

**RENEWABLE POWER PURCHASE AGREEMENT  
(EXISTING FACILITY)**

**by and between**

**THE CITY AND COUNTY OF SAN FRANCISCO,  
ACTING BY AND THROUGH ITS PUBLIC UTILITIES COMMISSION,  
CLEANPOWERSF**

**and**

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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>	SCHEDULING PROTOCOLS
<b>EXHIBIT F-1</b>	FORM OF LETTER OF CREDIT
<b>EXHIBIT F-2</b>	SIGHT DRAFT
<b>EXHIBIT G</b>	NOTIFICATION REQUIREMENTS FOR AVAILABLE CAPACITY AND PRODUCT OUTAGES AND CURTAILMENTS
<b>EXHIBIT H</b>	COMMUNITY BENEFITS COMMITMENTS

**Attachment 1: SELLER'S COMMUNITY BENEFITS COMMITMENTS  
PROPOSAL**

**POWER PURCHASE AGREEMENT**

**COVER SHEET**

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, Power Enterprise, CleanPowerSF program (“Buyer”) and **[insert name of Seller]**, a \_\_\_\_\_ **[include place of formation and business type]** (“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.

**A. Transaction**

Product:

Facility:

Address:

Contract Capacity:

Contract Price:

Delivery Point:

CEC RPS ID:

Delivery Period:

Deliverability:

- Energy Only, or
- Full Capacity Delivery Status

**C. Collateral**

Performance Assurance: \$ \_\_\_\_\_

- Cash,
- Guaranty, or
- Letter of Credit

**D. Notices:**

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

## RECITALS

1. Seller owns and operates a \_\_\_\_\_ generating facility located at \_\_\_\_\_ ; 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, Product from 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:** Means 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 Cover Sheet.

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

**Ancillary Services:** Has the meaning set forth in the CAISO Tariff.

**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 (“Governmental Authority”), or any binding interpretation of the foregoing, as any of them is amended or supplemented from time to time, that apply to either or both of the Parties or the terms of the Agreement.

**Availability Standards:** The program set forth in Section 40.9 of the CAISO Tariff, as it may be amended, supplemented or replaced (in whole or in part) from time to time, setting forth certain standards regarding the desired level of availability for Resource Adequacy resources and possible charges and incentive payments for performance thereunder.

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

**Business Day:** Means any day except a Saturday, Sunday, a Federal Reserve Bank holiday, or a City and County of San Francisco holiday and shall be 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.

**Buyer Curtailed Product:** Has the meaning set forth in Section 5.3(h)(ii)(B).

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

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

**Capacity Attributes:** Means 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, to require Buyer to procure, or to procure at Buyer's expense, Resource Adequacy or other such attribute.

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

**CEC Certification:** Means that the CEC has certified that the Facility is an ERR for purposes of the California Renewables Portfolio Standard and that all Product produced by the Facility qualifies as generation from an ERR for purposes of the RPS.

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

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

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

**Compliance Cost:** Has the meaning set forth in Section 3.7(a).

**Compliance Cost Cap:** Has the meaning set forth in Section 3.7.

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

**Contract Capacity:** As set forth on the Cover Sheet.

**Contract Quantity:** The annual Energy production set forth in Exhibit C.

**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 Delivery Start Date, and each subsequent Contract Year commencing on the twelve (12) month anniversary of the Delivery Start Date.

**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.

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

**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 S&P and/or Moody's.

**Cure:** Has the meaning set forth in Section 6.3(b).

**Curtailment Order:** An order of the PTO, distribution provider, and/or CAISO (whether directly or through a Scheduling Coordinator or the PTO), 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 PTO'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 PTO or distribution operator.

**DA Price:** The resource specific locational marginal price ("LMP") applied to the PNode applicable to the Facility in the CAISO Day-Ahead Market.

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

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

**Deficit Month:** Has the meaning set forth in Section 3.5(c)(iii).

**Delivered Energy:** Has the meaning set forth in Section 4.1(a).

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

**Delivery Start Date:** Has the meaning set forth in Section 2.2(b).

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

**Discretionary Curtailment:** Has the meaning set forth in Section 5.3(h)(ii)(A).

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

**Effective Date:** Means 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.

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

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

**Energy:** Means three-phase, 60-cycle alternating current electric energy measured in MWh and net of auxiliary loads and station electrical uses (unless otherwise specified).

**Environmental Attributes:** Means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Facility or Expansion Facility(s) (to the extent of sales to Buyer of Expansion Facility Product pursuant to Section 3.9), 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 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 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 Tags 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 Tags 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.

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

**Excess Quantity:** Has the meaning set forth in Section 3.3(c).

**Execution Date:** Means the date set forth in the Cover Sheet..

**Expansion Facility:** Any expansion of the Facility from its Initial 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 Product, associated Environmental Attributes, Ancillary Services, contributions towards Resource Adequacy or reserve requirements (if any) 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).

**Facility:** The power generation facilities owned and operated by Seller as described in Exhibit B, but not including any Expansion Facility.

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

**Force Majeure:** An event or circumstance, including a natural disaster, war, riot, or civil disturbance, which prevents one Party (“Claiming Party”) from performing its material obligations under this Agreement, which event or circumstance was not anticipated as of the Execution Date, which is not within the reasonable control of, or the result of the action or inaction of, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Neither Party may raise a claim of Force Majeure based in whole or in part on;

- (a) failures or delays by the PTO and/or the CAISO in entering into, or performing under, any agreements with Seller contemplated by this Agreement,;
- (b) a strike, work stoppage or labor dispute;
- (d) 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;
- (e) Seller’s inability to obtain Permits of any type, except where such failure is solely caused by a Force Majeure Event;
- (f) a Forced Outage except where such Forced Outage is caused by an event of Force Majeure;
- (g) a Curtailment Order; or
- (h) economic conditions that render a Party’s performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic, including buyer’s ability to buy Energy at a lower price, or Seller’s ability to sell Energy generated by the Facility at a higher price).

**Forced Outage:** Any unplanned reduction or suspension of the Energy from the Facility or unavailability of the Product in whole or in part from a unit in response to a mechanical, electrical, or

hydraulic control system trip or operator-initiated trip in response to an alarm or equipment malfunction and any other unavailability of a unit for operation, in whole or in part, for maintenance or repair that is not a Planned Outage and not the result of Force Majeure.

**GAAP or Generally Accepted Accounting Principles:** The standards for accounting and preparation of financial statements established by the Federal Accounting Standards Advisory Board (or its successor agency) or any successor standards adopted pursuant to relevant Securities Exchange Commission rule.

**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, subject to Section 9.3 hereof. Factors used in determining economic benefit may include reference to information either available to it internally or supplied by one or more third parties, including quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, market price referent, market prices for a comparable transaction, forward price curves based on economic analysis of the relevant markets, settlement prices for a comparable transaction at liquid trading hubs (e.g., NYMEX), all of which should be calculated for the remainder of the Term to determine the value of the Product, including the value of Environmental Attributes and Capacity Attributes.

