Potential Event of Default to:</b>  Attn: Phone: Email:

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## **EXHIBITS**

The follows Exhibits constitute a part of this Agreement and are incorporated into the Agreement by reference.

<b>EXHIBIT A</b>	SELLER DOCUMENTATION OF CONDITIONS PRECEDENT
<b>EXHIBIT B</b>	FACILITY DESCRIPTION AND SITE DRAWINGS
<b>EXHIBIT C</b>	CONTRACT QUANTITY
<b>EXHIBIT D</b>	INSURANCE COVERAGES
<b>EXHIBIT E</b>	CONSTRUCTION START CERTIFICATION
<b>EXHIBIT F</b>	PROGRESS REPORT
<b>EXHIBIT G-1</b>	COMMERCIAL OPERATION CERTIFICATION
<b>EXHIBIT G-2</b>	CERTIFICATE OF INSTALLED CAPACITY
<b>EXHIBIT H-1</b>	FORM OF LETTER OF CREDIT
<b>EXHIBIT H-2</b>	FORM OF SIGHT DRAFT
<b>EXHIBIT I</b>	FORM OF REPLACEMENT RA

## RENEWABLE POWER PURCHASE AGREEMENT

This Renewable Power Purchase Agreement (“Agreement”) is entered into between the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF (“Buyer”) and \_\_\_\_\_, a \_\_\_\_\_ (“Seller”), as of \_\_\_\_\_ (the “Execution Date”). The Agreement shall include the exhibits, attachments, any written and fully executed supplements hereto, and any designated collateral, credit support, or similar arrangement between the Parties.

### RECITALS

1. Seller intends to develop, finance, build, own and operate a \_\_\_\_\_ powered generating facility located in \_\_\_\_\_; and,
2. Buyer operates CleanPowerSF, a community choice aggregator that serves retail customers in the City and County of San Francisco; and,
3. Buyer is willing to purchase, and Seller is willing to sell, the Product of the Facility, on the terms and conditions and at the prices set forth in this Agreement.

**NOW THEREFORE**, in consideration of the recitals above and the following covenants, terms and conditions, the Parties agree as follows:

### ARTICLE 1: DEFINITIONS

**AC:** Alternating current.

**Affiliate:** 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 preamble.

**Ancillary Services:** Has the meaning set forth in the CAISO Tariff.

**Annual Forecast:** Has the meaning set forth in Section 5.7(a)(i).

**Applicable Laws:** 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, 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.

**Availability Standards:** Has the meaning set forth in the CAISO Tariff.

**Bankrupt:** With respect to any entity, such entity (a) 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 and such case filed against it is not dismissed within sixty (60) calendar days, (b) makes an assignment or any general arrangement for the benefit of creditors, (c) otherwise becomes bankrupt or insolvent (however evidenced), (d) 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 (e) is generally unable to pay its debts as they fall due.

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



**Business Day:** Any day except a Saturday, Sunday, a Federal Reserve Bank holiday, or a City and County of San Francisco holiday, between the hours of 8:00 a.m. and 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:** The City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF.

**Buyer Bid Curtailment:** An event in which an Economic Bid or Self-Schedule for Energy or Ancillary Services submitted for a Settlement Interval in accordance with this Agreement results in a Real Time Energy Production Schedule awarded or deployed by the CAISO that fails to provide for the delivery of the full quantity of Energy that could have been delivered as determined by the Final Output Estimate for that Settlement Interval.

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

**Buyer's WREGIS Account:** Has the meaning set forth in Section 3.5(c)(i).

**CAISO:** The California Independent System Operator Corporation, or its functional successor.

**CAISO Charges Invoice:** Has the meaning set forth in Section 5.5(c).

**CAISO Tariff:** The California Independent System Operator Corporation, Fifth Replacement FERC Electric Tariff, Business Practices Manuals (BPMs), and Operating Procedures as may be amended, supplemented, or replaced (in whole or in part) from time to time.

**Capacity Attributes:** Any current or future defined characteristic (including the ability to generate at a given capacity level, provide Ancillary Services, and ramp up or ramp down at a given rate), certificate, tag, credit, flexibility, or dispatchability attribute, whether general in nature or specific as to the location or any other attribute of the Facility, intended to value any aspect of the capacity of the Facility to produce energy, including any accounting construct, or any other measure by the CPUC, the CAISO, the FERC, or any other Governmental Authority with jurisdiction, including Resource Adequacy Benefits.

**Capacity Damages:** Has the meaning set forth in Section (5.3(j)).

**Capacity Procurement Mechanism (CPM) Soft Offer Cap:** Has the meaning set forth in the CAISO Tariff.

**CEC:** The California Energy Commission or any successor agency.

**CEC Certification:** Means that the CEC has certified, or pre-certified, that the Facility is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Energy produced by the Facility qualifies as generation from an ERR for purposes of the RPS.

**CEQA:** The California Environmental Quality Act, California Public Resources Code Sections 21000, et. seq., as it may be amended from time to time.

**Change in Law:** Has the meaning set forth in Section 11.5(f).

**City:** The City and County of San Francisco.

**CleanPowerSF:** Buyer's community choice aggregation program.

**Commercial Operation:** The condition of the Facility existing when Seller has fulfilled all of the conditions set forth in Section 2.2(b)(ii) and Seller has provided notice to Buyer in the form of the Commercial Operation Certification set forth in Exhibit G-1.

**Commercial Operation Certification:** Seller's certification of Commercial Operation in the form set forth as Exhibit G-2, duly executed by a Licensed Professional Engineer.

**Commercial Operation Date or COD:** The date upon which Commercial Operation is achieved as specified in the Commercial Operation Certification.

**Commercial Operation Date Delay Damages or COD Delay Damages:** An amount equal to the Development Assurance divided by sixty (60).

**Compliance Cost Cap:** Has the meaning set forth in Section 3.7.

**Compliance Costs:** Has the meaning set forth in Section 3.7(a).

**Confidential Information:** Has the meaning set forth in Section 11.2.

**Construction Start:** Has the meaning set forth in Section 5.3(a)(i).

**Construction Start Date:** Has the meaning set forth in Exhibit E.

**Construction Start Delay Damages:** An amount equal to the Development Assurance divided by one hundred twenty (120).

**Contract Price:** Has the meaning set forth in Section 3.2.

**Contract Quantity:** The annual expected Energy production set forth in Exhibit C.

**Contract Year:** A period of twelve (12) consecutive months, commencing at 12:00 a.m. on the COD, and each subsequent Contract Year commencing on the twelve (12) month anniversary of the COD.

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

**Costs:** With respect to a 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 entered into pursuant to this Agreement or entering into new arrangements which replace this Agreement and (b) all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with the termination of this Agreement.

**Cover Sheet:** The cover sheet to this Agreement.

**CPUC:** The California Public Utilities Commission or any successor entity.

**CPUC System RA Penalty:** The CPUC-adopted penalty imposed on load serving entities for system RA deficiencies as that penalty may be updated or revised from time to time.

**Credit Rating:** 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 unsecured senior long-term debt, then the rating assigned to such entity as an issuer rating by Standard & Poor's Financial Services and/or Moody's Investors Service. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

**Curtailment Cap:** The yearly quantity per Contract Year, in MWh, equal to XXX (XX) hours times the Installed Capacity.

**Curtailment Order:** An order, direction, alert, or notice of the CAISO, Transmission Provider (whether directly or through a Scheduling Coordinator or the Transmission Provider), to curtail deliveries of Energy for any reason, including, but not limited to, any System Emergency, any warning of an anticipated System Emergency, or any warning of an imminent condition or situation which could jeopardize the CAISO's or Transmission Provider's electric system integrity or the integrity of other systems to which the CAISO or the Transmission Provider is connected, including curtailment in accordance with Seller's obligations under its Interconnection Agreement with the Transmission Provider.

**Curtailment Period:** The period of time, measured using Settlement Intervals, during which Seller reduces generation from the Facility pursuant to a Curtailment Order, including the time required for the Facility to ramp down and ramp up.

**Damage Payment:** The amount to be paid by the Defaulting Party to the Non-defaulting Party in the event of a termination of this Agreement prior to the COD as calculated pursuant to Section 8.2(b).

**Day-Ahead Market or DAM:** Has the meaning set forth in the CAISO Tariff.

**Deemed Delivered Energy:** Means the amount of Energy expressed in MWh that the Facility could have produced and delivered to the Delivery Point, adjusted for Station Uses and Electrical Losses, but was not produced solely due to a Buyer Bid Curtailment, as adjusted pursuant to Section 5.6(c)(iv). Deemed Delivered Energy shall be calculated as the difference in MWh between the Final Output Estimate and Delivered Energy.

**Defaulting Party:** The Party that has caused an Event of Default.

**Delivered Energy:** Means Energy delivered to the Delivery Point and measured by the Facility Meter, as adjusted for Electrical Losses and Station Uses.

**Delivery Point:** \_\_\_\_\_.

**Delivery Term:** Has the meaning set forth in Section 2.2(b)(i).

**Development Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(a) of this Agreement.

**Early Termination Date:** Has the meaning set forth in Section 8.2(a)(i).

**Economic Losses:** With respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from the termination of this Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c)(ii). Factors used in determining the loss of economic benefit may include reference to information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including Environmental Attributes and Capacity Attributes. The Non-Defaulting Party shall not be required to enter into replacement transactions to establish Economic Losses. Economic Losses shall exclude any (1) associated loss of investment tax credits and other lost tax benefits, (2) any costs, penalties, fees, or charges associated with the termination of related financing agreements or similar obligations, and (3) consequential, incidental, punitive, exemplary, indirect, or business interruption damages.

**Effective Date:** The date on which all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties.

**Effective FCDS Date:** The date identified in Seller's notice to Buyer (along with a Full Capacity Deliverability Status Finding from CAISO) as the date that the Facility has attained Full Capacity Deliverability Status.

**Electric System Upgrades:** Any Network Upgrades, distribution upgrades, or Interconnection Facilities that are determined to be necessary by the CAISO or Transmission Provider, as applicable, to physically and electrically interconnect the Facility to the Transmission Provider's electric system for receipt of Energy at the Point of Interconnection.

**Electrical Losses:** All transmission and transformation losses between the Facility and the Delivery Point.

**Eligible Intermittent Resources Protocol:** Has the meaning set forth in the CAISO Tariff.

**Eligible LC Bank:** 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 with an outlook designation as "stable", or A- from S&P with an outlook designation as "stable".

**Eligible Renewable Energy Resource or ERR:** Has the meaning set forth in California Public Utilities Code Section 399.12(e) and California Public Resources Code Section 25741(a), as either code provision is amended or supplemented from time to time.

**Energy:** Three-phase, 60-cycle alternating current electric energy measured in kilowatt hours or megawatt hours. Energy shall include without limitation, reactive power and any other electrical energy products that may be developed or evolve from time to time during the Term.

**Environmental Attributes:** Any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to generation from the Facility or Expansion Facility(ies) and its avoided emission of pollutants. Environmental Attributes include, without limitation, Renewable Energy Credits as well as:

- (a) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO) and other pollutants;
- (b) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by Applicable Law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; and
- (c) the reporting rights to these avoided emissions such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser's discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tag are accumulated on a MWh basis and one Green Tag represents the Environmental Attributes associated with one (1) MWh of Energy.

Environmental Attributes do not include:

- (i) any Energy, capacity, reliability or other power attributes from the Facility,
- (ii) production tax credits associated with the construction or operation of the Facility and other financial incentives in the form of credits, reductions, or allowances associated with the Facility that are applicable to a state or federal income taxation obligation,
- (iii) fuel-related subsidies or "tipping fees" that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or
- (iv) emission reduction credits encumbered or used by a Facility for compliance with local, state, or federal operating and/or air quality permits. If the Facility is a biomass or biogas facility and Seller receives any tradable Environmental Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Environmental Attributes to ensure that there are zero net emissions associated with the production of electricity from the Facility.

**Environmental Costs:** Means all costs, taxes, charges, and fees pertaining to, or incurred in connection with: acquiring and maintaining all environmental permits and licenses for the Facility and the Product; the Product's and Facility's compliance with all applicable environmental laws, rules, and regulations; all costs of permits and licenses; costs associated with the storage, use, disposal, transportation, and clean-up of Hazardous Substances introduced to the Site, and; the decontamination or remediation, on or off the Site, necessitated by the introduction of such hazardous substances on the Site.

**EPC Contractor:** An engineering, procurement, and construction contractor, or if not utilizing an engineering, procurement, and construction contractor, the entity having lead responsibility for the management of overall construction activities, selected by Seller, with substantial experience in the engineering, procurement, and construction of utility-scale renewable generating projects.

**Event of Default:** Has the meaning set forth in Section 8.1.

**Excess Quantity:** Has the meaning set forth in Section 3.2(a).

**Execution Date:** Has the meaning set forth in the preamble.

**Expansion Facility:** Any expansion of the Facility from its Installed Capacity, or any other electricity generating facility owned or controlled by Seller or its affiliates, located at the Site. Each such expansion of the Facility or additional facility shall be deemed to be an “Expansion Facility.”

**Expansion Facility Product:** All Energy, Capacity Attributes, Environmental Attributes, Ancillary Services, contributions towards Resource Adequacy or reserve requirements, and any other reliability or power attributes produced by Seller at any Expansion Facility.

**Extended Delivery Term:** Has the meaning set forth in Section 2.2(c)2.2(b)(ii)(K).

**Facility:** The power generation facility, interconnection facilities, and associated facilities and equipment to be constructed, owned and operated by Seller located on the Site for the generation and delivery of electricity as described in the Cover Sheet and Exhibit B.

**Facility Meter:** The CAISO-approved, revenue quality meter or meters dedicated solely to the Facility, that meet all applicable CAISO metering requirements, along with a CAISO-approved compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Energy delivered to the Delivery Point. The Facility may contain multiple measurement devices that will make up the Facility Meter, and, unless otherwise indicated, references to the Facility Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

**FERC:** The Federal Energy Regulatory Commission and any successor organization.

**Fifteen Minute Market or FMM:** Has the meaning set forth in the CAISO Tariff.

**Final Output Estimate:** The final estimate of the quantity of Energy the Facility reasonably could have generated based on Facility availability, insolation, and other relevant meteorological conditions. The Final Output Estimate shall be equal to the RTM Forecast initially and may be replaced pursuant to Section 5.7(a).

**Financial Close:** Seller and/or one of its Affiliates has obtained debt and/or equity financial commitments from one or more Lenders or Seller’s owners sufficient to construct the Facility.

**Fiscal Year:** The period commencing on July 1 and ending on June 30 in the following calendar year.

**Flexible Capacity:** With respect to any particular Showing Month, the number of MWs of Product which are eligible to satisfy Flexible RAR.

**Flexible RAR:** The flexible capacity requirements established for load-serving entities by the CAISO pursuant to the CAISO Tariff or the Resource Adequacy Rulings.

**Force Majeure Event:** An event or circumstance, including without limitation, a natural disaster, war, riot, act of terrorism, sabotage, destruction by a third party, or civil disturbance, which prevents one Party (“Claiming Party”) from performing all or a portion of 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 (whether direct or indirect), 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 Transmission Provider and/or the CAISO in entering into, or performing under, any agreements with Seller contemplated by this Agreement, including a failure to complete, or a delay in completing, interconnection or Electric System Upgrades by the Commercial Operation Date 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 Agreement;

- (d) Seller's inability to obtain Permits of any type, except where such failure is solely caused by a Force Majeure event;
- (e) Seller's inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility, except to the extent such inability is caused by a Force Majeure event;
- (f) any equipment failure, except to the extent such inability is caused by a Force Majeure event;
- (g) a Forced Outage except where such Forced Outage is caused by a Force Majeure event;
- (h) a Curtailment Order, to the extent such inability is caused by a Force Majeure event; or
- (i) economic conditions that render a Party's performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs), including Buyer's ability to buy Product at a lower price, or Seller's ability to sell Product at a higher price.

**Forced Labor:** Has the meaning set forth in Section 5.1(i).

**Forced Outage:** Any unplanned reduction or suspension of the operation of the Facility or unavailability of the Product in whole or in part caused by a mechanical, electrical, or equipment malfunction and any other unavailability of the Facility, in whole or in part, for maintenance or repair that is not a Planned Outage and not the result of Force Majeure.

**Forward Certificate Transfers:** Has the meaning set forth in Section 3.5(c)(i).

**Full Capacity Deliverability Status or FCDS:** Has the meaning set forth in the CAISO Tariff.

**Full Capacity Deliverability Status or FCDS Finding:** A written or electronic confirmation from the CAISO that the Facility is eligible for FCDS.

**Gains:** With respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of the Agreement for the remainder of the Term, determined in a commercially reasonable manner, and subject to Sections 8.2(c) and 8.3. Factors used in determining economic benefit may include information either available to the Non-Defaulting Party internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product at the same or reasonably equivalent pNode 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 to determine the value of the Product, including the value of Environmental Attributes and Capacity Attributes.

**GEP Liquidated Damages or GEP LDs:** Has the meaning set forth in Section 3.4(a)(i).

**GEP Period:** Successive periods consisting of two (2) consecutive Contract Years with the first GEP Period commencing on the COD, and with each subsequent GEP Period commencing on the twelve (12) month anniversary of the commencement of the prior GEP Period.

**GEP Shortfall:** Has the meaning set forth in Section 3.4(a)(i).

**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.

**Guaranteed Commercial Operation Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Construction Start Date:** Has the meaning set forth on the Cover Sheet.

**Guaranteed Energy Production, or GEP:** Has the meaning set forth in Section 3.4(a).

**Guaranteed Installed Capacity:** Has the meaning set forth on the Cover Sheet.

**Hazardous Substance:** (a) any chemical, material or substance that is listed or regulated under Applicable Laws as a “hazardous” or “toxic” substance or waste, or as a “contaminant” or “pollutant” or words of similar import, (b) any petroleum or petroleum products, flammable materials, explosives, radioactive materials, asbestos, urea formaldehyde foam insulation, and transformers or other equipment that contain polychlorinated biphenyls, and (c) any other chemical or other material or substance for which exposure to or release of such substance is prohibited, limited, or regulated by Applicable Laws.