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

**Good Utility Practice:** Has the meaning in the CAISO Tariff.

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

**Guaranteed Energy Production, or GEP:** Has the meaning set forth in Section 3.4(a).

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

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

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

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

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

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

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

**LMP:** Has the meaning set forth in the definition of DA Price.

**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, subject to Section 9.3 hereof. Factors used in determining the loss of economic benefit may include reference to information either available to it internally or supplied by one or more third parties, including quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, market price referent, market prices for a comparable transaction, forward price curves based on economic analysis of the relevant markets, settlement prices for a comparable transaction at liquid trading hubs (e.g. NYMEX), all of which should be calculated for the remainder of the Term to determine the value of the Product, including Environmental Attributes and Capacity Attributes. If the Non-Defaulting Party is the Seller, then in addition to lost payments for Product pursuant to this Agreement, "Losses" shall exclude any associated loss of investment tax credits and other lost tax benefits.

**MWh:** Mega-watt hour.

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

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

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

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

**Participating Transmission Owner or PTO:** Has the meaning set forth in the CAISO Tariff. The PTO is \_\_\_\_\_.

**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(a)(ii) of this Agreement.

**Performance Liquidated Damages or Performance LDs:** Has the meaning set forth in Section 3.4(c).

**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.

**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 Contract Capacity.

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

**Point of Interconnection:** The point on the electrical system where the Facility is physically interconnected with the PTO System.

**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.

**PTO System:** The transmission system owned by the Participating Transmission Owner.

**Public Records Laws:** Means 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.

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

**REC or Renewable Energy Credit:** 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 law.

**Replacement Price:** Means, in MWh, Buyer's actual, reasonable cost of Replacement Product plus five percent (5%).

**Replacement Product:** Means 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 RECs, 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.

**Resource Adequacy:** The resource adequacy capacity requirements established for load serving entities by the CPUC pursuant to the CPUC Decisions D.04-01-050, 04-10-035 and 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, and any other existing or subsequent decisions, resolutions or rulings addressing Resource Adequacy issues, as those obligations may be altered from time to time, the flexible capacity standards under the CAISO Tariff, or by any other Governmental Authority having jurisdiction.

**RPS:** Means 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.

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

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

**Seller Excused Hours:** For each GEP Period, an amount expressed in MWh, equal to the aggregate amount of reduction(s) in delivered Product during such GEP Period as a result of Curtailment Orders, Discretionary Curtailment, Force Majeure Events, Buyer's breach or default hereunder or failure to accept delivered Product, or Forced Outages to the local transmission or distribution system.

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

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

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

**Site Drawings:** Has the meaning set forth on Exhibit B.

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

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

**Termination Payment:** With respect to the Non-Defaulting Party, the sum of (a) the Losses or Gains, and Costs, which such Party incurs as a result of the termination of this Agreement pursuant to Section 9.3, plus (b) the sum of all amounts then owed to the Non-Defaulting Party by the defaulting Party determined as of the Early Termination Date.

**WECC:** Means the Western Electricity Coordinating Council or successor agency.

**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:** Means any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the delivered Product 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:** Means those operating rules and requirements adopted by WREGIS as of December 2010, as subsequently amended, supplemented or replaced from time to time.

## ARTICLE 2: CONDITIONS PRECEDENT AND TERM

### 2.1 Conditions Precedent to Commencement of 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 Exhibit A; and
  - (ii) Buyer receives from Seller the Performance Assurance; and
  - (iii) This Agreement has been approved, if required, by the San Francisco Public Utilities Commission and the San Francisco 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 the all of the Conditions Precedent set forth in Section 2.1(a) have been satisfied or waived in writing by both Parties.
- (c) Failure to Meet All Conditions Precedent. If the Conditions Precedent set forth in Sections 2.1(a) are not satisfied or waived in writing by both Parties within ninety (90) Business 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 the Development Assurance to Seller.

### 2.2 Agreement Term, Delivery Term, and Extension.

- (a) Agreement 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 the delivery to Buyer of all of the Environmental Attributes under this Agreement (the "Term").
- (b) Delivery Term. The Delivery Term shall commence \_\_\_\_\_ (the "Delivery Start Date") from and including Hour Ending ("HE") 0100 and continue through and including HE 2400 on \_\_\_\_\_ ("Delivery Term"), unless terminated as provided by the terms of this Agreement.
- (c) Extension of End of Delivery Term.
  - (i) At its sole discretion, Buyer may provide notice to Seller no later than twelve (12) months prior to the end of Delivery Term of its desire to extend the Delivery Term of this Agreement ("Extended Delivery Term"). Buyer and

Seller shall promptly enter into good faith negotiations on the price and term for the Extended Delivery Term. If the Parties are unable to reach agreement within ninety (90) calendar days of notice under this Section, neither Party shall have any further obligation to negotiate for an Extended Delivery Term and Seller may enter into negotiations with third parties.

- (ii) If Seller receives a bona fide offer from a third party to purchase the output of the Facility at the end of the Term, Seller shall immediately notify Buyer of the price and terms of the offer and Buyer shall have the right of first refusal to extend the Term at the same price. If Buyer wishes to accept such offer, Buyer shall so notify Seller within seven (7) business days of its receipt of such offer. Buyer and Seller shall promptly thereafter enter into good faith negotiation of commercial modifications to this Agreement for the Extended Delivery Term.

### ARTICLE 3: PURCHASE AND SALE

#### 3.1 Purchase and Sale of Product.

- (a) Transaction. During the Delivery Term, Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, the Product at the Delivery Point, and Buyer shall pay Seller for delivered Product in accordance with the terms of this Agreement, unless specifically excused by the terms of this Agreement. In no event shall Seller have the right to procure any element of the Product from sources other than the Facility for sale or delivery to Buyer under this Agreement, or sell Product from the Facility to a third party (Subject to Sections 3.4(d) and (e), and 3.9). Buyer shall have no obligation to receive or purchase Product from Seller prior to or after the Delivery Term.
- (b) Title and Risk of Loss. Title to and risk of loss as to all Product purchased by Buyer shall pass from Seller to Buyer at the Delivery Point. Seller shall be responsible for any costs, fees, taxes, assessments, or charges associated with the Product or the delivery of the Product up to the Delivery Point. Buyer shall be responsible for any costs, or charges imposed on or associated with the Product or the delivery of the Product at and from the Delivery Point. Seller warrants that it shall deliver all Product to Buyer free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto created by any Person other than Buyer.

**3.2 Contract Price.** Buyer shall pay Seller \$\_\_\_\_\_ per MWh for Product delivered pursuant to this Agreement and Curtailed Product. The Contract Price shall be the total compensation owed by Buyer for the Product, adjusted as follows:

- (a) Excess Quantity Price. For all Product in excess of one hundred and fifteen percent (115%) of the Expected Energy Production for the then-current Contract Year, Buyer shall pay Seller fifty percent (50%) of the Contract Price.

#### **OR**

Excess Quantity. Buyer is not obligated to accept delivery of, or pay for, any Product in excess of one hundred and fifteen percent (115%) of the Expected Energy Production for the then-current Contract Year (“Excess Quantity”). Seller shall have the right to sell any Excess Quantity to a third party.

- (b) Surplus Energy Price. If during any Settlement Interval, Seller delivers Product amounts in excess of the Contract Capacity (“Surplus Energy”), then the price applicable to all such excess MWh in such Settlement Interval shall be zero dollars (\$0), and if there is a Negative LMP during such Settlement Interval, Seller shall pay to Buyer an amount equal to the Negative LMP times the amount of the Surplus Energy in MWh.