**Indemnified Party:** Has the meaning set forth in Section 9.2.

**Indemnifying Party:** Has the meaning set forth in Section 9.2.

**Initial Synchronization:** The initial delivery of Energy from the Facility to the Delivery Point.

**Installed Capacity:** The maximum dependable generating capacity of the Facility that achieves Commercial Operation, as measured by the Facility Meter and adjusted for ambient conditions on the date of the performance test and as set forth in the Installed Capacity Certificate substantially in the form set forth in Exhibit G-2.

**Interconnection Agreement:** The agreement and associated documents (or any successor agreement and associated documentation) by and among Seller, the Transmission Provider, and the CAISO governing the terms and conditions of the Facility’s interconnection with the CAISO grid, including any description of the plan for interconnection of the Facility to the Transmission Provider’s system.

**Interconnection Facilities:** The interconnection facilities, control and protective devices and metering facilities required to connect the Facility to the transmission or distribution system as set forth in the Interconnection Agreement.

**Investment Grade:** Means a Credit Rating of “Baa3” or better from Moody’s or “BBB-” or better from S&P.

**kW:** Kilowatt.

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

**Lender(s):** Any Person(s) providing money or extending credit (including any capital lease) to Seller, including in the form of debt or tax equity, for (a) the construction of the Facility, (b) the term or permanent financing of the Facility, or (c) working capital or other ordinary business requirements for the Facility. “Lender(s)” shall not include any trade creditor(s) of Seller.

**Letter of Credit or LC:** An irrevocable, non-transferable standby letter of credit issued by an Eligible LC Bank in a form that is substantially similar to the form contained in Exhibit H-1. Costs of a Letter of Credit shall be borne by the applicant for such Letter of Credit.

**Licensed Professional Engineer:** A third party acceptable to Buyer in its reasonable judgment who (a) is licensed to practice engineering in California, (b) has training and experience in the power industry specific to the technology of the Facility, (c) has no economic relationship, association, or nexus with Seller or Buyer, other than to meet the obligations of Seller pursuant to this Agreement, (d) is not a representative of a consultant, engineer, contractor, designer or other individual involved in the development of the Facility or of a manufacturer or supplier of any equipment installed at the Facility, and (e) is licensed in an appropriate engineering discipline for the required certification being made.

**Local Area Requirements or LAR:** The local area reliability requirements established for load serving entities by the CPUC pursuant to the Resource Adequacy Rulings, by CAISO pursuant to the Tariff, or by other Governmental Authority having jurisdiction. LAR may also be known as local area reliability, local resource adequacy, local resource adequacy procurement requirements, or local capacity requirement in other regulatory proceedings or legislative actions.

**Locational Marginal Price, or LMP:** Has the meaning set forth in the CAISO Tariff.

**Master File:** Has the meaning set forth in the CAISO Tariff.

**Mechanical Completion:** The condition of the Facility existing when (i) all components and systems of the Facility have been properly constructed, installed and functionally tested according to Seller's EPC contract requirements in a safe and prudent manner that does not void any equipment or system warranties or violate any permits, approvals or Applicable Laws; (ii) the Facility is ready for startup testing and commissioning; (iii) Seller has provided written acceptance to the EPC Contractor of mechanical completion as that term is specifically defined in the EPC contract.

**Milestones:** The key development activities required for the construction and operation of the Facility, as set forth more particularly in Section 5.2.

**Minimum Deliveries Liquidated Damages or Minimum Deliveries LDs:** Has the meaning set forth in Section 3.4(b)(i).

**Monthly Forecast:** Has the meaning set forth in Section 5.7(a)(ii).

**Monthly Payment:** Has the meaning set forth in Section 4.1(a)(i).

**Moody's:** Moody's Investors Service, Inc.

**MW:** Megawatt.

**MWh:** Megawatt hour.

**Negative LMP:** In any Settlement Interval, whether in the Day-Ahead Market or Real-Time Market, the LMP at the Delivery Point is less than zero dollars (\$0).

**NERC:** Means the North American Electric Reliability Corporation or a successor organization.

**Net Qualifying Capacity or NQC:** Has the meaning set forth in the CAISO Tariff.

**Network Upgrades:** Has the meaning set forth in the CAISO Tariff.

**Non-Defaulting Party:** Has the meaning set forth in Section 8.2(a).

**Notice to Proceed:** The full notice to proceed provided by Seller to the EPC Contractor following execution of the EPC contract between Seller and such EPC Contractor and satisfaction of all conditions to performance of such contract, by which Seller authorizes such EPC Contractor to begin construction of the Facility without any delay or waiting periods.

**Outage Schedule:** Has the meaning set forth in Section 5.8(a)(i).

**Parties:** Buyer and Seller, and their respective successors and permitted assignees.

**Party:** Buyer or Seller, and each such Party's respective successors and permitted assignees.

**Performance Assurance:** The collateral provided by Seller to Buyer to secure Seller's obligations hereunder in accordance with Section 6.2(b) of this Agreement.

**Permits:** All material federal, state or local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, ownership, operation and maintenance of the Facility, including any such permits or approvals required under CEQA or the National Environmental Policy Act, 42 U.S.C. Sections 4321 et. seq.

**Permitted Extensions:** Has the meaning set forth in Section 5.3(c).

**Person:** An individual, partnership, corporation, business trust, limited liability company, joint stock company, trust, unincorporated association, joint venture, Governmental Authority or other entity.

**Planned Outage:** The removal of equipment from service availability for inspection and/or general overhaul of one or more major equipment groups. To qualify as a Planned Outage, the maintenance (a) must actually be conducted during the Planned Outage, and in Seller's sole discretion must be of the type that is necessary to reliably maintain the Facility, (b) cannot be reasonably conducted during Facility operations, and (c) causes the generation level of the Facility to be reduced by at least ten percent (10%) of the Installed Capacity.



**PNode:** Has the meaning set forth in the CAISO Tariff.

**Point of Interconnection or POI:** The point on the electrical system where the Facility is physically interconnected with the Transmission Provider's system as further described in the Interconnection Agreement.

**Product:** The Energy, Environmental Attributes, Capacity Attributes, Ancillary Services, and any and all other reliability, power, or environmental attributes which are or can be produced by or associated with the Facility.

**Product Content Category 1, or PCC 1 Energy:** Means any Renewable Energy Credit and associated generation of electricity from an Eligible Renewable Energy Resource that meets the criteria set forth in California Public Utilities Code Section 399.16(b)(1), as may be amended from time to time or as further defined or supplemented by Applicable Laws.

**Progress Report:** A report containing the information set forth in Exhibit F.

**Prudent Operating Practice:** Means (a) the applicable practices, methods and acts required by or consistent with Applicable Laws and reliability criteria, and otherwise engaged in or approved by a significant portion of the electric utility industry during the relevant time period with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States, or (b) any of the practices, methods and acts which, in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Prudent Operating Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to acceptable practices, methods or acts generally accepted in the industry with respect to grid-interconnected, utility-scale generating facilities and co-located storage facilities in the Western United States. Prudent Operating Practice includes compliance with Applicable Laws, applicable reliability criteria, and the criteria, rules and standards promulgated in the National Electric Safety Code and the National Electrical Code, as they may be amended or superseded from time to time, including the criteria, rules and standards of any successor organizations.

**Public Records Laws:** The California Public Records Act, California Government Code Sections 6250 et seq., and the San Francisco Sunshine Ordinance, San Francisco Administrative Code, Chapter 67, the Ralph M. Brown Act, California Government Code Sections 54950, et seq., and any other applicable law regarding public records as may be amended from time to time.

**Qualifying Capacity:** Has the meaning set forth in the CAISO Tariff.

**RA Deficiency Amount:** The liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month as calculated in accordance with Section 3.6(d)(i).

**RA Guarantee Date:** The date set forth in the Cover Sheet which is the date the Facility is expected to achieve Full Capacity Deliverability Status.

**RA Shortfall:** Has the meaning set forth in Section 3.6(d)(i).

**RA Shortfall Month:** Commencing on the RA Guarantee Date, any month during which (a) the Facility has not achieved FCDS, or (b) the Net Qualifying Capacity of the Facility for such month was either (i) not published by the Notification Deadline, or (ii) was less than the Qualifying Capacity of the Facility for such month.

**Real-Time Market or RTM:** Has the meaning set forth in the CAISO Tariff.

**Reliability Coordinator:** Has the meaning set forth in the CAISO Tariff.

**Renewable Energy Credit or REC:** Has the meaning set forth in California Public Utilities Code Section 399.12(h) and CPUC Decision 08-08-028, as may be amended from time to time or as further defined or supplemented by Applicable Laws.

**Renewable Portfolio Standard or RPS:** The California Renewable Portfolio Standard as set forth in California Public Utilities Code Sections 399.11 et. seq. and California Public Resources Code Sections 25740, et. seq., as such provisions are amended or supplemented from time to time.

**Replacement Price:** In dollars per MWh (\$/MWh), Buyer's actual, reasonable and reasonably documented cost of Replacement Product, plus liquidated damages of five percent (5%) of such cost for Replacement Product purchased by Buyer pursuant to Section 3.4(a)(i) or Section 3.4(b)(i) provided, however, that if Buyer did not purchase Replacement Product during such period, then the Replacement Price shall be calculated as the sum of (1) the price of Energy based on the hourly Day-Ahead Market price at the NP 15 EZ Gen Hub, plus liquidated damages of five percent (5%) of such cost, for hours ending 7 through 22 during the applicable period, and (2) the price of Environmental Attributes and Capacity Attributes, if applicable, based on information either available to Buyer internally or supplied by one or more third parties, including quotations (either firm or indicative) for a like amount of a like Product.

**Replacement Product:** Energy produced from a facility other than the Facility that at the time of delivery to Buyer qualifies as an ERR and which (1) has the same or similar Environmental Attributes, including PCC 1 Renewable Energy Credits, that would have been generated by the Facility during the Contract Year for which the Replacement Product is provided, and (2) equivalent Capacity Attributes that would have been provided by the Facility during the Contract Year for which the Replacement Product is provided.

**Replacement RA:** Resource Adequacy provided by Seller to Buyer from a facility other than the Facility which pursuant to Section 3.6(d)(ii) has the same flexible attributes and local, zonal or other locational attributes associated with the Facility.

**Resource Adequacy Benefits:** The rights and privileges attached to the Facility that satisfy any entity's resource adequacy obligations, as those obligations are set forth in any Resource Adequacy Rulings and shall include Flexible Capacity, and any local, zonal or otherwise locational attributes associated with the Facility.

**Resource Adequacy Requirements or RAR:** the resource adequacy capacity requirements, including LAR and Flexible RAR, for load serving entities established by the Resource Adequacy Rulings.

**Resources Adequacy Rulings:** The CPUC's existing or subsequent decisions, resolutions, or rulings addressing resource adequacy issues, or any other resource adequacy laws, rules or regulations enacted, adopted, or promulgated by any other Governmental Authority having jurisdiction, including the CAISO, as those decisions, resolutions, rulings, laws, rules, or regulations may be amended or modified from time to time.

**RTM Forecast:** The final forecast of the Energy to be produced by the Facility prepared by the CAISO or its designee in accordance with the Eligible Intermittent Resources Protocol and communicated to the Scheduling Coordinator for the Facility for use in submitting bids in the Real-Time Market.

**Schedule:** Has the meaning set forth in the CAISO Tariff.

**Scheduled Energy:** The Energy economically bid or Self-Scheduled by the SC that clears the applicable CAISO market.

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

**Self-Schedule:** Has the meaning set forth in the CAISO Tariff.

**Seller:** Has the meaning in the Preamble, and any successor or permitted assignee.

**Seller Day-Ahead Forecast:** Has the meaning set forth in Section 5.7(a)(iv).

**Seller Excused Product:** For any period of time, an amount of Energy expressed in MWh, equal to the Final Output Estimate, that could have been produced but which was not produced as a result of Curtailment Orders, Buyer Bid Curtailment, Force Majeure events, System Emergencies, or forced outages to the transmission or distribution system that prevents delivery of Energy from the Facility from and after the Delivery Point.

**Seller's WREGIS Account:** Has the meaning set forth in Section 3.5(c)(i).

**Settlement Interval:** Has the meaning set forth in the CAISO Tariff.

**SFPUC:** The San Francisco Public Utilities Commission.

**Showing Month:** The calendar month that is the subject of the RA compliance showing as set forth in the Resource Adequacy Ruling and CAISO Tariff.

**Site:** The location of the Facility as described on Exhibit B.

**Standard & Poor's or S&P:** Standard & Poor's Financial Services, LLC (a subsidiary of S&P Global, limited liability company).

**Station Use:** The Energy used within the Facility to power the lights, motors, control systems and other electrical loads that are necessary for operation of the Facility.

**Surplus Energy:** Has the meaning set forth in Section 3.2(b).

**System Emergency:** Has the meaning set forth in the CAISO Tariff.

**Taxes:** Means all federal, state, local, or foreign taxes, levies, assessments, surcharges, duties, and other fees and charges of any nature imposed by a Governmental Authority whether currently in effect or adopted during the Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any related items of withholding, deficiency, penalty, additions, interests, or assessments.

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

**Termination Payment:** With respect to the Non-Defaulting Party, the sum of (a) the Economic Losses and Costs, minus the Gains, which the Non-Defaulting Party incurs as a result of the termination of this Agreement, subject to Sections 8.2(c) and 8.3, provided that if such amount is negative, then the amount determined pursuant to this clause (a) of the definition of Termination Payment will be deemed to be zero dollars (\$0), plus (b) the net of all amounts then owed to the Non-Defaulting Party by the Defaulting Party, or to the Defaulting Party by the Non-Defaulting Party, determined as of the Early Termination Date.

**Test Energy:** Product (to the extent available) including Environmental Attributes generated by the Facility and delivered to the Point of Interconnection prior to the COD.

**Three-Month Shortfall:** Has the meaning set forth in Section 3.4(b).

**Transmission Provider:** Any entity or entities that owns, operates and maintains transmission or distribution lines and associated facilities used for the purpose of transmitting Energy from the Facility to or from the Delivery Point.

**WECC:** The Western Electricity Coordinating Council or successor agency.

**Weekly Forecast:** Has the meaning set forth in Section 5.7(a)(iii).

**WREGIS:** The Western Renewable Energy Generation Information System, or any successor renewable energy tracking program.

**WREGIS Certificate:** Has the meaning set forth in the WREGIS Operating Rules and are designated as eligible for compliance with the California RPS.

**WREGIS Certificate Deficit:** Any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Delivered Energy for the same calendar month, after taking into account applicable delays in the issuance of WREGIS Certificates or otherwise arising under WREGIS Operating Rules.

**WREGIS Operating Rules:** Those operating rules and requirements adopted by WREGIS as of May 2018, as subsequently amended, supplemented, or replaced from time to time.

## ARTICLE 2: CONDITIONS PRECEDENT AND TERM

### 2.1 Conditions Precedent to Term of Agreement

- (a) Conditions Precedent. The Term of this Agreement shall not commence until the occurrence of all of the following:
  - (i) Buyer receives all necessary approvals from the SFPUC and the Board of Supervisors;
  - (ii) Buyer receives from Seller the conditions precedent documentation listed in Part I of Exhibit A; and
  - (iii) Buyer receives from Seller the Development Assurance; and
  - (iv) The Controller has certified in accordance with the City's Charter that sufficient unencumbered balances are available in the proper fund.
- (b) Effective Date. The Effective Date of this Agreement shall be the date that all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties. Buyer will notify Seller promptly in writing when the condition in Section 2.1(a)(i) has been met.
- (c) Failure to Meet All Conditions Precedent. If the Conditions Precedent set forth in Section 2.1(a) are not satisfied or waived in writing by both Parties within ninety (90) days of full execution of this Agreement, then either Party may terminate this 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 and Buyer shall return all Development Assurance to Seller.

### 2.2 Term, Delivery Term, and Extension

- (a) Term. The term of this Agreement shall commence, and this Agreement shall be effective, upon the Effective Date and, unless earlier terminated pursuant to an express provision of this Agreement, shall remain in effect until delivery to Buyer of all of the Environmental Attributes associated with Energy delivered under this Agreement subject to Section 11.5(v) ("Term").
- (b) Delivery Term.
  - (i) The delivery term shall commence on the Commercial Operation Date and continue for \_\_\_\_\_ years ("Delivery Term"), unless terminated as provided by the terms of this Agreement.
  - (ii) The Delivery Term shall not commence until Seller has completed to Buyer's reasonable satisfaction each of the following conditions:
    - (A) Seller has delivered to Buyer the Commercial Operation Certification in substantially the form set forth at Exhibit G-1 and the Installed Capacity Certification in substantially the form set forth at Exhibit G-2;
    - (B) equipment for the Facility with a capacity of no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Capacity has been installed;
    - (C) Seller has obtained the precertification approval component of the CEC Certification requirement for the Facility;
    - (D) The Facility has successfully completed all testing required by Prudent Operating Practice and any applicable requirement to operate the Facility;
    - (E) Seller has secured and maintained in full force and effect all necessary approvals, authorizations, and permits from CAISO and any other

Governmental Authority with jurisdiction to enable Seller to operate the Facility and deliver Product to Buyer and all conditions thereof that are capable of being satisfied on the COD have been satisfied and are in full force and effect;

- (F) Seller has delivered to Buyer a fully executed Interconnection Agreement between Seller and the Transmission Provider for the Facility, which agreement shall be in full force and effect;
  - (G) Seller has delivered to Buyer a fully executed Participating Generator Agreement and Meter Services Agreement between Seller and the CAISO for the Facility, which agreements shall be in full force and effect;
  - (H) Seller has taken all necessary steps to allow the RECs from the Facility to be tracked in WREGIS and transferred to Buyer and all other requirements applicable to Seller to enable Buyer to use such RECs for its RPS requirements;
  - (I) Seller has taken all actions and executed all documents required to authorize Buyer or its designee to act as Scheduling Coordinator for the Facility and Buyer or its designee is authorized to act as SC;
  - (J) Seller has demonstrated satisfaction of all requirements under this Agreement that commence prior to or as of the Delivery Term, including payment of all amounts owed to Buyer under this Agreement, if any; and
  - (K) Seller has delivered Performance Assurance to Buyer.
- (c) The Parties agree that, in order for Buyer to dispatch the Facility as of the Commercial Operation Date, the Parties must perform certain of their Delivery Term obligations in advance of the Commercial Operation Date. The Parties shall cooperate with each other in order for Buyer to be able to dispatch the Facility as of the Commercial Operation Date.

**2.3 Extended Delivery Term and Purchase Option.** At its sole discretion, Buyer may provide notice to Seller no later than twenty-four (24) months prior to the end of Delivery Term of its intent to (i) extend the Delivery Term of this Agreement (“Extended Delivery Term”), or (ii) purchase the Facility. Buyer and Seller shall promptly enter into good faith negotiations on the price and other terms that will apply to any Extended Delivery Term or Facility purchase and sale. If the Parties have not reached agreement on such price and other terms within ninety (90) days after delivery of Buyer’s notice under this Section 2.3 in the case of an Extended Delivery Term, or one-hundred and twenty (120) days in the case of a purchase and sale of the Facility, then neither Party shall have any further obligation to negotiate for an Extended Delivery Term or purchase and sale. Upon termination of negotiations under this Section 2.2(c), Seller may enter into negotiations and definitive agreements with one or more third parties for the sale of the Product, the Facility, or any component thereof with respect to the period occurring after the end of the Delivery Term.

### **ARTICLE 3: PURCHASE AND SALE OF PRODUCT**

**3.1 Purchase and Sale.** During the Delivery Term, subject to the terms and conditions of this Agreement, Buyer will purchase all of the Product produced by or associated with the Facility and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility.

- (a) Exclusive Right. Buyer shall have the exclusive right to all Product associated with the Facility. Buyer shall have the exclusive right to use, market, or resell the Product and the right to all revenues generated from the use, resale, or remarketing of the Product. Seller shall take all commercially reasonable actions and execute all documents or instruments

reasonably necessary to facilitate a resale of Product by Buyer and to allow subsequent purchasers to use such resold Product.

- (b) No Substitution. Except as otherwise set forth in this Agreement, Seller shall not substitute or purchase any element of the Product from sources other than the Facility or sell Product from the Facility to a third party.
- (c) Title to Product. Commencing on the Commercial Operation Date through the end of the Delivery Term, Seller shall supply and deliver Energy to Buyer at the Delivery Point, and Buyer shall take delivery of and title to the Energy at the Delivery Point in accordance with the terms of this Agreement. Title to and risk of loss as to Environmental Attributes shall pass from Seller to Buyer upon transfer of such Environmental Attributes in WREGIS. Seller represents and warrants that it shall deliver all Product to Buyer free and clear of all liens, security interests, claims and encumbrances or any interest created by any Person other than Buyer. Subject to Section 5.5(b), Seller shall be responsible for any costs, fees, Taxes, assessments, or charges imposed on or associated with the Product or the delivery of the Product up to the Delivery Point and Buyer shall be responsible for any costs, fees, Taxes, assessments, or charges imposed on or associated with the Product or the delivery of the Product at and from the Delivery Point (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees). If a Party is required to remit or pay Taxes that are the other Party's responsibility, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other for such Taxes.

**3.2 Contract Price.** Buyer shall pay Seller \_\_\_\_\_ dollars per MWh (\$ /MWh) for Product delivered pursuant to this Agreement and Deemed Delivered Energy as adjusted pursuant to Section 3.2 ("Contract Price"). The Contract Price shall be the total compensation owed by Buyer for the Product, adjusted as follows:

- (a) Excess Quantity. Buyer has the right, but not the obligation, to purchase any Product in excess of one hundred and ten percent (110%) of the Contract Quantity for the then-current Contract Year ("Excess Quantity"). Buyer shall pay Seller the lesser of fifty percent (50%) of the Contract Price or the LMP, but not less than zero dollars per MWh, for Excess Quantity. In each Contract Year, if the Facility achieves ninety percent (90%) of the Contract Quantity, Seller shall (i) provide notice to Buyer, and (ii) request written confirmation from Buyer that Buyer intends to purchase any Excess Quantity. If Buyer does not respond within ten (10) Business Days, Seller shall have the right to sell any Excess Quantity that Buyer does not elect to purchase to a third party; provided that if Buyer is SC and does not elect to purchase the Excess Quantity, the Parties shall cooperate on settlements such that Buyer passes through to Seller any applicable CAISO costs and revenues.
- (b) Surplus Energy Price. If during any Settlement Interval, Seller delivers Product amounts in excess of the quantity of Energy that would be delivered consistent with the power rating of the Installed Capacity ("Surplus Energy"), then the price applicable to all such MWh or Surplus Energy shall be zero dollars (\$0). If the real-time LMP at the Delivery Point during any Settlement Interval is less than zero dollars (\$0), Seller shall pay to Buyer an amount equal to the absolute value of the LMP multiplied by the amount of Surplus Energy in MWh.

**3.3 Contract Quantity.**

- (a) Contract Quantity. The Contract Quantity is set forth in Exhibit C.
- (b) Test Energy. Buyer may elect to purchase Test Energy for a period of up to ninety (90) days prior to the Commercial Operation Date and up to the commencement of the Delivery Term pursuant to the terms of this Agreement, provided that the decision to produce and deliver Test Energy shall be at the sole discretion of Seller. Buyer shall provide notice to Seller of its election at least sixty (60) days prior to the start of Facility testing. If Buyer

does not elect to purchase Test Energy, Seller may sell the Test Energy and associated Environmental Attributes to a third party and Buyer shall facilitate interactions with CAISO regarding Test Energy as necessary in accordance with Seller's directions. If Buyer elects to purchase Test Energy, Seller's full compensation for Test Energy sold to Buyer shall be the net amount resulting from (i) the CAISO revenues and other payments for the Test Energy from the Facility, including revenues associated with CAISO dispatches, and (ii) the debits, costs, penalties and interest that are directly assigned by the CAISO to the Facility for, or attributable to, scheduling and deliveries of Test Energy from the Facility under this Agreement, which amount may be a negative or positive value.

### 3.4 **Guaranteed Energy Production and Minimum Deliveries.**

- (a) **Guaranteed Energy Production.** For each GEP Period throughout the Term, Seller shall deliver no less than eighty (80%) of (i) the sum of the Contract Quantities for the GEP Period, minus (ii) the Seller Excused Product ("Guaranteed Energy Production" or "GEP").
  - (i) If Seller fails to meet the GEP, then within sixty (60) days after the end of the relevant GEP Period, Buyer shall notify Seller of the quantity of the shortfall calculated for the relevant GEP Period as: eighty percent (80%) of (A) the sum of the Contract Quantities for the GEP Period minus (B) the sum of (1) Delivered Energy quantities, plus (2) Seller Excused Product, plus (3) the MWh equivalent of any Replacement Product or Minimum Deliveries Liquidated Damages that Seller provided to Buyer for any Three-Month Shortfalls within the GEP Period ("GEP Shortfall") and the amount of liquidated damages owed under this Section 3.4(a)(i). Within ten (10) Business Days after the receipt of notice of the GEP Shortfall, Seller shall either (C) offer to provide Replacement Product in accordance with the procedures set forth in Section 3.4(c) in the amount of the GEP Shortfall, or (D) pay Buyer liquidated damages calculated as: the positive difference obtained by subtracting the (i) Contract Price from (ii) the Replacement Price; multiplied by the GEP Shortfall ("GEP LDs"). Buyer shall not be obligated to purchase Replacement Product.
  - (ii) If within ten (10) Business Days of receipt of notice of a GEP Shortfall, Seller does not either provide an offer to Buyer to provide Replacement Product or deliver payment of the GEP LD amount to Buyer, Buyer shall be entitled to collect the GEP LDs by electing, in its sole discretion, one or more of the following, (1) to draw upon the Performance Assurance; and/or (2) netting under Section 4.1(c).
  - (iii) As set forth in Section 8.1(b)(iii), Seller's failure to deliver in any two (2) consecutive Contract Years at least seventy percent (70%) of the sum of the expected Contract Quantities for the relevant Contract Years, excluding Seller Excused Hours, shall constitute a default of this Agreement.
  - (iv) No less frequently than quarterly during each year, Seller shall calculate and provide notice to Buyer of the then-cumulative amount of the Seller Excused Product for such year, along with an explanation in reasonable detail of the calculation based on historical Facility data, meteorological data, Product projections (including by the CAISO, if applicable) and other relevant data. The calculation shall be subject to Buyer's reasonable review and approval.
- (b) **Minimum Deliveries.** Notwithstanding any other provision of this Agreement, during any consecutive three (3) calendar month period of the Delivery Term, Seller shall deliver no less than fifty percent (50%) of the quantities for each month as set forth in the applicable Annual Forecasts for that three (3) month period minus Seller Excused Product ("Minimum Deliveries").
  - (i) If Seller fails to meet the Minimum Deliveries, Buyer shall notify Seller of the quantity of the shortfall, calculated as the Minimum Deliveries minus the sum of

the Delivered Energy quantities for the relevant three (3) month period (“Three-Month Shortfall”) and the amount of liquidated damages owed under this Section 3.4(b). Within ten (10) Business Days after receipt of notice from Buyer, Seller shall either (A) offer to provide Replacement Product in accordance with the procedures set forth in Section 3.4(c) in the amount of the Three-Month Shortfall, or, (B) pay Buyer liquidated damages, calculated as the positive difference obtained by subtracting the (1) Contract Price from (2) the Replacement Price; multiplied by the Three-Month Shortfall (“Minimum Deliveries Liquidated Damages” or “Minimum Deliveries LDs”). Buyer shall not be obligated to purchase Replacement Product. The payment of Minimum Deliveries LDs under this Section 3.4(b)(i) shall not excuse Seller’s obligations under Section 3.4(a)(i) to pay GEP Liquidated Damages to the extent there is a GEP Shortfall after accounting the MWh equivalent of any Replacement Product or Minimum Deliveries LDs in accordance with Section 3.4(c).

- (ii) If within ten (10) Business Days of receipt of notice of a Three-Month Shortfall, Seller does not either provide notice to Buyer of its election to provide Replacement Product or deliver payment of the Minimum Deliveries LDs amount to Buyer, Buyer shall be entitled to collect the Minimum Deliveries LDs by electing, in its sole discretion, one or more of the following, (1) drawing upon the Performance Assurance; and/or (2) netting under Section 4.1(c).
- (iii) As set forth in Section 8.1(b)(iv), Seller’s failure to deliver at least fifty percent (50%) of the expected monthly quantities as set forth in the Annual Forecast, excluding Seller Excused Hours, for twelve (12) consecutive months (measured as of the end of each month during the Delivery Term) shall constitute a default of this Agreement.

(c) Replacement Product and Cure.

- (i) If Seller provides an offer to Buyer to provide Replacement Product pursuant to Sections 3.4(a) or (b), then Buyer shall have fifteen (15) days after receipt of Seller’s notice to confirm whether it will accept Replacement Product from Seller. If Buyer agrees to accept the Replacement Product, the Parties shall mutually agree upon a delivery schedule. All Replacement Product shall be delivered to Buyer at the NP 15 EZ Gen Hub. Buyer will pay Seller for all such Replacement Product provided pursuant to this Section 3.4(c) at the Contract Price. If Buyer rejects the offer of Replacement Product, Seller shall pay the GEP LDs or Minimum Deliveries Liquidated Damages to Buyer.
- (ii) Buyer’s receipt of Replacement Product, GEP Liquidated Damages, or Minimum Delivery LDs shall cure the performance issue that triggered such remedy as follows:
  - (A) The MWhs of Replacement Product delivered and the MWhs used in the calculation of GEP LDs or Minimum Deliveries LDs which were paid to Buyer pursuant to Section 3.4(a)(i) or 3.4(b)(i) shall be treated as actual deliveries in the most recent month in which the applicable shortfall occurred when assessing Seller’s compliance with its obligations under this Agreement including delivery obligations under Section 3.4(a).
  - (B) The quantities of Energy for which Seller paid GEP LDs or delivered Replacement Product in the second Contract Year of a GEP Period shall be included in the calculation of the GEP Shortfall for the first Contract Year of the following GEP Period.



### 3.5 Environmental Attributes.

- (a) Purchase and Sale of Environmental Attributes. During the Term, Seller shall transfer to Buyer, and Buyer shall receive from Seller, all right, title and interest in and to the Environmental Attributes associated with Delivered Energy, whether now existing or subsequently created by a Governmental Authority after the Execution Date. Seller shall, at its sole expense, take all actions and execute all documents or instruments necessary to transfer all rights, title, and interest in and to the Environmental Attributes, whether now existing or that come into existence in the future, associated with the Delivered Energy. Seller shall transfer and make such Environmental Attributes available to Buyer as soon as practicable upon Seller's production of the Environmental Attributes.
- (b) Buyer's Right to Report Ownership of Environmental Attributes. Seller shall not report to any Person or entity that the Environmental Attributes belong to anyone other than Buyer, and Buyer may report under any program that such Environmental Attributes purchased hereunder belong to it.
- (c) Renewable Energy Credits. Seller shall, at its sole expense take all actions and execute all documents or instruments necessary to ensure that all WREGIS Certificates associated with all Renewable Energy Credits corresponding to all Delivered Energy are issued and tracked for purposes of satisfying the applicable requirements of the California RPS and transferred within three (3) months of creation to Buyer for Buyer's sole benefit. Seller shall comply with all Applicable Laws, including, without limitation, the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. In addition:
  - (i) Prior to the Commercial Operation Date, Seller shall register the Facility with WREGIS and establish an account with WREGIS ("Seller's WREGIS Account"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS Certificates using "Forward Certificate Transfers" (as described in the WREGIS Operating Rules) from Seller's WREGIS Account to the WREGIS account(s) of Buyer or another account identified by Buyer ("Buyer's WREGIS Account"). Seller shall be responsible for all expenses associated with registering the Facility with WREGIS, establishing and maintaining Seller's WREGIS Account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS Account to Buyer's WREGIS Account.
  - (ii) Seller shall cause Forward Certificate Transfers to occur on a monthly basis in accordance with the certification procedure established by the WREGIS Operating Rules. Any fractional MWh amounts shall be carried forward until sufficient generation is accumulated for the creation of a WREGIS Certificate.
  - (iii) Due to the delay in the creation of WREGIS Certificates relative to the timing of the monthly invoice payment under this Agreement, Buyer may make an invoice payment for a given month before the WREGIS Certificates for such month are formally transferred to Buyer in accordance with the WREGIS Operating Rules and this Section 3.5(c). Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller.
  - (iv) Seller shall, at its sole expense, ensure that the WREGIS Certificates for a given calendar month correspond with the Delivered Energy for such calendar month. If any WREGIS Certificate Deficit is caused by, or the result of any action or inaction, by Seller, then the amount of Delivered Energy in such calendar Month shall be reduced by the amount of the WREGIS Certificate Deficit for the purposes of calculating Buyer's payment(s) to Seller under Article 4 and the Guaranteed Energy Production for the applicable GEP Period. Any amount owed by Seller to

Buyer because of a WREGIS Certificate Deficit shall be made as an adjustment to Seller's next monthly invoice to Buyer in accordance with Article 4, and Buyer shall net such amount against Buyer's subsequent payment(s) to Seller.

- (v) Without limiting Seller's obligations, to the extent a WREGIS Certificate Deficit is caused by an error or omission of WREGIS, the Parties shall cooperate in good faith to cause WREGIS to correct its error or omission.
- (vi) If WREGIS changes the WREGIS Operating Rules after the Execution Date or applies the WREGIS Operating Rules in a manner inconsistent with this Agreement, the Parties shall promptly modify this Agreement as reasonably required (A) to cause and enable Seller to transfer to Buyer's WREGIS Account a quantity of WREGIS Certificates for each given calendar month that corresponds to the Delivered Energy in the same calendar month, or (B) as may otherwise be reasonably appropriate to address such inconsistency.

**3.6 Capacity Attributes and Resource Adequacy.** Throughout the Delivery Term, Seller grants, pledges, assigns, and otherwise commits to Buyer all of the Installed Capacity, including the Capacity Attributes, from the Facility for any purpose, including to enable Buyer to meet its Resource Adequacy Requirements or successor program requirements as the CPUC, CAISO, and/or other Governmental Authority may prescribe.

- (a) Full Capacity Deliverability Status. Seller shall be solely responsible for and take all necessary actions to obtain Full Capacity Deliverability Status for the Facility by the RA Guarantee Date and to maintain FCDS throughout the Delivery Term.
- (b) Resource Adequacy. From the Execution Date and throughout the Delivery Term, Seller shall perform all actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits from the Facility to Buyer. Seller shall take all commercially reasonable actions, including complying with all applicable registration and reporting requirements, and executing any and all documents or instruments necessary to enable Buyer to use or resell all of the Resource Adequacy Benefits committed to Buyer under this Agreement.
- (c) NQC. Seller shall take all commercially reasonable actions as necessary for Buyer to obtain and maintain an NQC value that is equal to the Qualifying Capacity for the Facility.
- (d) Resource Adequacy Guarantee. For each RA Shortfall Month, Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages and/or provide Replacement RA as the sole remedy for the Capacity Attributes that Seller failed to convey to Buyer.
  - (i) For any RA Shortfall Month, Seller shall pay liquidated damages to Buyer in an amount equal to the product of (A) the Qualifying Capacity minus the NQC, as the NQC may be adjusted by the CAISO to reflect the CAISO's capacity evaluations of the Facility (including for Forced Outages) for the RA Shortfall Month ("RA Shortfall"), multiplied by (B) the sum of (1) the CPM Soft Offer Cap, or any successor value adopted or implemented by the CAISO for procurement of backstop capacity resources and (2) the applicable CPUC System RA Penalty, or any successor value adopted or implemented by the CPUC and imposed on load-serving entities for RA deficiencies ("RA Deficiency Amount"). If a RA Shortfall Month occurs during the period between the COD and the Effective FCDS Date, for the purpose of this Section 3.6(d)(i), the Qualifying Capacity shall be the amount of Qualifying Capacity the Facility would reasonably be estimated to qualify for, based on the CPUC-adopted qualifying capacity methodologies then in effect, provided, the amount shall be deemed to be zero (0) if the NQC has not been published by the CAISO by the Notification Deadline for the RA Shortfall Month.