**3.3 Contract Quantity.** The Contract Quantity for Product is set forth in Exhibit C.

**3.4 Guaranteed Energy Production.**

- (a) Guaranteed Energy Production. For each GEP Period throughout the Term, Seller shall deliver no less than one hundred and sixty percent (160%) of (i) the Contract Quantity for the GEP Period, minus (ii) the Seller Excused Hours (“Guaranteed Energy Production” or “GEP”).
- (b) Reporting. 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 Hours for such year, along with an explanation in reasonable detail of the calculation thereof 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 review and approval by Buyer.
- (c) Performance LDs. 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 and the amount of the Performance LDs. Within thirty (30) days after the receipt of notice of the shortfall, Seller shall either (1) provide Replacement Product in the amount of the GEP shortfall, or (2) pay Buyer Performance LDs calculated as: the positive difference obtained by subtracting the (i) Contract Price from (ii) the Replacement Price, multiplied by the GEP shortfall. The Parties agree that, consistent with Section 9.3(b), the damages Buyer would incur due to Seller’s failure to meet the GEP would be difficult or impossible to predict with certainty and the Performance LD amount is a reasonable approximation of such damages.

If within ten (10) Business Days of receipt of notice of a GEP shortfall, Seller does not either provide notice to Buyer of its election to provide Replacement Product or deliver payment of the Performance LD amount to Buyer, Buyer shall be entitled to collect Performance LDs by electing, in its sole discretion, one or more of the following payment methods:

- (i) drawing upon the Performance Assurance;
  - (ii) setting off against any amounts owed to Seller by Buyer under this Agreement.
- (d) Seller may as an alternative to payment of Performance LDs pursuant to this section, provide Replacement Product within ninety (90) days after the conclusion of the applicable GEP Period but within the same calendar year as the conclusion of the applicable GEP Period. The Replacement Product shall be delivered to Buyer at the NP 15 EZ Gen Hub upon a schedule reasonably acceptable to Buyer. Buyer will pay Seller for all such Replacement Product provided pursuant to this Section 3.4(d) at the lower of: (1) the Contract Price, or (2) the hourly DA price at the Delivery Point for the Replacement Product.
  - (e) Notwithstanding any other provision of this Agreement, if in any consecutive three (3) month of the Term of the Agreement, the actual Product deliveries are less than fifty percent (50%) of the monthly quantities for that three month period set forth in the Seller’s Annual Forecast minus any Seller Excused Hours for that month, Buyer shall have the right to require Seller to provide Replacement Product as set forth in Section 3.4(d). Pursuant to Section 9.1(b)(iii), Seller’s failure to deliver at least fifty percent

(50%) expected monthly quantities, excluding Seller Excused Hours for twelve (12) consecutive months shall constitute a default of this Agreement.

### 3.5 Environmental Attributes.

- (a) Purchase and Sale of Environmental Attributes. During the Term, Seller shall sell and transfer to Buyer, and Buyer shall purchase and 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.
  - (i) Seller shall cause REC 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.
  - (ii) 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. Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller.
  - (iii) 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 ("the Deficient 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.
  - (iv) 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.

- (v) 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 promptly shall modify this Agreement as reasonably required (i) 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 (ii) as may otherwise be reasonably appropriate to address such inconsistency.

### **3.6 Resource Adequacy.**

- (a) Resource Adequacy Requirements. During the Delivery Term, Seller grants, pledges, assigns and otherwise commits to Buyer all of the Facility's Capacity Attributes, to enable Buyer to meet its Resource Adequacy or successor program requirements, as the CPUC, CAISO and/or other regional entity may prescribe, including submission of a supply plan or Resource Adequacy plan. From the Execution Date, and for the duration of the Delivery Term, 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 all of the Capacity Attributes, to be committed by Seller to Buyer pursuant to this Agreement to meet Buyer's Resource Adequacy requirements during the Delivery Term.
- (b) Availability Standards. Seller shall be responsible for all costs, charges, expenses, penalties, and obligations resulting from Availability Standards, if applicable, and Seller shall be entitled to retain all credits, payments, and revenues, if any, resulting from Seller achieving or exceeding Availability Standards, if applicable.

### **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 annually at five thousand dollars (\$5,000.00) per MW of Contract Capacity and in the aggregate throughout the Delivery Term at twenty thousand dollars (\$20,000.00) per MW of Contract Capacity (collectively "Compliance Cost Cap").

- (a) This Section shall apply to Seller's additional, reasonable out-of-pocket costs paid to third parties for obtaining, maintaining, conveying, or complying with: (i) CEC Certification, (ii) Environmental Attributes including WREGIS certificates, and (iii) Capacity Attributes ("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) 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.
- (c) Seller shall notify Buyer within sixty (60) calendar days after the applicable Change in Law if it anticipates that its Compliance Costs will exceed the Compliance Cost Cap and an estimate of the Compliance Costs. Buyer shall notify Seller within thirty (30) 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 tax credits, deductions, and incentives related to the generation and sale of Energy or investments in the Facility shall be owned by Seller, including tax credits available under Section 45 of Subtitle A, Chapter 1A, Part IV and Section 48(a)(3)(A)(i) and 48(a)(5) of the Internal Revenue Code of 1986 or any successor law. Buyer agrees to cooperate with Seller, as may be necessary, to allow maximization of the value of, and realization of, all such tax credits and incentives; provided that Buyer shall not be required to incur additional costs or accept any diminution in value of its rights under this Agreement or of the Product purchased hereunder.

In addition, Buyer shall not take any action (except as otherwise permitted under this Agreement), that would in any way reduce or eliminate the availability to Seller of any such tax credits and incentives. Notwithstanding the foregoing, Seller's rights under this section shall not include anything that qualifies as Product (including any Environmental Attributes).

### **3.9 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 notify Buyer of such determination and 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 so notify Seller within ninety (90) calendar days of its receipt of such offer. Buyer and Seller shall promptly thereafter enter into good faith negotiation of commercial modifications to this Agreement incorporating such Expansion Facility Product offer.
- (b) Buyer's Right to Purchase Expansion Facility Product. If Buyer does not accept Seller's offer to purchase 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 the same to multiple independent 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.

**3.10 Refurbishment of the Facility.** During the Term, Seller may not refurbish the Facility, alter components of the Facility, replace components of the Facility, add additional **[solar modules or inverters, or replace solar modules or inverters with more powerful solar modules or inverters]**, to increase capacity higher than the Installed Capacity without the prior written consent of Buyer, and 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 Installed Capacity.

## ARTICLE 4: BILLING, PAYMENT, AND CERTIFICATION

### 4.1 Billing and Payment.

- (a) Monthly Invoices. Seller shall provide to Buyer no sooner than the tenth (10<sup>th</sup>) day of each month an invoice for the Product and Buyer Curtailed Product for the prior month based upon meter data for Energy delivered in such calendar month. All Energy purchased under this Agreement must be measured by the Facility's CAISO revenue meter to be eligible for payment under this Agreement. The invoice shall include:
- (i) the hourly quantities of Energy delivered in the prior month based on CAISO metering and settlement data ("Delivered Energy");
  - (ii) a calculation of the amount of Buyer Curtailed Product, if any;
  - (iii) the quantity of Capacity Attributes produced in the prior month;
  - (iv) a calculation of the monthly payment based on the Contract Price and the Excess Energy Price, and the quantity of Delivered Energy and Buyer Curtailed Product, if any,
  - (v) credits for WREGIS Certificate Deficits pursuant to Section 3.5 (c)(iii), if any, and;
  - (vi) amounts of Surplus Energy and the LMP at the Delivery Point.
- (b) Payment. All invoices shall be due and payable on or before the thirtieth (30<sup>th</sup>) day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day ("Due Date"). Any amount not paid by the Due Date shall be considered late and Buyer shall pay a Late Payment Penalty 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 ("Late Payment Penalty").
- (c) 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 Penalty 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.
- (d) Disputes and Adjustments of Invoices. A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this 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 the Late Payment Penalty from and including the due date to but excluding the date paid. Inadvertent

overpayments shall be returned upon request or deducted by the 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.

- (e) CAISO Adjustments. If the CAISO makes any adjustment to any CAISO meter data for a given time period, Seller agrees that it shall submit revised monthly invoices, pursuant to Section 4.1, covering the entire applicable time period in order to conform fully such adjustments to the meter data. Seller shall submit any such revised invoice no later than thirty (30) days from the date on which the CAISO provides to Seller such binding adjustment to the meter data.

#### **4.2 Designated Fund.**

- (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 at all times 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) Biannual Budget Process. For each City biannual budget cycle during the term of this Agreement, Buyer agrees to take all necessary action to include the maximum amount of the Buyer's payment obligations under this Agreement in its budget submitted to the Board of Supervisors for that budget cycle.

## ARTICLE 5: FACILITY OPERATION AND MAINTENANCE

### 5.1 General Obligations.

- (a) Records. Seller shall keep complete and accurate 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 Good Utility Practice;
- (b) CAISO Agreements. Seller shall enter into any agreements with the CAISO required by the CAISO for generators delivering power into the CAISO-controlled grid;
- (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.
- (e) Compliance with Laws. Seek, obtain, maintain, and comply with all 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.
- (f) RPS Certification. Prior to the Effective Date and throughout the Delivery Term, take all actions necessary to obtain and maintain for the Facility (i) CEC Certification, and (ii) tracking and transfer of RECs associated with the Product in WREGIS.
- (g) 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).

### 5.2 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 Good Utility 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) CAISO and WECC Requirements and Good Utility Practice. Each Party shall perform in compliance with all applicable (i) operating policies, criteria, rules, guidelines, tariffs, and protocols of the CAISO, (ii) WECC scheduling practices, and (iii) Good Utility Practice.
- (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) CAISO Charges. Seller shall do all things reasonably needed to allow Buyer to comply

with any obligations, and minimize any potential liability, under the CAISO Tariff. If and to the extent that Seller fails to comply with the notice provisions in Section 5.6(g) concerning Forced Outages or with its obligations as outlined in the previous sentence, Seller shall be wholly responsible for all imbalances, deviations, or any other CAISO charges or penalties associated with such Forced Outage or related CAISO Tariff obligation.

- (e) Metering. All Energy from the Facility must be delivered through a single CAISO revenue meter dedicated solely to the Facility. Seller shall bear all costs relating to all metering equipment installed to accommodate the Facility. In addition, Seller hereby agrees to provide all meter data to Buyer in a form acceptable to Buyer, and consents to Buyer obtaining from the CAISO all inspection, testing and calibration data and reports. Seller shall grant Buyer the right to retrieve the meter reads from CAISO Operational Meter Analysis and Reporting (OMAR), or its successor MRI-S, via website and direct download, and directly from the CAISO meter(s) at the Facility site.

### **5.3 Scheduling, Forecasts, and Outages.**

- (a) Scheduling. Seller shall provide (or cause to be provided) all Scheduling Coordinator services for the Facility and for delivery of Product to the Delivery Point. Buyer shall provide (or cause to be provided) all Scheduling Coordinator services for Product at and from the Delivery Point. The Parties will purchase and sell Product through Inter-SC Trades in compliance with the CAISO Tariff.
- (b) CAISO Costs and Revenues. Seller shall be responsible for all CAISO costs (including penalties and other charges) and shall be entitled to all CAISO revenues (including credits and other payments) associated with the Facility and delivery of Product to the Delivery Point; provided, that, any costs or charges assessed by the CAISO which are not due to the Seller's generation, operation or dispatch of the Facility or delivery of Product to the Delivery Point, including costs and charges characterized by the Buyer's CAISO Charge Codes, shall be Buyer's responsibility. 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, the cost of the sanctions or penalties shall be the Seller's responsibility.
- (c) Variable or Intermittent Energy Resource Programs. During the Term, Seller may elect to participate in any CAISO program for scheduling variable or intermittent energy resources at its sole cost and discretion to the extent that such participation is consistent with Seller's obligations under this Agreement and the CAISO Tariff.
- (d) Scheduled and Delivered Amounts. (TBD)
- (e) Generation Forecasts.
  - (i) No later than thirty (30) 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 in accordance with Exhibit M. During the Delivery Term of this Agreement, Seller shall not schedule Planned Outages of more than twenty-four (24) hours during the period of reliability accounting (initially the period between June 1<sup>st</sup> and September 30<sup>th</sup> but subject to changes at Buyer's discretion in order to conform to the CAISO's availability assessment).
  - (ii) No later than ten (10) days prior to the first day of each month of the Delivery Term, Seller shall provide an electronic update, in a format specified by Buyer, 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) 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) In the Annual and Monthly Forecasts, Seller shall provide, at a minimum, the information set forth in Exhibit M. Planned Outages not included in the Annual or Monthly Forecast shall be provided by Seller to Buyer at least ten (10) Business Days prior to the start of the Planned Outage.
- (f) Planned Outages. If Buyer requests a change to the scheduled date of any Planned Outage, Seller shall consider such request in good faith and notify Buyer of its decision within seven (7) calendar days of receipt of Buyer’s request.
- (g) Forced Outages. Forced Outages shall be reported by Seller to Buyer verbally as soon as practicable and in writing in accordance with Exhibit M. Seller shall notify Buyer immediately, and in no event later than within ten (10) minutes, whenever the Facility is returned to service.
- (h) Curtailement.
  - (i) Mandatory Curtailement Periods. Seller shall reduce delivery amounts as directed by the CAISO, PTO, or any successor thereof pursuant to a Curtailement Order. Buyer shall not be required to pay Seller for the Product that Seller could have delivered to Buyer but for such Curtailement Order.
  - (ii) Discretionary Curtailement.
    - (A) Buyer may require Seller to curtail deliveries of Product from the Facility for any reason in Buyer’s sole discretion (a “Discretionary Curtailement”) by delivering a dispatch notice to Seller in accordance with Exhibit M, provided that (1) such Discretionary Curtailements shall be limited to a quantity of not more than ten percent (10%) of the Contract Quantity in each Contract Year. Seller shall reduce the Facility’s Product delivery by the amount and for the period set forth in each dispatch notice.
    - (B) In addition to paying Seller for all Delivered Energy hereunder, Buyer shall pay Seller the Contract Price for the amount of Product that Seller could reasonably have delivered to Buyer but for such Discretionary Curtailement (“Buyer Curtailed Product”).
  - (iii) Failure to Comply. If Seller fails to comply with a dispatch notice that meets the requirements for a Discretionary Curtailement, for the amount of Product (measured in MWhs of Product) that the Facility delivered in contradiction to the dispatch notice, Seller shall pay Buyer the greater of:
    - (A) Two hundred percent (200%) of the Contract Price for such MWhs plus any penalties or other charges actually incurred resulting from Seller’s failure to comply with the dispatch notice; and
    - (B) the CAISO’s Real-Time Market price for the applicable PNode for such MWhs plus any penalties or other charges actually incurred resulting from Seller’s failure to comply with the dispatch notice.