- (ii) Seller may offer to provide Replacement RA to Buyer in the amount of the Qualifying Capacity of the Facility minus the Net Qualifying Capacity for the applicable RA Shortfall Month. Seller shall provide notice to Buyer of the offer of Replacement RA substantially in the form of Exhibit I at least ninety (90) days prior to the applicable Showing Month for the purpose of monthly RAR reporting. Buyer may elect to accept some or all of the Replacement RA by providing notice to Seller of its election within fifteen (15) days of Seller's offer. If Buyer does not elect to accept all or some of the Replacement RA, Seller shall pay to Buyer the RA Deficiency Amount for the RA Shortfall minus the Replacement RA provided to Buyer, if any, for the RA Shortfall Month.
- (iii) If within ten (10) Business Days of the end of a RA Shortfall Month, Seller does not either provide an offer to Buyer to provide Replacement RA or deliver payment of the RA Deficiency Amount to Buyer, Buyer shall be entitled to collect the RA Deficiency Amount by electing, in its sole discretion, one or more of the following, (A) to draw upon the Performance Assurance; and/or (A) netting under Section 4.1(c).

**3.7 Compliance Cost Cap.** If Seller establishes to Buyer's reasonable satisfaction that a change in Applicable Law has occurred after the Effective Date that results in Compliance Costs as defined in Section 3.7(a), then Seller's Compliance Costs during the Delivery Term shall be capped in the aggregate throughout the Delivery Term at twenty-five thousand dollars (\$25,000.00) per MW of Installed Capacity ("Compliance Cost Cap").

- (a) Compliance Costs. This Section shall apply to Seller's additional, reasonable out-of-pocket costs paid to applicable Governmental Authorities for obtaining, maintaining, conveying, or complying with: (i) CEC Certification, (ii) Environmental Attributes including WREGIS certificates, (iii) Capacity Attributes, and (iv) Sections 10.1(g) through 10.1(j) ("Compliance Costs"). Compliance Costs includes only those new costs associated with the change in Applicable Law after the Execution Date that are in excess of the reasonably anticipated compliance costs as of the Execution Date.
- (b) Reimbursement. In the event that the Compliance Costs exceed the Compliance Cost Cap, Buyer shall either reimburse Seller for such Compliance Costs that exceed the Compliance Cost Cap, or excuse Seller from performing those obligations that cause the Compliance Costs to exceed the Compliance Cost Cap. If Buyer agrees to reimburse Seller, Seller shall perform the additional compliance actions and shall include the Compliance Costs in the monthly invoice.
- (c) Notice. Seller shall notify Buyer within sixty (60) calendar days after the change in Applicable Law if it anticipates that its Compliance Costs will exceed the Compliance Cost Cap and provide an estimate of the Compliance Costs. Buyer shall notify Seller within ninety (90) calendar days of receipt of the notice whether Buyer (i) agrees to reimburse Seller for the additional costs, or (ii) waives Seller's performance of such obligations.

**3.8 Expansion Facility and Expansion Facility Product.**

- (a) Buyer's Right of First Refusal. During the Term, Seller may, at its sole discretion, develop, finance, construct, and/or operate an Expansion Facility. Each time such a determination is made, Seller shall offer, in writing, to sell the Expansion Facility Product to Buyer. The offer shall include the price to be paid by Buyer for the Expansion Facility Product, the term, and other principal terms and conditions of the proposed sale. If Buyer wishes to accept such offer to purchase all (but not less than all) of the Expansion Facility Product, Buyer shall notify Seller within ninety (90) calendar days of its receipt of such offer. Buyer and Seller shall promptly thereafter enter into good faith negotiation for modifications to this Agreement incorporating the Expansion Facility Product offer.

- (b) Buyer's Right to Purchase Expansion Facility Product. If Buyer does not accept Seller's offer for the Expansion Facility Product within ninety (90) calendar days of receipt of Seller's offer, Seller shall be deemed authorized to offer to sell that portion of the Expansion Facility Product to one or more third parties at a price and on other terms and conditions which, taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer. If Seller offers to disaggregate the Expansion Facility Product for the purpose of selling such Product to multiple buyers, Seller shall notify Buyer, in writing, of the terms and conditions of such offers, and Buyer shall again have the right of first refusal consistent with the terms set forth above for each of the lesser amounts being offered to the third parties. If Buyer does not purchase the Expansion Facility Product and Seller sells such Expansion Facility Product to a third party, Seller shall promptly certify, in writing, to Buyer that the terms and conditions of sale of such Expansion Facility Product to such third party, taken as a whole, are at least as favorable to Seller as the price and other terms and conditions set forth in Seller's offer to Buyer, and, Seller shall provide the relevant final contract and any other supporting documentation for such certification by Buyer. Upon the sale of such Expansion Facility Product in compliance with this Agreement, Buyer shall have no further rights to be offered or to purchase such Expansion Facility Product. Buyer's refusal, in writing, of the Expansion Facility Product from one Expansion Facility shall not affect Buyer's right to purchase the Expansion Facility Product from a subsequently developed Expansion Facility under the terms of this Agreement. Notwithstanding any provision to the contrary herein, Seller shall not sell or provide the Expansion Facility Product to any third party, unless Seller can do so without compromising in any material way its ability to provide the Product or Expansion Facility Product, if any, to Buyer hereunder. The materiality of any such impact shall be determined by Buyer, acting in its reasonable discretion.

#### ARTICLE 4:

##### BILLING, PAYMENT, AND CERTIFICATION

###### 4.1 Billing and Payment.

- (a) Monthly Invoices. Seller shall provide to Buyer no sooner than the tenth (10th) calendar day of each month an invoice for the Product and Deemed Delivered Energy for the prior month based upon meter data for Energy delivered in such calendar month, and for other amounts due to or from Seller hereunder. Each invoice shall be in a form reasonably specified by Buyer and shall include sufficient data as is reasonably necessary to verify each element of the calculation of the Monthly Payment and other charges and credits as set forth in this Agreement. Except for Deemed Delivered Energy and Replacement Product, all Energy purchased under this Agreement must be measured by the Facility's CAISO revenue meter to be eligible for payment under this Agreement.
- (i) The "Monthly Payment" for each month will be an amount equal to the summation of the following for each Settlement Interval in such month:
- (A) the product of (1) the Delivered Energy for such Settlement Interval, multiplied by (2) the Contract Price, plus
  - (B) the product of (1) the Deemed Delivered Energy for such Settlement Interval, multiplied by (2) the Contract Price, plus
  - (C) credits for any amounts owed from Seller to Buyer under Section 5.6(b); plus
  - (D) any other amounts netted against the monthly invoice pursuant to Section 4.1(c).

- (ii) The Invoice shall include:
    - (A) the hourly quantities of Delivered Energy delivered in the prior month;
    - (B) a calculation of the Monthly Payment as set forth in Section 4.1(a)(i);
    - (C) credits for WREGIS Certificate Deficits pursuant to Section 3.5(c)(iv), if any;
    - (D) the quantity of Replacement Product provided by Seller in such month;
    - (E) a calculation of the Deemed Delivered Energy for such month; and
    - (F) the calculation of any other amounts due to or from Seller hereunder.
  - (iii) Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.
- (b) Payment. Unless otherwise specified under this Agreement, all payments shall be due and payable on or before the thirtieth (30th) calendar day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day. Any amount not paid when due shall be considered late and the Party owing the payment shall pay a Late Payment Fee equal to a daily rate of five dollars and fifty cents (\$5.50) per one hundred thousand dollars (\$100,000) on the unpaid balance for a maximum period of ninety (90) days after the due date of the payment ("Late Payment Fee") shall be added to the outstanding amount.
- (c) Netting. Except as otherwise set forth in this Agreement, the Parties shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting. All amounts owed by each Party to the other Party under this Agreement, including for the purchase and sale of Product during the monthly billing period, any damages set forth under this Agreement, CAISO Charges Invoices, Late Payment Fees, and payments or credits, shall be netted so that only the excess amount remaining shall be paid by the Party who owes it.
- (d) City Vendor Requirements. Notwithstanding any other provision of this Agreement, Buyer shall not be deemed to be in default of this Agreement and no Late Payment Fee shall be assessed if an invoice under this Agreement cannot be processed by Buyer due to Seller's failure to comply with all applicable City requirements for City 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, insurance requirements, registration in the City's vendor payment processing system, or any other current or future City 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.
- (e) 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 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 Fee from and including the due date to but excluding the date paid.

Inadvertent overpayments shall be returned upon request or deducted by the Buyer from subsequent payments. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 4.1(d) 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 delivery of Product occurred, the right to payment for such delivery is waived.

- (f) CAISO Adjustments. If the CAISO makes any adjustment to any CAISO meter data or applicable market prices for a given time period, the Parties shall share information necessary to revise the monthly invoices pursuant to Section 4.1 and Seller agrees that it shall submit revised monthly invoices 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 Seller receives such binding adjustment to the meter data.

#### **4.2 Designated Fund/Limited Obligations.**

- (a) Auto-Appropriating Designated Fund. Buyer's payment obligations under this 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 obligations under this Agreement. Buyer agrees to establish CleanPowerSF rates and charges that are sufficient to maintain revenues necessary to pay its obligations under this Agreement 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 upon request during the Delivery Term.
- (b) Limited Obligations. Buyer's payment obligations are special limited obligations of the Buyer payable solely from the revenues of CleanPowerSF. Buyer's payment obligations under this Agreement are not a charge upon the revenues or general fund of the SFPUC or the City and County of San Francisco or upon any non-CleanPowerSF moneys or other property of the SFPUC or the City.

#### **4.3 Guaranteed Maximum Costs.**

- (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 Buyer are not authorized to request, and Buyer is not required to reimburse Seller for, commodities or services beyond the agreed upon Agreement scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of Buyer are not authorized to offer or promise, nor is 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) Biennial Budget Process. For each City biennial budget cycle during the term of this Agreement, Buyer agrees to take all necessary action to include the Buyer's payment obligations under this Agreement in its budget submitted to the Board of Supervisors for that budget cycle.

## ARTICLE 5:

### FACILITY DEVELOPMENT, OPERATION, AND MAINTENANCE

**5.1 General Obligations.** Seller covenants that at its sole cost and expense, unless otherwise specifically stated in this Agreement, it shall:

- (a) Records. Seller shall keep complete and accurate design, operating, and other records and all other data for the purposes of proper administration of this Agreement, including such records as may be required by any Governmental Authority or Prudent Operating Practice;
- (b) Further Development Information. Seller shall provide to Buyer such other information regarding the permitting, engineering, construction, or operations of the Facility as Buyer may from time to time reasonably request, subject to licensing or other restrictions of Seller or a third party with respect to confidentiality, disclosure or use; provided, nothing herein shall limit Buyer's right to obtain such information upon agreeing to confidentiality or signing a confidentiality agreement with regard to such information;
- (c) Insurance. Seller shall obtain and maintain the policies of insurance in the amounts and with the coverages as set forth on Exhibit D;
- (d) Vendor Certification. Seller shall obtain, renew, and maintain, all City required vendor certifications and requirements during the Term of this Agreement;
- (e) Construction. Design, develop, finance, and construct the Facility;
- (f) Prevailing Wages. Pay any person performing labor in the construction of the Facility not less than the applicable prevailing wage rate for the county in which the Facility will be located, as determined by the California Department of Industrial Relations. Seller shall require in any contract related to the construction of the Facility the payment of the prevailing wage rate for the work to be performed. Seller shall provide to Buyer upon request, certified payroll reports with respect to all persons performing labor in the construction of the Facility;
- (g) Forced Labor. Not knowingly utilize equipment or resources for the construction, operation or maintenance of the Facility that rely on work or services exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily ("Forced Labor"). Consistent with the business advisory jointly issued by the U.S. Departments of State, Treasury, Commerce and Homeland Security on July 1, 2020, equipment or resources sourced from the Xinjiang region of China are presumed to involve Forced Labor.
- (h) Interconnection and Transmission. Take all necessary actions, including arranging and paying for any and all necessary Electric System Upgrades, obtaining all required regulatory approvals, and executing and maintaining in full force and effect all necessary agreements sufficient to allow Seller to interconnect the Facility to the CAISO grid or distribution system, and deliver the Product to the Delivery Point by the Commercial Operation Date in accordance with this Agreement. Seller shall comply with all applicable requirements, rules, contractual obligations, and Prudent Operating Practice to maintain any Interconnection Facilities and to cause delivery of the Product to Buyer;
- (i) RPS and Green-e® Certification. Prior to the Commercial Operation Date and throughout the Delivery Term, take all actions necessary to obtain and maintain for the Facility (A) CEC Certification, (B) tracking and transfer of RECs associated with the Product in WREGIS, and (C) Green-e® Energy eligibility for renewable energy and greenhouse gas emissions as administered by the Center for Resource Solutions;
- (j) Battery Storage. At the request of Buyer at any time during the Term, Seller shall in good faith evaluate and consider proposals for adding a battery storage unit(s) to the Facility, provided that Seller shall not be required to add any such storage unit(s) to the Facility

unless and until Seller, Buyer and any Lenders each (in their sole and absolute discretion) approves the technical details of such unit(s) and appropriate amendments to this Agreement related to such unit(s), including additional compensation related to such unit(s). Seller shall use commercially reasonable efforts to reserve land at the project substation and/or project site for the inclusion of up to \_\_\_\_\_ MWh of storage;

- (k) CEC Certification. Take all necessary steps including, but not limited to, making or supporting timely filings with the CEC to obtain and maintain CEC Certification for the Facility throughout the Delivery Term, including compliance with all applicable requirements for certified facilities set forth in the current version of the RPS Eligibility Guidebook (or its successor). Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the Commercial Operation Date, Seller shall apply with the CEC for final CEC Certification. Within one hundred eighty (180) days after the Commercial Operation Date, Seller shall obtain and maintain throughout the remainder of the Delivery Term the final CEC Certification. Seller shall take all necessary action to cause the creation of retroactive WREGIS Certificates for the period prior to the final CEC Certification. Seller must promptly notify Buyer and the CEC of any changes to the information included in Seller's application for CEC Certification for the Facility;
- (l) Environmental Costs. Be solely responsible for all Environmental Costs; and
- (m) Compliance with Laws. Seek, obtain, maintain, and comply with all Applicable Laws, Permits, certificates, agreements, or other authorizations or approvals which are required for the ownership, construction, operation, and maintenance of the Facility and the generation, delivery, and sale of the Product pursuant to this Agreement.

## 5.2 Facility Construction and Milestones.

- (a) Time is of the Essence. The Parties agree that time is of the essence in the performance of this Agreement. Seller covenants that it shall diligently pursue to completion each of the following Milestones:
  - (i) Site control: [\_\_\_\_\_];
  - (ii) Final and non-appealable discretionary authorizations, Permits, and approvals: [\_\_\_\_\_];
  - (iii) Phase I and II Interconnection study results: [\_\_\_\_\_];
  - (iv) Executed Interconnection Agreement: [\_\_\_\_\_];
  - (v) Financial Close: [\_\_\_\_\_];
  - (vi) Construction Start: [\_\_\_\_\_] ("Guaranteed Construction Start Date");
  - (vii) Mechanical Completion: [\_\_\_\_\_] ;
  - (viii) Initial Synchronization: [\_\_\_\_\_];
  - (ix) Network Upgrades completed (evidenced by a permission to parallel letter from the Transmission Provider): [\_\_\_\_\_]; and,
  - (x) Commercial Operation: [\_\_\_\_\_] ("Guaranteed Commercial Operation Date").
- (b) Progress Report. Seller shall provide to Buyer a Progress Report concerning the progress towards construction and completion of the each of the Milestones (including whether Seller has met or is on target to meet each of the Milestones), which shall be substantially similar in form and substance to that attached as Exhibit F, and include such additional information as reasonably required by Buyer. Commencing on the Effective Date, Seller shall provide Progress Reports every three (3) months prior to the Guaranteed Construction Start Date and monthly Progress Reports thereafter. Seller agrees to meetings between



representatives of Buyer and Seller to review such Progress Reports and discuss Seller's construction progress, as Buyer may request from time to time.

- (c) Certification of Completion of Milestones. Within five (5) Business Days of the completion of each Milestone, Seller shall provide a certification to Buyer (along with any relevant supporting documentation), stating Seller's achievement or satisfaction of each such Milestone.
- (d) Notice of Failure to Achieve Milestone. Upon becoming aware that it shall, or is reasonably likely to, fail to achieve any Milestone by the required date for any reason, Seller shall notify Buyer in writing as soon as is reasonably practical but no later than thirty (30) days prior to the Milestone date. If the delay is caused by a Force Majeure event and thirty (30) days' notice is not feasible, Seller shall notify Buyer in writing as soon as reasonably practical. The notice shall provide information regarding the cause of the delay, provide a revised estimated date for achievement of the Milestone(s), and describe Seller's plan for meeting the Milestone(s) in sufficient detail to enable Buyer to reasonably assess the sufficiency of the plan to remedy the delay and achieve the Milestone. Seller's notice shall also explain any impact such delay may or shall have on any other Milestone, and measures to be taken to mitigate such impact. Subject to the provisions of Section 5.3, Seller shall not be considered in default of this Agreement for failure to meet a Milestone if Seller complies with its obligations under this Section 5.2(d).

### **5.3 Guaranteed Construction Start Date and Guaranteed Commercial Operation Date.**

(a) Construction Start.

- (i) "Construction Start" will occur when Seller has (i) obtained all necessary approvals, Permits, and authorizations for the construction of the Facility, (ii) executed an EPC contract and engaged all necessary contractors, (iii) ordered all essential equipment and supplies that are necessary to commence physical construction of the Facility and to proceed to completion without a foreseeable interruption of material duration, (iv) issued a final Notice to Proceed to the EPC Contractor, and (v) commenced mobilization at the Site by Seller or its agents, including site preparation at a sufficient level to reasonably demonstrate that Seller has commenced preparations for construction of the Facility, and (vi) delivered to Buyer the Construction Start Certification substantially in the form set forth in Exhibit E. Seller shall cause the Construction Start to occur no later than the Guaranteed Construction Start Date.
- (ii) Seller may extend the Guaranteed Construction Start Date by paying Construction Start Delay Damages to Buyer for each day Seller desires to extend the Guaranteed Construction Start Date, not to exceed a total of one hundred twenty (120) days. At least ten (10) Business Days prior to the Guaranteed Construction Start Date, Seller shall provide notice and payment to Buyer of the Construction Start Delay Damages for the number of days of extension to the Guaranteed Construction Start Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions to such date resulting from Seller's payment of Commercial Operation Date Damages, but as may be extended pursuant to a Permitted Extension), Buyer shall refund to Seller all Construction Start Delay Damages.

(b) Commercial Operation.

- (i) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date.
- (ii) Seller may extend the Guaranteed Commercial Operation Date by paying COD Delay Damages to Buyer for each day Seller desires to extend the Guaranteed

Construction Start Date, not to exceed a total of sixty (60) days. At least sixty (60) days prior to the Guaranteed Commercial Operation Date, Seller shall provide notice and payment to Buyer of the COD Delay Damages for the number of days of extension to the Guaranteed Commercial Operation Date. If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions resulting from Seller's payment of COD Delay Damages, but as may be extended pursuant to a Permitted Extension), then Buyer shall refund to Seller all COD Delay Damages.

- (c) Permitted Extensions. The following events constitute "Permitted Extensions":
  - (i) A Force Majeure event occurs and Seller works diligently to resolve the effect of the Force Majeure event;
  - (ii) Seller has used commercially reasonable efforts to obtain Facility interconnection but the Electric System Upgrades are not complete and ready for the Facility to connect and deliver and sell Product at the Delivery Point by the Guaranteed Commercial Operation Date; or
  - (iii) Buyer has not made all necessary arrangements to receive Energy from the Facility at the Delivery Point by the Guaranteed Commercial Operation Date.
- (d) Notice. If Seller claims a Permitted Extension, Seller shall provide Buyer with sixty (60) days' notice prior to the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date which notice shall clearly identify the grounds for the requested extensions and include information necessary for Buyer to verify the length of and grounds for the extension. If the delay is due to Force Majeure and sixty (60) days' notice is impracticable or impossible, Seller shall provide notice as soon as possible after the occurrence of the Force Majeure event.
- (e) Maximum Delay.
  - (i) The combined Permitted Extensions under this Section 5.3 (other than the extensions under Section 5.3(c)(iii)) for the Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date combined shall not exceed one hundred twenty (120) days in the aggregate.
  - (ii) The cumulative extensions of the Guaranteed Construction Start Date for Permitted Extensions and by payment of Construction Start Delay Damages shall not exceed one hundred and eighty (180) days.
  - (iii) The cumulative extensions of the Guaranteed Commercial Operation Date for Permitted Extensions (other than the extensions under Section 5.3(c)(iii)) and by payment of Commercial Operation Delay Damages shall not exceed one hundred and eighty (180) days.
- (f) No Limitation of Damages. The Parties agree that Buyer's receipt of the Construction Start Delay Damages or COD Delay Damages shall (i) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Article 8, and (ii) not limit Buyer's right to receive a Termination Payment or Damage Payment, as applicable, upon exercise of Buyer's termination rights pursuant to Section 5.3(h) or Article 8.
- (g) Development Assurance. If Seller fails to timely pay any Construction Start Delay Damages or COD Delay Damages, Buyer may draw upon the Development Assurance to satisfy Seller's payment obligations under this Section 5.3.
- (h) Termination of Agreement. Buyer may terminate this Agreement by written notice to Seller if:

- (i) Seller fails to achieve Construction Start on or before the Guaranteed Construction Start Date and the combined extensions to the Guaranteed Construction Start Date exceed the limits under Sections 5.3(a)(ii) and 5.3(e); or
  - (ii) Seller fails to achieve COD on or before the Guaranteed COD Date and the combined extensions to the Guaranteed COD Date exceed the limits under Sections 5.3(b)(ii) and 5.3(e)(c); or
  - (iii) Seller fails to pay, or discontinues paying, any or all of the Construction Delay Damages or COD Delay Damages when due and Buyer cannot obtain such amounts by drawing upon the Development Assurance and/or setting off against any amounts owed to Seller by Buyer under this Agreement.
- (i) Additional Extension. Notwithstanding the foregoing, the Parties may mutually agree in writing to an extension of the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date of up to ninety (90) days beyond the maximum extensions set forth under Sections 5.3(e) with payment of the Construction Start Delay Damages or COD Delay Damages, as applicable, by Seller. Buyer may not terminate this Agreement for failure to achieve the Guaranteed Construction Start Date or Guaranteed Commercial Operation Date during the mutually agreed upon extension period so long as Seller continues to pay the Construction Start Delay Damages or COD Delay Damages.
  - (j) Failure to Reach Guaranteed Installed Capacity. If, at Commercial Operation, the Installed Capacity is less than one hundred percent (100%) of the Guaranteed Installed Capacity, within ninety (90) days after the Commercial Operation Date, Seller shall take all necessary actions to cause the Installed Capacity to equal to (but not exceed) the Guaranteed Installed Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as Exhibit G-2 specifying the Installed Capacity. If Seller fails to construct the Guaranteed Initial Capacity by such date, Seller shall pay damages to Buyer, in an amount equal to Two Hundred Fifty Thousand Dollars (\$250,000) for each MW that the Guaranteed Installed Capacity exceeds the Installed Capacity ("Capacity Damages"), and the Guaranteed Installed Capacity and other applicable portions of the Agreement shall be adjusted accordingly. Capacity Damages shall not be offset or reduced by the payment of Development Assurance, Performance Assurance, Construction Start Delay Damages, COD Delay Damages, or any other form of liquidated damages under this Agreement.

#### **5.4 Operation and Maintenance.**

- (a) Operation and Maintenance. Seller shall be solely responsible for the ownership, operation, maintenance, and repair of the Facility in compliance with this Agreement, all Applicable Laws, the requirements of the California general safety orders, CAISO, NERC and WECC, all applicable contractual obligations and Permits, and in accordance with Prudent Operating Practice, and shall be solely responsible for all associated costs and expenses. In the event Seller requires any data or information from Buyer in order to comply with any Applicable Law, including the requirements of CAISO, NERC and WECC, relating to the Facility, then Seller shall request in writing such data from Buyer no less than forty-five (45) calendar days prior to Seller's requested date of Buyer's response; provided that if Seller has less than forty-five (45) calendar days prior notice of the need for such data, Seller shall request in writing such data from Buyer as soon as reasonably practicable. Buyer shall make a good faith effort to provide such data and/or information within the timeframe specified in writing by Seller or as soon thereafter as reasonably practicable.
- (b) Maintenance of Health and Safety. Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair, and replacement of the Facility. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt,

reasonable action to prevent such damage or injury and shall give Buyer's emergency contact identified in the Cover Sheet notice of such condition. Such action may include disconnecting and removing all or a portion of the Facility, or suspending the supply of Energy to the Delivery Point.

- (c) Start-ups and Shut-downs. Seller shall coordinate all Facility start-ups and shut-downs, in whole or in part, with Buyer in accordance with CAISO scheduling protocols and the reasonable protocols established by Buyer that are not inconsistent with the CAISO Tariff and CAISO procedures.
- (d) Metering.
  - (i) All Energy from the Facility must be delivered through the Facility Meter, which shall be subject to adjustment in accordance with applicable CAISO meter requirements and Prudent Operating Practices, including to account for Electrical Losses. Seller shall separately meter all Station Uses. Each meter shall be kept under seal which may be broken only when the Facility Meters are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable.
  - (ii) The meter data will account for transformer losses and will be programmed to reflect Electrical Losses to the Delivery Point, consistent with CAISO requirements. Seller shall bear all costs relating to all metering equipment installed to accommodate the Facility. Seller shall grant Buyer (and Buyer's Scheduling Coordinator) read-only rights to retrieve all data, including the meter reads, directly from the CAISO meter(s) at the Facility site through both (A) physical access and (B) remote electronic read-only access as necessary for the Scheduling Coordinator to meet its obligations under the CAISO Tariff and other applicable rules. Seller shall maintain an updated record of programmed meter parameters (such as channel configuration and other relevant settings) that is accessible and reasonably acceptable to Buyer. In addition, Seller shall provide all meter data to Buyer in a form reasonably acceptable to Buyer and consents to Buyer obtaining from CAISO the CAISO meter data directly related to the Facility and all inspection, testing, and calibration data and reports.
  - (iii) If Seller has reason to believe there may be a Facility Meter malfunction, or upon Buyer's reasonable request, Seller shall test the Facility Meter(s) at its sole cost and expense. The tests shall be conducted by independent third-parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a meter is inaccurate, Seller shall promptly repair or replace the meter at its sole cost and submit corrected meter data in compliance with CAISO requirements. Seller shall be responsible for and shall reimburse Buyer for all CAISO costs, penalties, and charges related to the inaccuracy of the Facility Meter.
  - (iv) Upon Buyer's request, Seller shall take all commercially reasonable actions to become, as specified by Buyer, either a CAISO Metered Entity or a Scheduling Coordinator Metered Entity (as those terms are defined in the CAISO Tariff).
- (e) Shared Facilities. The Parties acknowledged and agree that the Facility may share the Interconnection Facilities and other assets, including the Interconnection Agreement and transmission service agreements. Seller agrees that such joint ownership or arrangements shall permit Seller to perform or satisfy, and shall not limit, Seller's obligations under this Agreement and providing for separate metering of the Facility.
- (f) Refurbishment of the Facility. During the Term, Seller may not refurbish the Facility, alter components of the Facility, or replace major components of the Facility where such action results in a total increased capacity higher than the Guaranteed Installed Capacity, without

the prior written consent of Buyer. Buyer shall have the right, in its sole discretion, to accept or decline to permit any such refurbishment or alteration that may increase capacity of the Facility above the Guaranteed Installed Capacity. Nothing in this Section 5.4 is intended to limit Seller's ability to refurbish, repair, maintain, or replace any portion of the Facility where such actions will not increase the Facility's total generating capacity above the Guaranteed Installed Capacity.

## **5.5 Scheduling.**

### **(a) Scheduling Coordinator.**

- (i) Upon Initial Synchronization, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for the delivery and the receipt of the Product at the Delivery Point. At least thirty (30) days prior to Initial Synchronization, (A) Seller shall take all actions and execute and deliver to Buyer and the CAISO all documents necessary to authorize or designate Buyer or Buyer's designee as Scheduling Coordinator for the Facility effective as of the date of Initial Synchronization and (B) Buyer shall, and shall cause its designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Buyer or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization. On and after Initial Synchronization, Seller shall not authorize or designate any other party to act as Seller's Scheduling Coordinator, nor shall Seller perform for its own benefit the duties of Scheduling Coordinator, and Seller shall not revoke Buyer's authorization to act as Seller's Scheduling Coordinator unless agreed to by Buyer. Buyer or its designee shall submit Schedules and updates to Schedules consistent with the requirements of the CAISO Tariff and CAISO protocols and scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute, or real time basis, as determined by Buyer in its sole discretion.
- (ii) At any time during the Term of this Agreement, Buyer may elect to require Seller or Seller's designee to become the Scheduling Coordinator for the Facility. Buyer shall provide one hundred twenty (120) days prior notice to Seller and the Parties shall promptly enter into good faith negotiations on necessary amendments to this agreement to reflect the transfer of Scheduling Coordinator responsibilities to Seller. The negotiations shall be limited to necessary amendments that are solely related to the Scheduling Coordinator services for the Facility.
- (iii) Buyer shall provide Seller with access to a web-based system through which Seller shall submit to Buyer and the CAISO all notices and updates required under the CAISO Tariff regarding the Facility's status, including but not limited to, all outage requests, forced outages, forced outage reports, clearance requests, or must offer waiver forms. Seller shall cooperate with Buyer to provide such notices and updates. If the web-based system is not available, Seller shall promptly submit such information to Buyer and the CAISO (in order of preference) telephonically and by electronic mail to the personnel designated to receive such information.
- (iv) At least thirty (30) days prior to the expiration of the Delivery Term or the date that Seller assumes SC services under Section 5.5(a)(ii), or as soon as reasonably practicable upon an early termination of this Agreement, the Parties will take all actions necessary to terminate the designation of Buyer as Scheduling Coordinator for the Facility as of 11:59 p.m. on the designated expiration, termination, or transfer date.

- (v) Prior to the COD, the Parties shall cooperate to develop protocols as necessary to implement scheduling and settlements procedures consistent with this Agreement and the CAISO Tariff.
- (b) CAISO Costs and Revenues.
- (i) Except as otherwise set forth in this Section 5.6(b), Buyer (as Scheduling Coordinator for the Facility) shall be responsible for CAISO costs and shall be entitled to all CAISO revenues or credits related to the Product Scheduled or delivered from the Delivery Point.
  - (ii) Seller shall be responsible for and reimburse Buyer for all CAISO costs, charges, costs, and penalties which are related to (A) the unavailability of the Facility, (B) Seller's default, breach, or other failure to perform as required by this Agreement, (C) any failure by Seller to comply with the CAISO Tariff, any requirements imposed on it as the Facility owner, or the outage notification requirements set forth in the CAISO Tariff and this Agreement (except to the extent such non-compliance is caused by Buyer's failure to perform its duties as Scheduling Coordinator for the Facility), (D) any failure by Seller to comply with any Buyer Bid Curtailment, CAISO dispatch instruction, or Curtailment Order, (E) Facility Meter inaccuracies, and (F) penalties related to non-performance with respect to Ancillary Services and Residual Unit Commitment (as defined in the CAISO Tariff) awards due to conditions within Seller's control. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be Seller's responsibility. Notwithstanding the foregoing, Buyer shall be responsible for any non-performance penalties due solely to decreases in solar irradiance.
  - (iii) Seller shall be entitled to any Availability Incentive Payments (as defined in the CAISO Tariff) and shall be responsible for any Non-Availability Charges (as defined in the CAISO Tariff).
  - (iv) Seller shall be responsible for all CAISO fees, charges, and penalties imposed as a result of deviations between RTM Scheduled Energy and Delivered Energy during any Settlement Interval, except for those charges due solely to real-time uninstructed Energy caused by decreases in solar irradiance.
  - (v) Each Party shall use commercially reasonable efforts to cooperate with the other Party to allow that Party to comply with any obligations, and minimize any potential liability, it may have under the CAISO Tariff in relation to Product under this Agreement.
- (c) CAISO Settlements. Buyer (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties ("CAISO Charges Invoice") for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer shall review, validate, and if requested by Seller under paragraph (d) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer's existing settlement processes for charges that are Buyer's responsibilities. Subject to Seller's right to dispute and to have Buyer pursue the dispute of any such invoices, Seller

shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller's receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for such CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.

- (d) CAISO Charges Disputes. Seller may require Buyer (as the Facility's SC) to dispute CAISO settlements related to any costs or revenues for which Seller is responsible under this Agreement. Seller agrees to pay Buyer's costs and expenses (including reasonable attorneys' fees) associated with CAISO charges that Seller has directed Buyer to dispute.
- (e) Master File. Seller shall provide the data to the CAISO (and to Buyer) that is required for the CAISO's Master File (or successor data systems) for the Facility consistent with this Agreement. Neither Party shall change such data without the other Party's prior written consent.
- (f) Seller Equipment for Operating Instruction Communications. Seller shall acquire, install, and maintain such facilities, communications links and other equipment, and implement such protocols and practices, as necessary to respond to and follow operating instructions from the CAISO and Buyer's SC.

## **5.6 Dispatch Down/Curtailment of Facility.**

- (a) Curtailment.
  - (i) Seller shall reduce generation from the Facility by the amount and for the period required by the Reliability Coordinator, CAISO, Transmission Provider, or any successor thereto pursuant to a Curtailment Order. Buyer shall not be required to pay Seller for the Product that Seller could have delivered to Buyer but for such Curtailment Order.
  - (ii) Seller shall reduce the generation from the Facility by the amount and for the period set forth in any CAISO notice related to a Buyer Bid Curtailment.
- (b) Failure to Comply. If Seller fails to comply with a Buyer Bid Curtailment or Curtailment Order, then, for each MWh of Delivered Energy that the Facility generated in contradiction to the Buyer Bid Curtailment or Curtailment Order, Seller shall pay Buyer for each such MWh at an amount equal to the sum of (A) + (B) + (C), where: (A) is the amount, if any, paid to Seller by Buyer for delivery of such MWh and, (B) is the sum, for all Settlement Intervals with a Negative LMP during the Buyer Bid Curtailment period or Curtailment Period, of the absolute value of the product of such excess MWh in each Settlement Interval and the Negative LMP for such Settlement Interval, and (C) is any penalties or other charges resulting from Seller's failure to comply with the Buyer Bid Curtailment or Curtailment Order.
- (c) Deemed Delivered Energy.
  - (i) If a Buyer Bid Curtailment occurs, Buyer shall pay Seller for Deemed Delivered Energy in excess of the Curtailment Cap at the Contract Price.
  - (ii) In Seller's monthly invoice, Seller will reasonably calculate, consistent with this Agreement and Prudent Utility Practice the amount of Deemed Delivered Energy for the applicable month. The Parties shall share any documentation necessary to create or support such calculation. Seller shall include supporting documentation and calculations for the determination of Deemed Delivered Energy with the monthly invoice.
  - (iii) If either Party believes that the Final Output Estimate is an inaccurate estimate of the quantity of Energy the Facility reasonably could have generated based on

Facility availability, insolation, and other relevant meteorological conditions, the Parties will mutually agree upon the use of (1) the Seller Day-Ahead Forecast, (2) the Day-Ahead forecast of the Facility's output from the CAISO's independent forecast provider, or (3) another mutually agreed upon methodology to determine the Final Output Estimate.

- (iv) In the event of an overlapping Buyer Bid Curtailment and a Curtailment Order, Forced Outage, system emergency, or transmission outage, Seller shall exclude Energy curtailed during such Curtailment Order time period from the calculation of Deemed Delivered Energy.