The Parties agree that, consistent with Section 9.3(b), the damages Buyer would incur due to Seller’s failure to comply with a Discretionary Curtailement would be difficult or impossible to predict with certainty and the liquidated damages set forth in this Section are a reasonable approximation of such damages.

- (iv) If Seller does not provide payment to Buyer within ten (10) days of Seller's receipt of an invoice from Buyer for the damages set forth in Section 5.6(h)(iii), at Buyer's sole discretion, Buyer shall be entitled to collect damages by one or more of the following:
  - (A) drawing upon the Performance Assurance;
  - (C) setting off against any amounts owed to Seller by Buyer under this Agreement.

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

**6.1 Grant of Security Interest/Remedies.** 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 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 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 Performance Assurance and any and all proceeds resulting therefrom or from the liquidation thereof, respectively. Upon or any time after the occurrence or deemed occurrence and during the continuation of an Event of Default or an Early Termination Date, Buyer, as the Non-Defaulting Party, may do any one or more of the following:

- (a) exercise any of the rights and remedies of a secured party with respect to all Performance Assurance, as applicable, including any such rights and remedies under the law then in effect;
- (b) draw on any outstanding Letter of Credit or Guaranty issued for its benefit and retain any cash held by Buyer as Performance Assurance; and
- (c) liquidate all 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.

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 Performance Assurance.**

- (a) Provision of Security by Seller. Seller agrees to deliver to Buyer collateral to secure its obligations under this Agreement which Seller shall maintain in full force and effect for the period posted with Buyer in the amount of five percent (5%) of the total Project revenue under this Agreement in the form of cash, a Letter of Credit, or a Guaranty from the Commercial Operation Date and ending at the expiration of the Delivery Term. The amount of the Performance Assurance shall adjust annually to reflect the remaining value of the Agreement.
- (b) No Limitation of Damages. The amount of Performance Assurance required under this Agreement shall not be deemed a limitation of damages.
- (d) Use of Performance Assurance. 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.
- (e) Return of Performance Assurance. Buyer shall return the unused portion of Performance Assurance to Seller within thirty (30) days after the following has

occurred: (i) the Agreement Term of the Agreement has ended, or an Early Termination Date has occurred; and (ii) all payment obligations of the Seller arising under this Agreement, including payments pursuant to a Termination Payment, indemnification payments, or other damages are paid in full (whether directly or indirectly such as through set-off or netting).

**6.3 Letter of Credit.** Performance Assurance provided in the form of a Letter of Credit shall be substantially in the form set forth in Exhibit F-1 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 in accordance with this Agreement.
- (b) Failure of Letter of Credit and Cure. In the event the issuer of such Letter of Credit at any time: fails to maintain the requirements of an Eligible LC Bank or Letter of Credit, becomes Bankrupt, indicates its intent not to renew such Letter of Credit, or fails to honor Buyer's properly documented request to draw on such Letter of Credit, Seller shall cure such occurrence by complying with either (i) or (ii) below in an amount equal to the outstanding Letter of Credit, and by completing the action within five (5) Business Days after the date of Buyer's notice to Seller of an occurrence listed in this subsection (Seller's compliance with either (i) or (ii) below is considered the "Cure"):
  - (i) providing a substitute Letter of Credit that is issued by an Eligible LC Bank other than the bank which is the subject of Buyer's notice to Seller in this section 6.3(b),
  - (ii) providing a Guaranty, or
  - (iii) posting cash.
- (c) Failure to Cure. If Seller fails to cure or if such Letter of Credit expires or terminates without a full draw thereon by Buyer, or fails or ceases to be in full force and effect at any time that such Letter of Credit is required pursuant to the terms of this Agreement, then Seller shall have failed to meet the collateral requirements of Section 6.2 and Buyer may declare an Event of Default as set forth in Article 9.
- (d) Letter of Credit Costs. In all cases, the reasonable costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the Letter of Credit shall be borne by Seller.

**6.4 Guaranty.** If at any time Seller's Guarantor or Guaranty is no longer acceptable to Buyer, in its reasonable discretion, Seller shall replace the Guaranty within five (5) Business Days following Buyer's written request for replacement of the Guaranty. Seller shall provide for the benefit of Buyer either (1) cash, (2) a replacement Guaranty from a different Guarantor meeting the criteria set forth in the definition of Guarantor, or (3) a replacement Letter of Credit from an issuer meeting the criteria set forth in the definition of Letter of Credit. If Seller fails to provide replacement Development or Performance Assurance as required in this Section 6.4, then Buyer may declare an Event of Default as set forth in Article 9.

## ARTICLE 7: FINANCIAL STATEMENTS

**7.1 Seller's Obligations.** If requested by Buyer, Seller shall deliver to Buyer (i) within six (6) months following the end of each fiscal year, a copy of Seller's and Seller's Parent's annual report containing audited consolidated financial statements for such fiscal year (or if not available, unaudited consolidated financial statements for such fiscal year) and (ii) within forty-five (45) calendar days after the end of each of its first three (3) fiscal quarters of each fiscal year, a copy of Seller's and Seller's Parent's quarterly report containing unaudited consolidated financial statements for such fiscal quarter.

In all cases, the statements shall be for the most recent accounting period and shall be prepared in accordance with GAAP and shall be certified by the Chief Financial Officer or equivalent officer of Seller on behalf of Seller and of Seller's Parent on behalf of Seller's Parent; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay shall not constitute an Event of Default so long as Seller diligently pursues the preparation, certification and delivery of the statements.

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

## **ARTICLE 8: FORCE MAJEURE**

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

**8.2 Notice.** In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party suffering the Force Majeure Event shall, as soon as practicable under the circumstances, notify the other Party, in writing, of the nature, cause, date of commencement, and the anticipated extent of any delay or interruption in performance.

**8.3 Termination Due To Force Majeure Event.** If a 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, the unaffected 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 amount paid by or due and payable by Seller pursuant to Sections 3.4(c) or 5.3(h) prior to the date of such termination for reasons unrelated to this Section 8.3. This Section 8.3 shall not affect the rights and remedies associated with any other termination rights set forth in this Agreement.

## **ARTICLE 9: DEFAULT, REMEDIES, AND TERMINATION**

### **9.1 Events of Default.**

- (a) 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 thirty (30) calendar days after written notification of default by the other Party; however, the Parties may mutually

- agree upon a longer period for cure if the Event of Default cannot reasonably be cured within thirty (30) calendar days;
- (ii) subject to Section 4.1(c), failure to make any payment when due under this Agreement within ten (10) 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 is not cured or remedied within thirty (30) days after written notice;
  - (iv) such Party becomes Bankrupt;
  - (v) subject to Section 12.1(c), 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) The following shall constitute additional Events of Default by Seller:
- (i) Notwithstanding any other provision of this Agreement, Seller fails for a consecutive twelve (12) month period to deliver at least fifty percent (50%) of the expected deliveries as set forth in the Annual Forecast excluding Seller Excused Hours;
  - (ii) Seller fails to satisfy any of the credit requirements of Article 6 of this Agreement.

## **9.2 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 after the day such notice is deemed to be received, as an Early Termination Date for this Agreement;
  - (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, the Termination Payment (which shall be calculated in accordance with Section 9.2(b)) if any Event of Default by either Party arose 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 Termination Payment.
- (i) The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Termination Payment as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or

Losses may include dealers in the relevant markets, end-users of relevant Product, information vendors and other sources of market information. The quotes obtained shall be: for a like amount of a like Product; at the same (or a reasonably equivalent) PNode, and; for the remainder of the Delivery Term, or in any other commercially reasonable manner.

- (ii) If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from such termination of this Agreement, the amount of the Termination Payment shall be zero.
  - (iii) The Non-Defaulting Party shall not have to enter into replacement transactions to establish a Termination Payment.
  - (iv) The Termination Payment shall be the sole and exclusive remedy available to the Non-Defaulting Party in connection with its termination of this Agreement and shall not include consequential, incidental, punitive, exemplary, indirect, or business interruption damages.
  - (v) Section 4.3 of this Agreement is not a limitation on Buyer's liability for a Termination Payment
- (c) Notice of 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 Termination Payment due from the Defaulting Party to the Non-Defaulting Party, if any. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to the Non-Defaulting Party fifteen (15) Business Days after such termination payment notice is effective.
- (d) Disputes Regarding Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of the Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Following delivery of such a notice, disputes regarding the Termination Payment shall be resolved in accordance with Section 10.8.

### 9.3 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 THE LIQUIDATED DAMAGES AND DAMAGE PAYMENTS SET FORTH IN SECTIONS 3.4(c), 5.3(h)(iii), AND 9.2(a)(iii) ARE EACH REASONABLE AND REPRESENT A FAIR AND GENUINE ESTIMATE OF THE DAMAGES 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.

- (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 ARTICLES 3 AND 4, AND SECTION 9.2.
- (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 10: INDEMNIFICATION

### 10.1 Indemnification.

- (a) Seller and Buyer Indemnification. 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.
- (b) Notice. If an 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.

**10.2 Debt Liability Disclaimer.** Buyer shall not be liable for and shall be held harmless and indemnified by Seller for (a) any claims or damages arising out of any other contract to which Seller is a party, and (b) subject to Section 10.1(a), any tortious action or inaction, negligent error in judgment, act of negligence, intentional tort, negligent mistakes or other acts taken or not taken by the Seller, its employees, agents, servants, invitees, guests or anyone acting in concert with or on behalf of the Seller.

## ARTICLE 11: REPRESENTATIONS AND WARRANTIES

**11.1 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 \_\_\_\_\_, 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;
- (d) 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;
- (e) 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;
- (f) 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;
- (g) It is not Bankrupt and there are no proceedings pending or being contemplated by it or any of its affiliates, or, to its knowledge, threatened against it or its affiliates which would result in it being or becoming Bankrupt; and
- (h) It is a forward contract merchant within the meaning of the U.S. Bankruptcy Code (as in effect as of the Execution Date of this Agreement).

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

- (a) Buyer is a municipal corporation, duly organized and validly existing, and has the lawful power to engage in the business it presently conducts and contemplates conducting in this 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; and
- (g) It is a forward contract merchant within the meaning of the U.S. Bankruptcy Code (as in effect as of the Execution Date of this Agreement).

### **11.3 Covenants.**

- (a) General Covenants. In addition to other covenants in this Agreement, each Party covenants that throughout the Delivery Term:
  - (i) it shall continue to be duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation;
  - (ii) 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
  - (iii) 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.
- (b) Seller Covenant. Seller covenants that, throughout the Delivery Term:
  - (i) it shall maintain CEC Certification of the Facility; and
  - (ii) it shall ensure that the Renewable Energy Credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard and as may be modified by subsequent decision of the CPUC or by subsequent legislation.

## **ARTICLE 12: MISCELLANEOUS**

### **12.1 Assignment**

- (a) General Assignment. Except as provided in Sections 12.2(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 12.1, Buyer hereby consents to assignment of this Agreement by Seller as collateral for any financing or refinancing of the Facility 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 12.1(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 with such Lender that provide for recognition of the Lender's security interest by Buyer and such other provisions as may be reasonably requested by Seller or any such Lender; provided, however, that 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 9.2(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 12.1, 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. 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 all ensuring that required changes to its vendor certifications are promptly implemented.

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

## 12.2 Proprietary or Confidential Information.

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

- (e) Nondisclosure of Private Information. If this 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.

### **12.3 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) Choice of Law and Venue. This Agreement and the rights and duties of the Parties hereunder shall be construed, enforced and performed in accordance with the laws of the state of California, and/or the laws of the United States, as applicable, without regard to principles of conflicts of law which may direct the application of the laws of another jurisdiction. Venue shall be in the County of San Francisco, State of California.

**12.4 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.

### **12.5 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 (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 and that has the effect of changing the transfer and sale procedure set forth in this Agreement so that the implementation of this Agreement becomes impossible or impracticable, or otherwise modifies the RPS or language required to conform to the RPS, the Parties shall work in good faith to revise this Agreement in a manner that maintains to the greatest extent practicable the original intent of the Parties under this Agreement so that the Parties may perform their obligations regarding the purchase and sale of Product. If the Parties cannot reach a good faith agreement on amendments, the Agreement shall be terminated by mutual agreement without liability for either Party.

- (g) Headings. The headings used herein are for convenience and reference purposes only.
- (h) Assigns. This Agreement shall be binding on each Party's successors and permitted assigns.
- (i) No Dedication. No undertaking by one Party to the other under any provision of the 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) Compliance with Americans with Disabilities Act. Seller acknowledges that, pursuant to the Americans with Disabilities Act (ADA), programs, services and other activities provided by a public entity to the public, whether directly or through a contractor, must be accessible to the disabled public. Seller shall provide the services specified in this Agreement in a manner that complies with the ADA and any and all other applicable federal, state and local disability rights legislation. Seller agrees not to discriminate against disabled persons in the provision of services, benefits or activities provided under this Agreement and further agrees that any violation of this prohibition on the part of Seller, its employees, agents or assigns will constitute a material breach of this Agreement.
- (l) Limitations on Contributions. Through execution of this Agreement, Seller acknowledges that it is familiar with Section 1.126 of City's Campaign and Governmental Conduct Code, which prohibits any person who contracts with City for the rendition of personal services or for the furnishing of any material, supplies or equipment to City, whenever such transaction would require approval by City's elective officer of the board on which that elective officer serves, from making any campaign contribution to the officer at any time from the commencement of negotiations for the contract until the later of either: (1) the termination of negotiations for such contract, or (2) three months after the date this Agreement is approved by the City's elective officer or the board on which that elective officer serves.