## **5.7 Forecasts.**

- (a) Forecasts. Seller shall use generally accepted industry standards consistent with the forecasting requirements of the CAISO Tariff to produce the forecasts described in this Section 5.7. All forecasts shall be based on P-90 values. If Seller does not follow Section 4.8.2 of the CAISO Tariff with respect to forecasting, then upon Buyer's written request, Seller shall also retain, at Seller's expense, a third-party forecasting service reasonably acceptable to Buyer to produce such forecasts, in addition to those forecasts produced by Seller. Seller shall provide identical input data to such third-party service provider as are used to produce Seller's own forecast. Such forecast(s) shall be provided to Buyer and Buyer's SC in a manner reasonably acceptable to Buyer. If, during any given calendar month, the forecast error of such third-party service is larger than the forecast error of the forecasts produced by the Seller, determined as the sum of squared errors between the Seller Day-Ahead Forecast, for each respective forecast, and actual hourly production, then Buyer shall reimburse Seller for such third-party forecasting service costs.
  - (i) No later than thirty (30) calendar days prior to the end of each Contract Year, Seller will provide a forecast of available capacity and production ("Annual Forecast") detailing hourly expected available generation and monthly capacity and all proposed Planned Outages for the next Contract Year. Within five (5) Business Days following any change to the Planned Outage schedule for such Contract Year, Seller will provide notice to Buyer and Buyer's SC with an updated Annual Forecast reflecting the updated Planned Outage schedule, which will automatically supersede the prior Annual Forecast for such Contract Year.
  - (ii) No later than ten (10) calendar days prior to the first day of each month of the Delivery Term, Seller shall provide an electronic update to the Annual Forecast for that calendar month ("Monthly Forecast"). The Monthly Forecast shall include hourly available capacity and expected generation and all Planned Outages.
  - (iii) No later than seven (7) calendar days prior to the first day of each week of the Delivery Term, Seller shall provide a weekly forecast of available capacity and production and any changes in Planned Outages ("Weekly Forecast"). The Weekly Forecast shall include hourly available capacity and generation and all Planned Outages.
  - (iv) By 5:30 PM Pacific Time on the Business Day immediately preceding the date of delivery, Seller shall provide a forecast of available capacity and production for each hour of the date of delivery ("Seller Day-Ahead Forecast"). The Seller Day-Ahead Forecast shall include hourly available capacity and generation and all Planned Outages.

## **5.8 Outages.**

- (a) Planned Outages.
  - (xi) No later than January 15, April 15, July 15, and October 15 of each Contract Year, and at least sixty (60) days prior to the Guaranteed Commercial Operation Date,



Seller shall submit to Buyer the schedule of proposed Planned Outages ("Outage Schedule") for the following twelve (12) month period in a form reasonably specified by Buyer. Within twenty (20) Business Days after its receipt of an Outage Schedule, Buyer shall give notice to Seller of any request for changes to the schedule, and Seller shall, consistent with Prudent Operating Practices, accommodate Buyer's requests regarding the timing of any Planned Outage. Seller shall deliver to Buyer the final Outage Schedule no later than five (5) days after receiving Buyer's comments.

- (i) Seller shall not schedule Planned Outages during the period of reliability accounting, initially the period between June 1st and October 31 of each year; however, such period shall be subject to changes at Buyer's discretion in order to conform to the CAISO's Availability Assessment procedures. In the event that Seller has a previously Planned Outage that becomes coincident with a System Emergency, Seller shall make all reasonable efforts to reschedule such Planned Outage.
  - (ii) If replacement capacity is required by the CAISO for the period of any Planned Outage, Seller shall provide the replacement capacity in the amount and for the duration specified by the CAISO pursuant to the CAISO Tariff.
  - (iii) If reasonably required in accordance with Prudent Operating Practices, Seller scheduled shall have the right, on no less than sixty (60) days advance notice to Buyer, to propose changes to the Outage Schedule. Buyer may provide comments no later than ten (10) days after receiving Seller's notice of proposed changes to the Outage Schedule and Buyer shall permit any changes if doing so would not have a material adverse impact on Buyer and Seller agrees to reimburse Buyer for any costs and charges associated with such changes.
- (b) Forced Outages. Seller shall notify Buyer by telephoning Buyer's Scheduling Coordinator as soon as reasonably possible but no later than ten (10) minutes following the occurrence of a Forced Outage, or if Seller has knowledge that a Forced Outage will occur, within twenty (20) minutes of determining that such Forced Outage will occur. Seller shall relay outage information to Buyer as required by the CAISO Tariff within twenty (20) minutes of the Forced Outage. Seller shall communicate to Buyer the estimated time of return of the Facility as soon as practical. Seller shall promptly prepare and provide to Buyer, all reports of Forced Outages or Planned Outages that Buyer may reasonably require for the purpose of enabling Buyer to comply with CAISO requirements or any Applicable Laws.

## **ARTICLE 6: DEVELOPMENT AND PERFORMANCE ASSURANCE**

### **6.1 Grant of Security Interests/Remedies.**

- (a) First Priority Security Interest. To secure its obligations under this Agreement hereunder, Seller hereby grants to Buyer, as the secured party, a first priority security interest in, and lien on (and right of setoff against), and assignment of, all such Development Assurance and Performance Assurance posted with Buyer 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, Buyer. Within thirty (30) calendar days of the delivery of the Development Assurance or Performance Assurance, as applicable, Seller agrees to take such action as Buyer reasonably requires in order to perfect a first-priority security interest in, and lien on (and right of setoff against), such Development Assurance or Performance Assurance and any and all proceeds resulting therefrom or from the liquidation thereof, respectively.

- (b) Rights and Remedies. Upon or any time after the occurrence and during the continuation of an Event of Default by Seller or an Early Termination Date or the occurrence of any event under this Agreement where Buyer is entitled to draw upon the Development Assurance or Performance Assurance, Buyer may do any one or more of the following:
- (i) exercise any of the rights and remedies of a secured party with respect to all Development Assurance or Performance Assurance, as applicable, including any such rights and remedies under Applicable Law;
  - (ii) draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Assurance or Performance Assurance; and
  - (iii) liquidate all Development Assurance or Performance Assurance, as applicable, then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.
- (c) Application of Proceeds. Buyer shall apply the proceeds of the collateral realized upon the exercise of any such rights or remedies to reduce Seller's obligations under the Agreement (Seller remaining liable for any amounts owing to Buyer after such application), subject to the Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

## **6.2 Development Assurance and Performance Assurance.**

- (a) Development Assurance.
- (i) Seller shall post Development Assurance in the amount of sixty dollars per kilowatt (\$60/kW) multiplied by the Guaranteed Installed Capacity in the form of cash or a Letter of Credit within ten (10) calendar days following the Execution Date and maintain the Development Assurance in full force and effect until such time as Seller posts the Performance Assurance pursuant to Section 6.2(b) below with Buyer. Seller shall replenish the Development Assurance within five (5) Business Days of any draw down of any portion of the Development Assurance for any reason permitted under this Agreement other than to satisfy a Damage Payment.
  - (ii) Buyer shall be entitled to draw upon the Development Assurance posted by Seller for any reason permitted under this Agreement. Buyer shall also be entitled to draw upon the Development Assurance for any Damage Payment arising upon Buyer's declaration of an Early Termination Date prior to the Commercial Operation Date.
  - (iii) Buyer shall return to Seller the Development Assurance less any amounts drawn in accordance with this Agreement: (A) within thirty (30) days after Seller posts Performance Assurance with Buyer, or (B) within sixty (60) days after the following have occurred: (1) early termination of the Agreement; (2) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Damage Payment, indemnification payments, or other damages, (whether directly or indirectly such as through set-off or netting). With Buyer's consent, Seller may elect to apply the Development Assurance (or a portion thereof) toward the Performance Assurance.
- (b) Performance Assurance.
- (i) Seller shall post Performance Assurance in an amount equal to the product of sixty dollars per kilowatt (\$60/kW) multiplied by the Installed Capacity in the form of cash or a Letter of Credit before the COD. Seller shall replenish the Performance Assurance within five (5) Business Days of any draw down of any portion of the

Performance Assurance for any reason permitted under this Agreement other than to satisfy a Termination Payment.

- (ii) Buyer shall be entitled to draw upon the Performance Assurance posted by Seller for any reason permitted under this Agreement, including Buyer's declaration of an Early Termination Date after the Commercial Operation Date.
  - (iii) Seller shall maintain Performance Assurance from the Commercial Operation Date until the following have occurred: (a) the Delivery Term has expired or terminated early, and; (b) all payment obligations of Seller due and payable under this Agreement are paid in full, including compensation for the Termination Payment, indemnification payments, or other damages (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security.
- (c) No Limitation of Damages. The amount of Development Assurance and Performance Assurance required under this Agreement shall not be deemed a limitation of damages.

**6.3 Letter of Credit.** Development Assurance or Performance Assurance provided in the form of a Letter of Credit shall be substantially in the form set forth in Exhibit H-1, or another form reasonably acceptable to Buyer, subject to the following provisions:

- (a) Renewal of Letter of Credit. If Seller has provided a Letter of Credit pursuant to any of the applicable provisions in this Article 6, then Seller shall renew or cause the renewal of each outstanding Letter of Credit on a timely basis.
- (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 ten (10) 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); or
  - (ii) 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 Agreement, then Seller shall be deemed to have failed to meet the collateral requirements of Section 6.2 and Buyer may declare an Event of Default as set forth in Article 8.
- (d) Letter of Credit Costs. In all cases, the costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Seller.

## **ARTICLE 7: FORCE MAJEURE**

**7.1 Remedial Action.** Subject to the limitation on extensions of Milestones set forth in Section 5.3(e), 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 Claiming Party shall take all action necessary to remove such inability with all due speed and diligence. The Claiming 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 the Claiming 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 Claiming Party 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. The Claiming Party's failure to give timely notice shall not affect such Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving notice materially prejudices the other Party.
- 7.3 **Termination Due to Force Majeure Event.** Subject to the provisions of Section 5.3(e) on extensions of Milestones, if the Claiming Party is prevented in any material respect from performing any material obligations under this Agreement solely due to a Force Majeure Event lasting for a period of twelve (12) consecutive months or longer, either Party may terminate this 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. In such event, Buyer shall promptly return to Seller all Development Assurance or Performance Assurance, as applicable, less any damages due and payable by Seller prior to the date of such termination for reasons unrelated to this Section 7.3. This Section 7.3 shall not affect the rights and remedies associated with any other termination rights set forth in this Agreement.

## **ARTICLE 8: DEFAULT, REMEDIES, AND TERMINATION**

### **8.1 Events of Default.**

- (a) Events of Default. The occurrence of any of the following shall constitute an Event of Default by a Party:
- (i) the breach of any material obligation or covenant of this Agreement and such Party fails to cure such breach within sixty (60) days after written notification of default by the other Party; however, the Parties may mutually agree upon a longer period for cure if the breach cannot reasonably be cured within sixty (60) days, provided that the extended cure period will only continue for so long as the Party in breach is pursuing a cure with reasonable diligence;
  - (ii) subject to Sections 4.1(d) and 4.1(e), failure to make any payment when due under this Agreement within fifteen (15) Business Days after written notice that such payment is due;
  - (iii) 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 neither such circumstance nor the adverse effects of such circumstance are cured or remedied within thirty (30) days after written notice;
  - (iv) such Party becomes Bankrupt;
  - (v) subject to Section 11.1(d), 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 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.
- (b) Seller Events of Default. The following shall constitute additional Events of Default by Seller:

- (i) subject to Section 5.3(i), the occurrence of any of the events set forth in Section 5.3(h);
- (ii) Seller fails to satisfy any of the credit requirements of Article 6
- (iii) notwithstanding any other provision of this Agreement and subject to Section 3.4(c), Seller fails to deliver in any two (2) consecutive Contract Years, at least seventy percent (70%) of the sum of the expected Contract Quantities for the relevant Contract Years minus Seller Excused Hours;
- (iv) notwithstanding any other provision of this Agreement and subject to Section 3.4(c), Seller fails to deliver at least fifty percent (50%) of the expected monthly quantities as set forth in the Annual Forecast minus Seller Excused Hours in any consecutive twelve (12) month period; or
- (v) except for Replacement Product, Seller delivers or attempts to deliver Energy to the Delivery Point that was not generated by the Facility.

## 8.2 Termination for Default.

- (a) Declaration of 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) send notice, designating a day, no earlier than ten (10) calendar days and no later than sixty (60) days after the day such notice is deemed to be received, as the date on which this Agreement will terminate (the “Early Termination Date”);
  - (ii) accelerate all amounts owing between the Parties, terminate this Agreement and end the Delivery Term effective as of the Early Termination Date;
  - (iii) collect as of the Early Termination Date, (A) the Damage Payment in the case of an Event of Default arising at any time prior to the Commercial Operation Date, including an Event of Default pursuant to Section 8.1, or (B) the Termination Payment in the case of an Event of Default arising after the Commercial Operation Date;
  - (iv) withhold any payments due to the Defaulting Party under this Agreement;
  - (v) suspend performance;
  - (vi) exercise its rights pursuant to Article 6 of this Agreement to draw upon and retain Development Assurance or Performance Assurance, as applicable; and
  - (vii) exercise any other right or remedy available at law or in equity to the extent otherwise permitted under this Agreement.
- (b) Calculation of Damage Payment. If the Early Termination Date occurs prior to the Commercial Operation Date, the Damage Payment shall be calculated by the Non-Defaulting Party as follows:
  - (i) If Seller is the Defaulting Party, the Damage Payment owed to Buyer shall equal the entire Development Assurance amount and any accrued interest. Buyer shall be entitled to retain for its own benefit those funds held as Development Assurance and any accrued interest, accrued thereon and any amount of Development Assurance that Seller has not yet posted with Buyer shall be immediately due and payable by Seller to Buyer. There will be no amounts owed to Seller.
  - (ii) If Buyer is the Defaulting Party, then the Damage Payment shall be owed to Seller and shall equal the sum of the actual, documented, and verifiable costs incurred by Seller between the Effective Date and the Early Termination Date in connection with the Facility, less the fair market value (determined in a commercially

reasonable manner) of (A) all Seller's assets individually, or (B) the entire Facility, whichever is greater on the Early Termination Date, regardless of whether or not any Seller asset or the entire Facility is actually sold or disposed of. There will be no amount owed to Buyer.

- (c) Calculation of Termination Payment. If the Early Termination Date occurs on or after the Commercial Operation Date, the Termination Payment shall be calculated by the Non-Defaulting Party as follows:
  - (i) The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Termination Payment as of the Early Termination Date.
  - (ii) If the Non-Defaulting Party's aggregate Gains exceed its aggregate Economic Losses and Costs, if any, resulting from such termination of this Agreement, the amount of the Termination Payment shall be limited to the amounts set forth in clause (b) of the definition of Termination Payment.
  - (iii) The Non-Defaulting Party is not required to enter into replacement transactions to establish a Termination Payment.
  - (iv) The Termination Payment shall not include consequential, incidental, punitive, exemplary, indirect, or business interruption damages.
- (d) Notice of Damage Payment or Termination Payment. As soon as practicable after declaration of an Early Termination Date, the Non-Defaulting Party shall give notice to the Defaulting Party of the amount of the Damage Payment or Termination Payment due to or from the Defaulting Party to the Non-Defaulting Party, as applicable. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Damage Payment or Termination Payment shall be made to the Non-Defaulting Party fifteen (15) Business Days after such termination payment notice is effective.
- (e) Disputes Regarding Damage Payment or Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of the Non-Defaulting Party's calculation of the Damage Payment or Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Following delivery of such a notice, disputes regarding the Damage Payment or Termination Payment shall be resolved in accordance with Section 11.3.
- (f) Rights and Remedies are Cumulative. Except where this Agreement explicitly states that liquidated damages or another remedy is the exclusive remedy, the rights and remedies in this Agreement, including this Article 8, are cumulative.
- (g) Mitigation. The Non-Defaulting Party shall use commercially reasonable efforts to mitigate its Costs, Economic Losses, and damages resulting from any Event of Default.

### **8.3 Limitation of Liability/Liquidated 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 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, UNLESS THE PROVISION PROVIDES THAT THE EXPRESS REMEDIES ARE IN ADDITION TO OTHER REMEDIES THAT MAY BE AVAILABLE. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, 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 SUCH OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED UNLESS EXPRESSLY HEREIN PROVIDED. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY UNDER THIS AGREEMENT FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, INCLUDING, WITHOUT LIMITATION, LOSS OF USE, LOSS OF REVENUES, LOSS OF PROFIT, OR OTHER BUSINESS INTERRUPTION DAMAGES, INTEREST CHARGES, OR COST OF CAPITAL, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION, OR OTHERWISE; PROVIDED HOWEVER, NOTHING IN THIS SECTION SHALL AFFECT THE ENFORCEABILITY OF THE PROVISIONS OF THIS AGREEMENT RELATING TO EXPRESS REMEDIES OR MEASURE OF DAMAGES. THE PARTIES ACKNOWLEDGE AND AGREE THAT TO THE EXTENT THAT ANY DAMAGES SET FORTH IN THIS AGREEMENT ARE LIQUIDATED, INCLUDING PAYMENTS SET FORTH IN SECTIONS 3.4, 3.6, 5.3, 5.6, AND 8.2, SUCH DAMAGES ARE EACH REASONABLE AND REPRESENT A FAIR AND GENUINE ESTIMATE OF THE HARM OR LOSS THAT WOULD OCCUR RELATED TO THE EVENTS DESCRIBED THEREIN. THE PARTIES ACKNOWLEDGE AND AGREE THAT THE DAMAGES FOR THE CIRCUMSTANCES SET FORTH ABOVE WOULD BE IMPOSSIBLE OR DIFFICULT TO MEASURE, 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 AND THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

- (c) BUYER'S PAYMENT OBLIGATIONS UNDER THIS AGREEMENT SHALL BE LIMITED TO THE PAYMENT OF THE COMPENSATION PROVIDED UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO, THE COMPENSATION PROVIDED FOR IN ARTICLE 3, AND SECTIONS 5.6 AND 8.2.
- (d) EXCEPT AS OTHERWISE PROVIDED HEREIN, THE RIGHTS AND REMEDIES OF A PARTY PURSUANT TO THIS ARTICLE 8 SHALL BE CUMULATIVE AND IN ADDITION TO THE RIGHTS OF THE PARTIES OTHERWISE PROVIDED IN THIS AGREEMENT.

#### **ARTICLE 9: INDEMNIFICATION**

- 9.1 Seller Indemnification Prior to Commercial Operation Date.** Up to and including the Commercial Operation Date, Seller shall indemnify, defend, and hold harmless Buyer, and its officials, directors, agents and employees ("Buyer Indemnified Party"), from any claim, liability, loss, injury or damage arising out of, or in connection with, the negligence, willful misconduct or violation of Applicable Law by Seller and/or its agents, employees or sub-contractors, excepting only loss, injury or damage caused by the active negligence, willful misconduct or violation of Applicable Law by a Buyer Indemnified Party.

- 9.2 Seller and Buyer Indemnification after Commercial Operation Date.** After the Commercial Operation Date, each Party (“Indemnifying Party”) shall defend, indemnify and hold harmless the other Party and its elected officials, officers, directors, employees, agents, affiliates and representatives (each, an “Indemnified Party”) from and against any and all losses, including but not limited to losses arising from personal injury or death, or damage to property, but only to the extent such losses result from or arise out of the negligence, willful misconduct or violation of Applicable Law by the Indemnifying Party.
- 9.3 Environmental Indemnity.** Seller shall indemnify, defend, and hold harmless the Buyer Indemnified Parties, from any claim, liability, loss, injury or damage arising out of, or in connection with Environmental Costs and any environmental matters associated with the Facility, including the disposal and transportation of Hazardous Substances by or on behalf of the Seller or at the Seller’s direction or agreement.
- 9.4 Notice.** If an Indemnified Party determines that it is entitled to defense and indemnification under this Article 9, 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 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 the State of \_\_\_\_\_, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this 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 Agreement 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 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 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 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;



- (g) Throughout the Delivery Term of this Agreement that: (i) the Facility qualifies and is pre-certified or certified by the CEC as an Eligible Renewable Energy Resource (“ERR”) as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Facility’s output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law;
- (h) Throughout the Delivery Term of this Agreement the Renewable Energy Credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard, as set forth in California Public Utilities Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law;
- (i) All necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in the Western Renewable Energy Generation Information System will be taken prior to the first delivery under this Agreement; and
- (j) It will provide and convey all Environmental Attributes associated with all electricity generation from the Project to Buyer as part of the Product being delivered, it holds the rights to all Environmental Attributes from the Facility, and it agrees to convey and hereby conveys all such Environmental Attributes to Buyer as included in the delivery of the Product from the Facility.
- (k) As of the Effective Date, Seller represents and warrants to Buyer that it has not received notice from or been advised by any existing or potential supplier or service provider that the disease designated COVID-19 or the related virus designated SARS-CoV-2 have caused, or are reasonably likely to cause, a delay in the construction of the Facility or the delivery of materials necessary to complete the Facility, in each case that would cause the Commercial Operation Date to be later than the Guaranteed Commercial Operation Date.

**10.2 Buyer’s 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 Agreement;
- (b) Buyer has the legal power and authority to make and carry out this Agreement 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 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 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 Agreement; and

- (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.

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

- (a) It shall continue to be duly organized, validly existing and in good standing under the 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 Agreement; and
- (c) It shall perform its obligations under this 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) General Assignment. Except as provided in Sections 11.1(b) and 11.1(c), neither Party shall assign this 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 Agreement, (ii) the assignee agrees in writing to be bound by the terms and conditions of this Agreement, (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 to Financing Providers. Notwithstanding any provision to the contrary in this Section 11.1, Buyer hereby consents to assignment of this Agreement by Seller as collateral for any financing or refinancing of the Facility to a Lender. Seller's obligations under this Agreement shall continue in their entirety in full force and effect. Promptly after granting such interest, Seller shall notify Buyer in writing of the name, address, and telephone and facsimile numbers of any Lender to which the Seller's interest under this Agreement has been assigned. The notice shall include the names of the Lender's primary contact(s) to whom all communications may be addressed. Seller shall promptly notify Buyer of any changes to the information contained in the notice. As a condition to Buyer's consent to assignment, the following provisions shall apply to any assignment under this Section 11.1(b):
  - (i) Lender shall have the right, but not the obligation, to perform any act required to be performed by Seller under this Agreement to prevent or cure a default by the Seller and such act performed by Lender shall be as effective to prevent or cure a default as if done by Seller.
  - (ii) Buyer shall cooperate with Seller or a Lender to execute or arrange for the delivery of certificates, consents, opinions, estoppels, amendments, and other documents reasonably requested by Seller or Lender in order to complete any financing or refinancing and shall enter into reasonable agreements as necessary to provide for

recognition by Buyer of the Lender's security interest in this Agreement and such other provisions as may be reasonably requested by Seller or any Lender, so long as the terms and conditions of such agreements are consistent with this Agreement and such amendments or agreements are reasonably acceptable to both Parties. All costs and expenses (including reasonable attorney's fees) incurred by Buyer in connection with an assignment of this Agreement to a Lender shall be borne by Seller.

- (iii) In the event of a Default under this Agreement, Buyer shall provide a copy of the notice of Default to the Lender pursuant to Section 8.2(a) at the same time as the notice is provided to Seller. Buyer shall accept a cure performed by a Lender and shall negotiate in good faith with the Lender as to the cure period(s) allowed for the Lender to cure any Event of Default. Buyer shall accept a cure by Lender so long as the cure is accomplished within the applicable cure period. Notwithstanding any Lender cure, Seller shall not be released and discharged from, and shall remain liable for, any and all obligations to the Buyer arising or accruing hereunder.
  - (iv) If Lender, directly or indirectly, takes possession of, or title to the Facility (including possession by a receiver or title by foreclosure or deed in lieu of foreclosure), Lender must (i) assume all of Seller's obligations arising under this Agreement, and (ii) shall cure all defaults under this Agreement existing as of the date of change of title or control as required under this Agreement.
  - (v) If Lender elects to sell or transfer the Facility after taking possession of, or title to the Facility, or a sale occurs through the actions of Lender, Lender must cause the transferee or buyer to assume all of Seller's obligations arising under this Agreement and all related agreements as a condition of the sale or transfer. Such transferee or buyer must be made to an entity that: (A) has a tangible net worth of not less than one hundred fifty million dollars (\$150,000,000) or a Credit Rating of at least BBB- from S&P or Baa3 from Moody's, and (B) has at least two (2) years of experience in the ownership and operation of energy storage facilities similar to the Facility, or has retained a third-party with such experience to operate the Facility.
- (c) Assignment in Connection with a Change in Control. Notwithstanding any provision to the contrary in this Section 11.1, any direct or indirect change of control of Seller (whether voluntary or by operation of Law) shall not require the prior written consent of Buyer. Seller shall promptly notify Buyer of any direct or indirect change in control and shall provide any information reasonably requested by Buyer regarding the change in control, provided that this obligation does not apply to any direct or indirect owners of Seller's Parent. Seller acknowledges that its obligations under this Agreement remain in full force and effect notwithstanding such change in control and that Seller is solely responsible for ensuring that all required changes to its vendor certifications are promptly implemented.
- (d) Unauthorized Assignment. Any assignment or purported assignment in violation of this Section 11.1 is void.

## **11.2 Proprietary or Confidential Information.**

- (a) Confidential Information. Each Party understands and agrees that, in the performance of this Agreement or in contemplation thereof, the other Party may have access to private or confidential information and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the Party that owns or controls the Confidential Information. Each Party agrees that all private and confidential information disclosed by one Party to the other Party shall be held in confidence and used only in performance of the Agreement; however, a Party may disclose the Confidential

Information of the other Party to its officers, employees, agents, consultants, and contractors as necessary for the performance of its obligations under this Agreement and as necessary to comply with any applicable requirements or orders of a Governmental Authority. Each Party 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 Laws).
- (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 11.2 nothing shall restrict any Party from using or disclosing information related to this 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, or to the auditors, attorneys, advisors, or actual or potential lenders or investors of the non-disclosing Party and/or its Affiliates which are required to keep the information that is disclosed in confidence.
- (e) Nondisclosure of Private Information. If this 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 Agreement and only as necessary in performing this Agreement. Seller is subject to the enforcement and penalty provisions in Chapter 12M.

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

- (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 Agreement by negotiation. The status of any dispute or controversy notwithstanding, each Party shall proceed diligently with the performance of its obligations under this Agreement in accordance with and subject to the terms of this 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) Governing Law; Venue. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of law. Venue shall be in the County of San Francisco, 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 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 Agreement or until after final audit has been resolved, whichever is later.

#### **11.5 General.**

- (a) Entire Agreement. This Agreement, the exhibits, attachments, and any written and fully executed supplements hereto, any designated collateral, credit support, or similar arrangement between the Parties constitute the entire agreement between the Parties relating to the subject matter.
- (b) Construction. This 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 Agreement shall be enforceable unless reduced to writing and executed by both Parties.
- (d) No Third-Party Beneficiaries. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this 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 Agreement is rendered unlawful by action by any Governmental Authority, or any change in Applicable Law including the CAISO Tariff (a "Change in Law") occurring after the Execution Date, the remaining lawful obligations that arise under this 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 so that the performance of this Agreement becomes impossible or impracticable, the Parties shall work in good faith to revise this Agreement so that the Parties may perform their obligations in a manner that maintains to the greatest extent practicable the original intent of the Parties and the benefits, burdens, and obligations under this Agreement. A change in cost shall not in and of itself be deemed to render this Agreement or any provision of this Agreement impossible or impracticable.
- (g) Headings. The headings used herein are for convenience and reference purposes only.
- (h) Assigns. This Agreement shall be binding on each Party's successors and assigns.
- (i) No Dedication. No undertaking by one Party to the other under any provision of the 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. The

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 the Facility or any business related to the Facility.

- (k) Limitations on Contributions. By executing this Agreement, Seller acknowledges its obligations under Section 1.126 of the City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with, or is seeking a contract with, any department of the City for the rendition of personal services, for the furnishing of any material, supplies or equipment, for the sale or lease of any land or building, for a grant, loan or loan guarantee, or for a development agreement, from making any campaign contribution to (i) a City elected official if the contract must be approved by that official, a board on which that official serves, or the board of a state agency on which an appointee of that official serves, (ii) a candidate for that City elective office, or (iii) a committee controlled by such elected official or a candidate for that office, at any time from the submission of a proposal for the contract until the later of either the termination of negotiations for such contract or twelve months after the date the City approves the contract. The prohibition on contributions applies to each prospective party to the contract; each member of Seller's board of directors; Seller's chairperson, chief executive officer, chief financial officer and chief operating officer; any person with an ownership interest of more than ten percent (10%) in Seller; any subcontractor listed in the bid or contract; and any committee that is sponsored or controlled by Seller. Seller certifies that it has informed each such person of the limitation on contributions imposed by Section 1.126 by the time it submitted a proposal for the contract, and has provided the names of the persons required to be informed to the City department with whom it is contracting.
- (l) 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 in the performance of this Agreement. Seller agrees to comply with San Francisco Administrative Code Chapter 12.G and any implementing rules and regulations promulgated by the Controller. 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 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.
- (m) Nondiscrimination 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 Agreement, and will not during the term of this 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.

- (n) Consideration of Salary History. Seller shall comply with San Francisco Administrative Code Chapter 12K, the Consideration of Salary History Ordinance or "Pay Parity Act." Seller is prohibited from considering current or past salary of an applicant in determining whether to hire the applicant or what salary to offer the applicant to the extent that such applicant is applying for employment to be performed on this Agreement or in furtherance of this Agreement, and whose application, in whole or part, will be solicited, received, processed or considered, whether or not through an interview, in the City or on City property. Seller is subject to the enforcement and penalty provisions in Chapter 12K.
- (o) Consideration of Criminal History in Hiring and Employment Decisions. Seller agrees to comply fully with and be bound by all of the provisions of Chapter 12T, "City Contractor/Subcontractor Consideration of Criminal History in Hiring and Employment Decisions," of the San Francisco Administrative Code, including the remedies provided, and implementing regulations, as may be amended from time to time. The requirements of Chapter 12T shall only apply to Seller's operations to the extent those operations are in furtherance of the performance of this Agreement, shall apply only to applicants and employees who would be or are performing work in furtherance of this Agreement, and shall apply when the physical location of the employment or prospective employment of an individual is wholly or substantially within the City. Chapter 12T shall not apply when the application in a particular context would conflict with federal or state law or with a requirement of a government agency implementing federal or state law.
- (p) Submitting False Claims. Pursuant to San Francisco Administrative Code Section 21.35, any contractor or subcontractor who submits a false claim shall be liable to Buyer for the statutory penalties set forth in that section. A contractor or subcontractor will be deemed to have submitted a false claim to Buyer if the contractor or subcontractor: (a) knowingly presents or causes to be presented to an officer or employee of 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 Buyer; (c) conspires to defraud Buyer by getting a false claim allowed or paid by 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 Buyer; or (e) is a beneficiary of an inadvertent submission of a false claim to Buyer, subsequently discovers the falsity of the claim, and fails to disclose the false claim to Buyer within a reasonable time after discovery of the false claim.
- (q) Use of City 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 Buyer.
- (r) Business License Taxes. Seller agrees that it is obligated to pay all amounts due to the City under the San Francisco Business and Tax Regulations Code during the Term of this Agreement. Pursuant to Section 6.10-2 of the San Francisco Business and Tax Regulations Code, Seller further acknowledges and agrees that City may withhold any payments due to Seller under this Agreement if Seller is delinquent in the payment of any amount required to be paid to the City under the San Francisco Business and Tax Regulations Code. Any payments withheld under this Section 11.5(r) shall be made to Seller, without interest, upon full payment of all taxes owed by Seller and reinstatement of Seller's vendor certification
- (s) Conflict of Interest. Through its execution of this Agreement, Seller acknowledges that it is familiar with the provision of Section 15.103 of the 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 Buyer if it becomes aware of any such fact during the term of this Agreement.

- (t) **City Requirements.** Seller shall keep itself fully informed of the City's Charter, codes, ordinances and regulations of City and of all state, and federal laws in any manner affecting the performance of the Agreement, and must at all times materially comply with such local codes, ordinances, and regulations as they may be amended from time to time. Buyer shall use best efforts to provide notice to Seller of any such amendment to the City's Charter, codes, ordinances and regulations of which it becomes aware; however, Seller's obligations under this Section shall not be contingent on notice from Buyer.
  - (u) **Severability.** Should any provision of the Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of the 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.
  - (v) **Survival.** All rights pursuant to Section 3.5 (Environmental Attributes); Section 4.1(e) (Disputes and Adjustment of Invoices); Section 5.6(c) (CAISO Charges Invoices); Article 8 (Default; Remedies; and Termination), Article 9 (Indemnification), Section 11.2 (Proprietary or Confidential Information); Section 11.3 (Dispute Resolution; Choice of Law), Section 11.4 (Audit); Section 11.5(l) (Prohibition on Political Activity with City Funds); and Section 11.5(q) (City Opinion) shall also survive termination of this Agreement.
- 11.6 Mobile Sierra.** Absent the prior written agreement of all Parties, the standard of review for changes to any rate, charge, term, or condition of service of this Agreement, whether proposed by a 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).
- 11.7 Forward Contract.** The Parties acknowledge and agree that this Agreement constitutes a "forward contract" within the meaning of the United States Bankruptcy Code and Buyer and Seller are "forward merchants" within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any Bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. §366 or another provision of 11 U.S.C. § 101-1532.
- 11.8 Notices.** Unless otherwise stated in this Agreement, any notice, demand, request, or communication required or authorized by this Agreement shall be delivered either by hand, 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 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.
- 11.9 Counterparts.** This 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 Agreement by fax or other electronic means shall be deemed as effective as delivery of an originally executed counterpart. Any Party delivering an executed counterpart of this 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 Agreement shall not affect the validity or effectiveness of this Agreement.

*[Signature page follows on next page.]*

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

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

**Seller**

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

General Manager  
San Francisco Public Utilities Commission

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

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

Approved as to Form:

City Attorney

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

## **EXHIBIT A**

### **SELLER DOCUMENTATION OF CONDITIONS PRECEDENT**

#### **Part I:**

Seller shall provide to Buyer all of the following documentation at least five (5) Business Days prior to the Execution Date:

1. A copy of each of (a) the articles of incorporation, certificate of incorporation, operating agreement or similar applicable organizational document of Seller and (b) the by-laws or other similar document of Seller as in effect, or anticipated to be in effect, on the Execution Date.
2. 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.
3. Evidence of Site control (e.g. lease with redacted price terms).
4. Evidence of CEC Certification or pre-certification received, as applicable.
5. A copy of the Interconnection Agreement, if any.
6. Insurance documentation as required in Exhibit D.
7. A copy of the most recent financial statements (which may be unaudited) from Seller's Parent.

#### **Part II:**

Seller shall provide to Buyer all of the following documentation in a timely manner following the Execution Date:

1. Evidence of all Permits received, as applicable, including but not limited to, any copies of all final environmental review documents.
2. A copy of the project labor or similar agreement for the Facility, if any.

## **EXHIBIT B**

### **FACILITY DESCRIPTION AND SITE DRAWINGS**

#### **I. Facility Description**

Facility name:

Facility physical address:

Technology type (including any applicable model):

Interconnection Point of Facility:

Interconnection Agreement Name/Number:

Assessor's Parcel No:

#### **II. Operational Characteristics / Limitations**

PMax of the Facility:

PMin of the Facility:

#### **III. Site Drawings**

A. Site Map

B. Single Line Diagram.

**EXHIBIT C**  
**CONTRACT QUANTITY**

<b>Contract Year</b>	<b>Contract Quantity (in MWh)</b>
1	
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## EXHIBIT D

### INSURANCE COVERAGES

1. **Liability Coverages.** Without in any way limiting Seller's liability pursuant to the "Indemnification" section of this Agreement, Seller must maintain in force, during the full term of the Agreement, insurance in the following amounts and coverages and be responsible for its subcontractors, including Seller's EPC Contractors, maintaining sufficient limits of the appropriate insurance:
  - (a) Workers' Compensation, in statutory amounts, with Employers' Liability Limits not less than \$1,000,000 each accident, injury, or illness; and include a blanket waiver of subrogation; and
  - (b) Commercial General Liability Insurance with limits not less than \$1,000,000 each occurrence and \$2,000,000 general aggregate for Bodily Injury and Property Damage, including Contractual Liability, Personal Injury, Products and Completed Operations; and
  - (c) Commercial Automobile Liability Insurance with limits not less than \$1,000,000 each occurrence, "Combined Single Limit" for Bodily Injury and Property Damage, including Owned, Non-Owned and Hired auto coverage, as applicable.
  - (d) Employer's Liability Insurance. Employers' Liability insurance shall not be less than One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.
  - (e) Construction All-Risk Insurance. Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming Seller (and Lender if any) as the loss payee.
2. **Additional Coverages**
  - (a) Property insurance, on an all-risk form, including earthquake and flood, for one hundred percent (100%) of the full replacement value of the Site and Facility or 125% of the Loss Limit of the 1/500 year earthquake/flood event as established by a Maximum Foreseeable Loss earthquake and flood study prepared by the applicable insurer in accordance with current industry standard. Such insurance shall, include Business Interruption coverage in an amount equal to twelve months of revenue from this Agreement.
  - (b) Seller shall maintain or cause to be maintained during the construction of the Facility prior to the Commercial Operation Date, Pollution Legal Liability Insurance in the amount of two million dollars (\$2,000,000) per occurrence and I the aggregate, naming the Seller (and Lender if any) as additional named insured.
3. **Endorsements.**
  - (a) Commercial General Liability and Commercial Automobile Liability Insurance policies must be endorsed to provide include blanket endorsements:
    - (i) Name as Additional Insured, the City and County of San Francisco, its Officers, Agents, and Employees.
    - (ii) The certificate of insurance shall state that such policies are primary insurance to any other insurance available to the Additional Insureds, with respect to any claims arising out of this Agreement, and that insurance applies separately to each insured against whom claim is made or suit is brought.