- (m) Prohibition on Political Activity with City Funds. In accordance with San Francisco Administrative Code Chapter 12.G, Seller may not participate in, support, or attempt to influence any political campaign for a candidate or for a ballot measure in San Francisco (collectively, "Political Activity") in the performance of this 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.
- (n) 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.
- (o) Submitting False Claims. The full text of San Francisco Administrative Code Chapter 21, Section 21.35, including the enforcement and penalty provisions, is incorporated into this Agreement. 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.
- (p) 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.
- (p) Compliance with Laws. 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 and all applicable laws as they may be amended from time to time. Buyer 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.

- (q) 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.
- (r) 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.
- (s) Survival. All rights pursuant to (i) Section 3.5 (Environmental Attributes); Section 4.1(d) (Disputes and Adjustment of Invoices); Article 9 (Events of Default; Remedies; Limitations), (iii) Article 10 (Indemnification), (iv) Section 12.2 (Confidential Information); (v) Section 12.3 (Dispute Resolution/Choice of Law), and (vi) Section 12.4 (Audit); (vii) Section 12.5(m) (Prohibition of Political Use of City Funds); and (viii) Section 12.5(p) (City Opinion) shall also survive termination of this Agreement.

**12.6 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).

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

**12.8 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.

**12.9 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.

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

Harlan J. Kelly, Jr.  
General Manager,  
San Francisco Public Utilities  
Commission

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

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

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

Approved as to Form:

Dennis J. Herrera  
City Attorney

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

Deputy City Attorney

## **EXHIBIT A**

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

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 (collectively, "Charter Documents") 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 CEC Certification satisfactory to Buyer.
4. A copy of the Interconnection Agreement, if any.
5. Insurance documentation as required in Exhibit D.
6. A copy of the most recent financial statements (which may be unaudited) from Seller and Seller's Parent together with a certificate from the Chief Financial or equivalent officer of Seller, dated no earlier than ten (10) Business Days prior to the Seller Execution, to the effect that, to the best of such officer's knowledge, (A) such financial statements are true, complete and correct in all material respects and (B) there has been no material adverse change in the financial condition, operations, properties, business or prospects of Seller since the date of such financial statements.

**EXHIBIT B**

**FACILITY DESCRIPTION AND SITE DRAWINGS**

**I. Facility Description**

Facility name:

Facility physical address:

Assessor's Parcel No:

Technology type (including any applicable model):

Interconnection Point of Facility:

Local Capacity Area:

The nameplate capacity of the Facility:

**II. Site Drawings**

**[INSERT SITE MAP]**

**[INSERT ONE-LINE DIAGRAM FOR  
INTERCONNECTION FACILITIES AND METERING]**

**EXHIBIT C**  
**CONTRACT QUANTITIES**

**[INSERT TABLE OF MONTHLY ENERGY AND RA QUANTITIES]**

## 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
- (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.

**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. 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:
  - (i) Name as Additional Insured, the City and County of San Francisco, its Officers, Agents, and Employees.
  - (ii) 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 be endorsed to provide thirty (30) days' advance written notice to Buyer of cancellation for any reason, intended non-renewal, or reduction in coverages.

**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.

**6. 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-, VIII 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**

### **SCHEDULING PROTOCOLS**

Following the Execution Date, the Parties shall agree on Scheduling Protocols, which shall be consistent with the CAISO Tariff, customary industry practice, and the Facility's operational parameters (including as to levels and timing of curtailments), such agreement not to be unreasonably withheld by either Party.

**EXHIBIT F-1**

**FORM OF LETTER OF CREDIT**

**[Issuing Bank Letterhead and Address]**

STANDBY LETTER OF CREDIT NO. XXXXXXXXX

**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 A 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 F-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 G

### NOTIFICATION REQUIREMENTS FOR AVAILABLE CAPACITY AND PROJECT OUTAGES AND CURTAILMENTS

#### 1. Notification Requirements For Routine Start-Up and Shutdowns

Prior to paralleling or after disconnecting from the electric system, ALWAYS follow your balancing authority rules and notify the applicable Participating Transmission Owner's (PTO) switching center.

- Call the applicable Participating Transmission Owner's (PTO) switching center and Buyer at \_\_\_\_\_ to advise of the intent to parallel before any Start-up.
- Call the applicable Participating Transmission Owner's (PTO) switching center and Buyer at \_\_\_\_\_ after the unit has been paralleled and report the parallel time and intended unit output.
- Call the applicable Participant Transmission Owner's (PTO) switching center and Buyer at \_\_\_\_\_ after any routine separation and report the separation time as well as the date and time estimate for return to service.

#### 2. Submission of Available Capacity and Planned Outages

Submit information as set forth below:

- a. For all email correspondence: \_\_\_\_\_
- b. For Annual Forecasts of Available Capacity: \_\_\_\_\_,
- c. For Monthly and Weekly Forecasts of Available Capacity: \_\_\_\_\_
- d. For Hourly Forecasts of Available Capacity: \_\_\_\_\_
- e. For Planned Outages: \_\_\_\_\_ Include the following information:
  - i. Start Date and Start Time
  - ii. Estimated or Actual End Date and End Time for Outage
  - iii. Date and time when reported to Buyer and name(s) of Buyer's representative(s) contacted
  - iv. Description of additional information as needed, including, but not limited to, changes to a Planned Outage.
  - v. Contact name: first and last name of the individual at the Facility to contact regarding the outage(s) at issue in the email.

#### 3. Forced Outage Reporting

- a. Forced Outages – Seller shall notify Buyer verbally at \_\_\_\_\_ ten (10) minutes of event or as soon as reasonably possible, after the safety of all personnel and securing of all facility equipment.

- a. Verbal notification shall include time of Forced Outage, cause, expected duration, and capacity reduction.
  - b. After verbally notifying Buyer of the Forced Outage, Seller shall also take commercially reasonable efforts to notify Buyer's Scheduling Coordinator.
  - c. As soon as practicable, but no later than forty-eight (48) hours after the commencement of the Forced Outage, Seller shall provide Buyer with an email to \_\_\_\_\_.
1. Type of Outage: Forced Outage
  2. Start Date and Start Time
  3. Estimated or Actual End Date and End Time
  4. Date and time when reported to PG&E and name(s) of PG&E representative(s) contacted.
  5. Text description of additional information as needed.
  6. Primary and secondary causes of Forced Outage, including a detailed description of specific equipment involved and the nature of the problem or condition.
  7. Equipment description and nature of work being performed. For generation outages, include NERC Generation Availability Data System (GADS) numbers (as available) that identify the specific equipment and type of work that affect restrictions. Include additional equipment designations as available.
  8. Text description of additional information as needed, including, but not limited to, changes to a previously scheduled Outage, links/cross-references to related outage cards and log entries, outage classifications per the CAISO Tariff, etc.
  9. Associated events, e.g. operation of Special Protection Schemes.
  10. Impact on CAISO-controlled Grid.

#### **4. Buyer Curtailment Orders**

Operational characteristics of the Project for Buyer Curtailment Orders are listed below. Buyer, as the Scheduling Coordinator, may request that CAISO modify the Master File for the Project to reflect the findings of a CAISO audit of the Project. In addition, Seller agrees to coordinate with Buyer or Third-Party SC, as applicable, to ensure all information provided to the CAISO regarding the operational and technical constraints in the Master File for the Project are accurate and are based on the true physical characteristics of the resource.

- PMax of the Project: \_\_\_\_MW
- Minimum operating capacity: \_\_\_\_MW
- Ramp Rate: \_\_\_\_MW/Minute

#### ***[For As-Available Products]***

- Advance notification required for Buyer Bid Curtailment and Buyer Curtailment Order: Not greater than the shortest Dispatch Interval in the Real-Time Market (as defined in the CAISO Tariff).

- Maximum number of Start-ups per calendar day (if any such operational limitations exist): \_\_\_\_\_

***[For Baseload Products]***

- Maximum number of Start-ups per calendar day, month, year (if any such operational limitations exist): \_\_\_\_\_
- Advance notification required for Buyer Bid Curtailment and Buyer Curtailment Order: Not greater than the shortest Dispatch Interval in the Real-Time Market (as defined in the CAISO Tariff).

**Other Requirements:**

- Maximum number of hours annually for Buyer Curtailment Periods: unlimited hours
- The Project will be capable of receiving and responding to all Dispatch Instruction in accordance with Section 3.1(q).
- Start-Up Time (if applicable): \_\_\_\_\_Minutes
- Minimum Run Time after Start-Up (if applicable): \_\_\_\_\_Minutes
- Minimum Down Time after Shut-Down (if applicable):\_\_\_\_\_Minute

## **EXHIBIT H**

### **Community Benefits Commitments**

1. **Community Benefits Manager.** \_\_\_\_\_ shall serve as the manager of Seller's community benefits commitments ("Manager") and provide fiduciary oversight. The Manager shall ensure that the community benefits commitments listed in the community benefits table below are delivered to the communities that they are intended to benefit in a transparent and accountable manner. The Manager shall work with Buyer's Community Benefits Coordinator, to organize, plan, track, measure, and report on Seller's community benefits commitments. The Manager shall coordinate the senior management of Seller's subconsultants to ensure the entire team participates in providing benefits to the community benefits set forth in this Agreement.

2. **Performance.**

(a) Following the Execution of this Agreement, Seller commits to providing the Community Benefits Commitments detailed below during the Term of the Agreement. Seller's commitments shall be funded independently by Seller and shall not be tied to or dependent upon Buyer's funds or sources of funding, or receivables from Buyer. The representations, warranties and other terms contained in this Exhibit K have been designed by Seller as the basis for a Community Benefit Plan, but are for the sole benefit of the Parties hereto and shall not be construed as conferring any rights on any other persons or entities.

(b) Community Benefits are a deliverable, zero-dollar task. No hours or dollars should be allotted or included in Seller's costs for this Project in order to perform or deliver the voluntarily proposed Community Benefits Commitments. If Seller commits any funds to delivering the Community Benefits Commitments it proposes, all such funds must be independent of Buyer funding or any dollars associated with this Agreement. If Buyer commits to contributing any funds to performing or delivering its commitments related to this task, such funds may not be dependent in any way upon receipt of Buyer payments under this Agreement.

(c) Seller's Community Benefits Commitments shall be performed prospectively during the Term of the Agreement. Commitments performed as part of previous contracts or prior to the award of this Agreement to Seller cannot be used as part of Seller's Community Benefits Commitments for this Agreement. If Seller has established programs or plans that are consistent with the Community Benefits areas described in the Request for Offers for this Agreement, Seller may continue those programs as part of its community benefits commitments and will be given credit for activities that are performed after the contract is awarded by Buyer.

3. **Deliverables**

(a) Seller shall meet with the SFPUC Assistant General Manager for External Affairs and External Affairs Community Benefits and Social Responsibility Manager to develop a Community Benefits Plan and Timeline within three (3) months of Execution Date. The Community Benefits Plan and Timeline will provide details regarding expenditures, a schedule, and timelines related to the Community Benefits Commitments outlined in the Community Benefits Table.

(b) Seller shall meet once a year with the External Affairs Community Benefits and Social Responsibility Manager during the implementation of the Community Benefits Plan to discuss the work plan and associated timelines, and make any adjustments or updates regarding timing, expenditure of funds, partners, strategic delivery, scale, and performance necessary to ensure the commitments are aligned with and driven by Buyer's priorities and SFPUC's community benefits strategy to ensure we maximize the collective resources and positive impact.

**4. Community Benefits Commitments.** Seller will deliver the proposed Community Benefits Commitments in the community benefits table which provides a description of the community benefit activity, expected outcomes, the timetable and duration of the commitments, the dollar amount of direct contributions, the number and cost of volunteer hours, and trainee hours that will be committed to each specific initiative, as well as for the total value of the Community Benefits Commitments. **[INSERT DESCRIPTION OF COMMITMENTS]** Any changes that occur to the Community Benefits Commitments must be approved by the Community Benefits and Social Responsibility Manager.

**Community Benefits Summary Table**

	(A)	(B)	(C)	(D)	(E)
<b>Community Benefit Category</b>	<b>Direct Financial Contribution</b>	<b>Volunteer Hours</b>	<b>Volunteer Hourly Rate (rate is standardized)</b>	<b>Value of Volunteer Hours (B x C)</b>	<b>Total Contributions (A + D + E)</b>
<b>TOTAL</b>					

**5. Reporting Requirements:**

(a) Seller shall provide detailed descriptions of accountability methods and measures that will be implemented to ensure that the proposed Community Benefits Commitments will be delivered to the communities they are intended to benefit in a transparent and accountable manner. To maximize transparency and accountability, a process or mechanism must be proposed that will assist Buyer in independently verifying that such funds and resources were actually delivered to the intended beneficiaries.

(b) During the implementation of the Community Benefits Commitments, Seller shall submit progress reports to the SFPUC External Affairs Community Benefits and Social Responsibility Manager, which should detail factors such as total number of hours, dollars, etc. contributed to-date. Reports are submitted on the last business day of the month following the close of the 2<sup>nd</sup> and 4<sup>th</sup> quarter. As part of the progress reports, Seller will also submit documents to substantiate that the Community Benefits Commitments were in fact delivered to the communities they were intended to benefit.

(c) Seller shall also submit an annual report and newsletter to the SFPUC External Affairs Community Benefits and Social Responsibility Manager documenting the Community Benefit Commitments, beneficiaries, and outcomes for the year.

**6. Seller Acknowledgement.** Seller acknowledges that it agrees with the following statements:

(a) Any of the Community Benefits Commitments should directly benefit the communities, neighborhoods, and/or residents identified in the Community Benefits Commitments Proposal attached hereto as Attachment 1.

(b) Commitments must support nonprofit and charitable activities.

(c) Commitments shall not go to, nor benefit any SFPUC employee or entities associated with the SFPUC.

(d) Commitments must be delivered at zero cost to the SFPUC.

- (e) Commitments are separate from and in addition to any regulatory or legal requirements related to the contract.
- (f) Commitments are considered binding once they are included in the final agreement.
- (g) Activities related to the commitments can only commence once there is a Notice to Proceed (NTP) associated with this project.
- (h) Contractor commits to complying with SFPUC's reporting requirements.
- (i) Seller shall provide all of the Commitments, consistent with all of the terms of Seller's Community Benefits Commitments Proposal which are not explicitly set forth in this Exhibit K. If there are any conflicts or discrepancies between this Agreement and the attached Proposal, the terms of this Agreement shall prevail.