- (b) All policies shall provide thirty (30) days' advance written notice of cancellation for any reason, intended non-renewal, or reduction in coverages, except ten (10) days' notice for non-payment of premiums.
4. **Length of Coverage.** Should any of the required insurance be provided under a claims-made form, Seller shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three years beyond the expiration of this Agreement, to the effect that, should occurrences during the Term give rise to claims made after expiration of the Agreement, such claims shall be covered by such claims-made policies.
5. **Maintenance of Coverage.** Should any required insurance lapse during the term of this Agreement, requests for payments originating after such lapse shall not be processed until the Buyer receives satisfactory evidence of reinstated coverage as required by this Agreement, effective as of the lapse date. If insurance is not reinstated, Buyer may, at its sole option, terminate this Agreement effective on the date of such lapse of insurance.

**Certificates.** Prior to commencement of the Term, Seller shall furnish to Buyer certificates of insurance and additional insured policy endorsements with insurers with ratings comparable to A- , VII or higher, that are authorized to do business in the State of California, and that are satisfactory to Buyer, in form evidencing all coverages set forth above. Approval of the insurance by Buyer shall not relieve or decrease Seller's liability hereunder.

**EXHIBIT E**

**CONSTRUCTION START  
CERTIFICATION**

\_\_\_\_\_(Date)\_\_\_\_\_

This certification ("Certification") of the Construction Start Date is delivered by \_\_\_\_\_ ("Seller") to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, ("Buyer") in accordance with the terms of that certain Renewable Power Purchase Agreement dated \_\_\_\_\_ ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement. Seller hereby certifies and represents to Buyer that Construction Start has occurred and:

- a) the Construction Start Date occurred on \_\_\_\_\_. ("Construction Start Date");
- b) the Notice to Proceed was issued by Seller to the EPC Contractor, [EPC Contractor Name] on \_\_\_\_\_ (attached), and;
- c) mobilization at the Facility Site commenced on \_\_\_\_\_.

IN WITNESS WHEREOF, the undersigned has executed this certificate on behalf of the Seller as of the \_\_\_\_ day of \_\_\_\_\_.

**Seller:**

**[Licensed Professional Engineer]**

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

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

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

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

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

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

License Number and LPE Stamp: \_\_\_\_\_



**EXHIBIT F**  
**PROGRESS REPORT**

Each Progress Report must include the following items:

1. Executive Summary.
  2. Gantt chart schedule showing progress on achieving each of the Milestones.
  3. Description of any material planned changes to the Facility or the Project Site.
  4. Financing activities. Provide a summary of the status and progress of each major financing activity, including the date of execution of significant documents, and information on the expected timing of future significant activities.
  5. Major equipment procurement activities. For each type of equipment, list the number of each major item to be procured, the manufacturer, model number (if applicable), and rating. List the delivery schedule (expected or actual as applicable), breaking out the number of each item to be procured or delivered in each Calendar Quarter.
  6. Construction Activities. Include information on the status of any construction-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the Facility infrastructure, generating equipment, and major auxiliary equipment. Also include information on the substations, switchyards, gen-ties, telecommunications equipment or other Interconnection Facilities that are the direct responsibility of the Facility.
  7. Interconnection Activities. Include information on interconnection-related factors that may affect the ability of the Facility to deliver Product to the Buyer. Include information on the status of interconnection studies, Interconnection Agreements, design and construction of Interconnection Facilities (e.g., substations, switchyards, gen-ties, system protection schemes, telecommunications equipment to the extent not already covered in the Facility construction information), Network Upgrades, and grid outage and/or interconnection schedules.
  8. Startup. Include information on the status of activities related to preparation for Commercial Operation, including progress towards the items set forth in Exhibit H-2, the requirements and notifications of the grid operator and Transmission Provider, and any other activities that must be conducted before the Facility may deliver Energy to the grid and/or declare Commercial Operation.
- For items 4 through 8, include the progress and schedule of all major agreements, contracts, permits, approvals, technical studies, financing agreements, and major equipment purchase orders showing the start dates, completion dates, and completion percentages. 8. Forecast of activities scheduled for the current calendar quarter.
9. List of issues that are likely to potentially affect Seller's Milestones.
  10. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and startup progress of the Facility, the interconnection into the Transmission System and all other interconnection utility services.
  11. CPUC General Order 156 supplier diversity reporting. Format to be provided by Buyer.
  12. Any other documentation reasonably requested by Buyer.

## EXHIBIT G-1

### FORM OF COMMERCIAL OPERATION CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by [LICENSED PROFESSIONAL ENGINEER] ("Engineer") to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF ("Buyer") in accordance with the terms of that certain Energy Storage Agreement dated \_\_\_\_\_ ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined in this Exhibit G-1 shall have the meanings assigned to these terms in the Agreement.

Engineer hereby certifies and represents to Buyer the following:

1. The Facility is fully operational, reliable, and interconnected.
2. The Facility is fully integrated and synchronized with the Transmission System.
3. The Facility's Installed Capacity is no less than ninety-five percent (95%) and no more than one hundred percent (100%) of the Guaranteed Installed Capacity.
4. The Facility has met all Interconnection Agreement requirements and is capable of delivering Energy to the CAISO Balancing Authority up to the Guaranteed Installed Capacity.
5. The commissioning of all equipment for the Facility has been completed in accordance with the applicable manufacturer's specifications.
6. The Facility's testing included a performance test demonstrating peak electrical output of no less than ninety-five (95%) of the Guaranteed Initial Capacity for the Facility at the Delivery Point, as adjusted for ambient conditions on the date of the Facility testing, and such peak electrical output, as adjusted, was [*peak output in MW*].
7. Authorization to parallel the Facility was obtained by the Transmission Provider on \_\_\_\_[DATE]\_\_\_\_.
8. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Transmission Owner] on \_\_\_\_[DATE]\_\_\_\_.
9. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO tariff on \_\_\_\_[DATE]\_\_\_\_.

EXECUTED by ENGINEER this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**Licensed Professional Engineer:**

Signature: \_\_\_\_\_

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

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

**EXHIBIT G-2**  
**FORM OF INSTALLED CAPACITY CERTIFICATION**

This certification of the Installed Capacity is delivered by [licensed professional engineer] to the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, in accordance with the terms of the Renewable Power Purchase Agreement dated \_\_\_\_\_, (“Agreement”) by and between Buyer and Seller. All capitalized terms used in this certification but not otherwise defined herein shall have the meanings set forth in the Agreement.

I hereby certify the following:

The initial Facility performance test under Seller’s EPC contract for the Facility demonstrated peak Facility electrical output of [ ] MW AC to the Delivery Point, as adjusted for ambient conditions on the date of the performance test (“Installed Capacity”).

EXECUTED BY [LICENSED PROFESSIONAL ENGINEER]

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**[Licensed Professional Engineer]**

Signature:\_\_\_\_\_

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

**EXHIBIT H-1**  
**LETTER OF CREDIT**

**[Issuing Bank Letterhead and Address]**

STANDBY LETTER OF CREDIT NO. XXXXXXXX

**Date:** [Insert issue date]

**Beneficiary:** City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF  
525 Golden Gate Avenue  
San Francisco, CA 94102  
Attn:

**Applicant:** [Insert name and address of Applicant]

**Letter of Credit Amount:** [insert Amount]

**Expiry Date:** [insert expiry date]

Ladies and Gentlemen:

By order of [insert name of Applicant] ("Applicant"), we hereby issue in favor of the City and County of San Francisco, acting by and through its Public Utilities Commission, CleanPowerSF, (the "Beneficiary") our irrevocable standby letter of credit No. [insert number of letter of credit] ("Letter of Credit"), for the account of Applicant, for drawings up to but not to exceed the aggregate sum of U.S. \$ [insert amount in figures followed by (amount in words)] ("Letter of Credit Amount"). This Letter of Credit is available with [insert name of issuing bank, and the city and state in which it is located] by sight payment, at our offices located at the address stated below, effective immediately, and it shall expire at our close of business on [insert expiry date] (the "Expiry Date").

Funds under this Letter of Credit are available to the Beneficiary against presentation of the following documents:

1. Beneficiary's signed and dated sight draft in the form of Exhibit J-2 hereto, referencing this Letter of Credit No. [insert number] and stating the amount of the demand; and
2. One of the following statements signed by an authorized representative or officer of Beneficiary:
  - A. Pursuant to the terms of that certain [insert name of the agreement] (the "Agreement"), dated [insert date of the Agreement], between Beneficiary and [insert name of Seller under the Agreement], Beneficiary is entitled to draw under Letter of Credit No. [insert number] amounts owed by [insert name of Seller under the Agreement] under the Agreement; or
  - B. "Letter of Credit No. [insert number] shall expire in thirty (30) days or less and [insert name of Seller under the Agreement] has not provided replacement security acceptable to Beneficiary.

Special Conditions:

1. Partial and multiple drawings under this Letter of Credit are allowed;
2. All banking charges associated with this Letter of Credit are for the account of the Applicant;

3. This Letter of Credit is not transferable; and
4. The Expiry Date of this Letter of Credit shall be automatically extended without a written amendment for a period of one year and on each successive Expiry Date, unless at least sixty (60) days before the then current Expiry Date, we notify you by registered mail or courier that we elect not to extend the Expiry Date of this Letter of Credit for such additional period.

We engage with you that drafts drawn under and in compliance with the terms of this Letter of Credit shall be duly honored upon presentation, on or before the Expiry Date (or after the Expiry Date as provided below), at our offices at **[insert issuing bank's address for drawings]**.

All demands for payment shall be made by presentation of originals or copies of documents; or by facsimile transmission of documents to **[insert fax number]**, Attention: **[insert name of issuing bank's receiving department]**, with originals or copies of documents to follow by overnight mail. If presentation is made by facsimile transmission, you may contact us at **[insert phone number]** to confirm our receipt of the transmission. Your failure to seek such a telephone confirmation does not affect our obligation to honor such a presentation.

Our payments against complying presentations under this Letter of Credit shall be made no later than on the sixth (6th) banking day following a complying presentation.

Except as stated herein, this Letter of Credit is not subject to any condition or qualification. It is our individual obligation, which is not contingent upon reimbursement and is not affected by any agreement, document, or instrument between us and the Applicant or between the Beneficiary and the Applicant or any other party.

Except as otherwise specifically stated herein, this Letter of Credit is subject to and governed by the *Uniform Customs and Practice for Documentary Credits, 2007 Revision*, International Chamber of Commerce (ICC) Publication No. 600 (the "UCP 600"); provided that, if this Letter of Credit expires during an interruption of our business as described in Article 36 of the UCP 600, we shall honor drafts presented in compliance with this Letter of Credit within thirty (30) days after the resumption of our business and effect payment accordingly. The law of the State of New York shall apply to any matters not covered by the UCP 600.

For telephone assistance regarding this Letter of Credit, please contact us at **[insert number and any other necessary details]**.

**EXHIBIT H-2**  
**SIGHT DRAFT**

TO: [INSERT NAME AND ADDRESS OF PAYING BANK]

AMOUNT: \$

DATE:

AT SIGHT OF THIS DEMAND PAY TO THE ORDER OF \_\_\_\_\_ THE AMOUNT  
OF U.S.\$ \_\_\_\_\_ U.S. DOLLARS) DRAWN  
UNDER [INSERT NAME OF ISSUING BANK] LETTER OF CREDIT NO. XXXXXX.

REMIT FUNDS AS FOLLOWS:

[INSERT PAYMENT INSTRUCTIONS]

DRAWER

Name and Title

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

**EXHIBIT I**  
**FORM OF REPLACEMENT RA NOTICE**

This Replacement RA Notice is delivered by [SELLER ENTITY] (“Seller”) to the City and County of San Francisco acting by and through its Public Utilities Commission, CleanPowerSF in accordance with the terms of the Energy Storage Agreement dated \_\_\_\_\_ (“Agreement”) by and between Seller and Buyer. All capitalized terms not otherwise defined in this RA Notice shall have the meaning set forth in the Agreement.

UNIT SPECIFIC INFORMATION	
Resource Name	
Physical Location	
CAISO Resource ID	
SCID of Resource	
Unit NQC by month	
Unit EFC by month	
Resource Type	
Minimum Qualified Flexible Capacity Category	
TAC Area	
Prorated Percentage of Unit Factor	
Prorated Percentage of Unit Flexible Factor	
Local Capacity Area	
Resource Category as defined by the CPUC	

Showing Month and Year	Quantity (MW)
[MM] [YY]	

## PUBLIC UTILITIES COMMISSION

City and County of San Francisco

RESOLUTION NO.: 22-0109

WHEREAS, The San Francisco Board of Supervisors ("Board") established a Community Choice Aggregation ("CCA") program in 2004 (Ordinance 86-04) and has implemented the program, called CleanPowerSF, through the work of the San Francisco Public Utilities Commission ("SFPUC" or "Commission") in consultation with the San Francisco Local Agency Formation Commission (Ordinances 146-07, 147-07, and 232-09); and

WHEREAS, Hetch Hetchy Power serves its customers primarily with electricity generated by City-owned generation resources; CleanPowerSF serves its customers entirely with electricity purchased through wholesale market transactions; and

WHEREAS, Hetch Hetchy Power and CleanPowerSF must comply with state law and California Independent System Operator market rules, including requirements to procure renewable energy, Resource Adequacy capacity, and energy storage, and to contribute to grid reliability; and

WHEREAS, The SFPUC needs to engage in a continual process of procuring power and simultaneously negotiating a mix of short-, medium-, and long-term contracts for a diverse supply of energy and energy-related products with multiple suppliers, all in an expedited time frame consistent with regulatory deadlines in order to meet regulatory requirements, secure the best possible prices and terms, keep rates affordable and competitive, and manage procurement risk; and

WHEREAS, The SFPUC uses several industry template contracts and City created templates to procure and sell energy and energy related products and these contracts do not include all of the standard City contract terms and may be in excess of the term and the amount that requires Board approval; and

WHEREAS, Adoption of this Resolution does not constitute a "project" under the California Environmental Quality Act (CEQA) Guidelines Section 15378 because it does not involve any commitment to any specific contract or project that may result in a physical change in the environment; the form contracts require Sellers of electricity products to comply with the law and, for to-be-constructed projects, to complete environmental review and obtain all necessary permits prior to commercial operation and commencing delivery of electricity; now, therefore, be it

RESOLVED, That this Commission conditionally authorizes the General Manager to execute energy supply contracts as specified in this item and to seek Board of Supervisors approval, if required, to execute the energy supply contracts, subject to the following conditions:

- (i) the total cost of the executed contracts may be recovered by Hetch Hetchy Power and CleanPowerSF in adopted rates and is consistent with the programs' 10-year Financial Plans adopted by the Commission;



(ii) the total cost of all energy supply contracts executed under this authorization shall not exceed \$150 million per year;


(ii) the total revenue from contracts to sell electricity products executed under this authorization shall not exceed \$10 million per year;

(vii) the duration of any contract shall not exceed 25 years, unless the Commission approves a contract extension; and

(viii) the authority granted under this Resolution shall expire on June 30, 2027 unless the Commission approves an extension; and be it

FURTHER RESOLVED, The General Manager shall report on a quarterly basis to the Commission, the duration, product purchased, and cost of contracts entered into pursuant to this delegated authority.

*I hereby certify that the foregoing resolution was adopted by the Public Utilities Commission at its meeting of June 14, 2022.*

A handwritten signature in black ink, appearing to read "Monna Wood". The signature is fluid and cursive, with the first name "Monna" and the last name "Wood" clearly distinguishable.

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Secretary, Public Utilities Commission



**TO: Angela Calvillo, Clerk of the Board**

**FROM: Jeremy Spitz, Policy and Government Affairs**

**DATE: May 23, 2022**

**SUBJECT: [Administrative Code - Purchase and Sale of Electricity and Related Products - Public Utilities Commission]**

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Please see attached a proposed Ordinance amending the Administrative Code to approve the use of certain form contracts to purchase and sell electricity and related products by the Public Utilities Commission (PUC), grant waivers of specified contract-related requirements in the Administrative and Environment Codes for these transactions, and delegate to the General Manager of the PUC authority under Charter section 9.118 to execute certain contracts with terms in excess of 10 years or requiring expenditures of \$10,000,000 or having anticipated revenue of one million dollars or more subject to specified limitations through June 30, 2027.

The following is a list of accompanying documents:

- (1) Renewable Power and Energy Storage Purchase Agreement
- (2) Energy Storage Purchase Agreement
- (3) Small Renewable Power Purchase Agreement
- (4) Project Participation and Share Agreement
- (5) Buyer Liability Pass Through Agreement
- (6) Coordinated Operations Agreement
- (7) Proposed Ordinance
- (8) Legislative Digest

Please contact Jeremy Spitz at [jspitz@sfgwater.org](mailto:jspitz@sfgwater.org) if you need any additional information on these items.

**London N. Breed**  
Mayor

**Anson Moran**  
President

**Newsha Ajami**  
Vice President

**Sophie Maxwell**  
Commissioner

**Tim Paulson**  
Commissioner

**Dennis J. Herrera**  
General Manager

