

# **AGENDA**

# Regular Meeting of the Board of Directors of San Diego Community Power (SDCP)

May 27, 2021

5:00 p.m.

Due to the public health orders and guidelines in California and in accordance with the Governor's Executive Orders N-25-20 and N-29-20, there will be no location for in-person attendance. SDCP is providing alternatives to in-person attendance for viewing and participating in the meeting. Further details are below.

**Note**: Any member of the public may provide comments to the SDCP Board of Directors on any agenda item. When providing comments to the Board, it is requested that you provide your name and city of residence for the record. Commenters are requested to address their comments to the Board as a whole through the Chair. Comments may be provided in one of the following manners:

- 1. Providing Oral Comments During Meeting. To provide comments during the meeting, join the Zoom meeting by computer, mobile phone, or dial-in number. On Zoom video conference by computer or mobile phone, use the "Raise Hand" feature. This will notify the moderator that you wish to speak during a specific item on the agenda or during non-agenda Public Comment. Members of the public will not be shown on video but will be able to speak when called upon. If joining the meeting using the Zoom dial-in number, you can raise your hand by pressing \*9. Comments will be limited to three (3) minutes.
- 2. Written Comments. Written public comments must be submitted prior to the start of the meeting by using this (web form). Indicate a specific agenda item when submitting your comment. All written comments received prior to the meeting will be provided to the Board members in writing. In the discretion of the Chair, the first ten (10) submitted comments shall be stated into the record of the meeting. Comments read at the meeting will be limited to the first 400 words. Comments received after the start of the meeting will be collected, sent to the Board members in writing, and be part of the public record.

If you have anything that you wish to be distributed to the Board, please provide it via <a href="mailto:info@sdcommunitypower.org">info@sdcommunitypower.org</a> and it will be distributed to the Members.

The public may participate using the following remote options:

Teleconference Meeting Webinar

https://zoom.us/j/94794075133

Telephone (Audio Only)

(669) 900-6833 or (346) 248-7799 | Webinar ID: 947 9407 5133

AGENDA - BOARD OF DIRECTORS - SAN DIEGO COMMUNITY POWER

Welcome

Call to Order

Pledge of Allegiance

Roll Call

Items to be Added, Withdrawn, or Reordered on the Agenda

#### **Public Comments**

Opportunity for members of the public to address the Board on any items not on the agenda but within the jurisdiction of the Board. Members of the public may use the web form noted above to provide a comment or request to speak.

#### **Consent Calendar**

All matters are approved by one motion without discussion unless a member of the Board of Directors requests a specific item to be removed from the Consent Agenda for discussion. A member of the public may use the web form noted above to comment on any item on the Consent Calendar.

- 1. Approval of the minutes of the Regular Meeting of the Board of Directors of San Diego Community Power held on March 25, 2021 and April 22, 2021.
- 2. Amendment to Professional Services Agreement with Maher Accountancy for Accounting Services

Recommendation: Approve first amendment to Professional Services Agreement with Maher Accountancy to increase the not-to-exceed amount by \$37,500 to \$241,000 through June 30, 2022 and authorize the Interim CEO to execute the amendment.

3. Amendment to Professional Services Agreement with Tosdal APC for Legal and Regulatory Services

Recommendation: Approve second amendment to Professional Services Agreement with Tosdal APC to increase the not-to-exceed amount by \$80,000 for services through FY 21, add a not-to-exceed amount of \$240,000 for FY 22 and authorize the Interim CEO to execute the agreement.

4. Amendment to Professional Services Agreement with NewGen Strategies and Solutions, LLC for Regulatory Support and Rate-related Analysis

Recommendation: Approve second amendment to Professional Services Agreement with NewGen Strategies and Solutions, LLC to increase the not-to-exceed amount by \$260,000, extend agreement term through FY 22 and authorize the Interim CEO to execute the amendment.

5. Amendment to Professional Services Agreement with Keyes & Fox LLP for Legal and Regulatory Services

Recommendation: Approve third amendment to Professional Services Agreement with Keyes & Fox LLP to increase the not-to-exceed amount by \$37,500 and authorize the Interim CEO to execute the amendment.

# 6. Amendment to Engagement Letter with Best Best & Krieger in the amount of \$300,000 for Services through FY22 -

Recommendation: Approve amendment to Engagement Letter with Best Best & Krieger for \$300,000 through June 30, 2022 and authorize the Interim Chief Executive Officer to execute the contract.

# 7. Amendment to Professional Services Agreement with Civilian, Inc. for Marketing and Communication Services -

Recommendation: Approve first amendment to Professional Services Agreement with Civilian, Inc. in the amount of \$143,000 for marketing and communications services, and authorize the Interim CEO to execute the agreement.

# 8. Amendment to Professional Services Agreement with Neyenesch Printers in the amount of \$277,000 for services through FY22

Recommendation: Approve amendment to Professional Services Agreement with Neyenesch Printers for \$277,000 through June 30, 2022 and authorize the Interim Chief Executive Officer to execute the contract.

# REGULAR AGENDA

The following items call for discussion or action by the Board of Directors. The Board may discuss and/or take action on any item listed below if the Board is so inclined.

# 9. Operations and Administration Report from the Interim Chief Executive Officer

Recommendation: Receive and file update on various operational and administration activities.

- General Administrative Updates
  - San Diego County
  - Strategic Planning
- Staffing
- Power Resources
- Back Office Operations
- Retirement Plans

#### 10. Update on Regulatory and Legislative Affairs

Recommendation: Receive and file the update on regulatory and legislative affairs.

- Power Charge Indifference Adjustment Final Decision
- Senate Bill 612 Update
- SDG&E Application for Approval of 2022 Electric Procurement Revenue Requirement Forecasts
- Direct Access Rulemaking Proposed Decision
- Provider of Last Resort Rulemaking

# 11. Discussion and Direction on Potential New Members to SDCP and Input on Response Letter to County of San Diego

Recommendation:

- 1. Discuss considerations of adding new member jurisdictions to SDCP and provide direction to staff.
- 2. Provide input to staff on the draft response letter to the County of San Diego.

# 12. Approval of Fiscal Year (FY) 2021 Budget Amendment and Review Proposed Fiscal Year 2022 Budget

Recommendation:

- 1. Approve the FY21 budget amendment.
- 2. Review the proposed FY22 budget.

# 13. Approval of Updates to the Net Energy Metering (NEM) Program and Amend the NEM Program Policy

Recommendation:

- 1. Establish a Net Surplus Compensation Rate
- 2. Establish a Net Surplus Compensation Limit
- 3. Establish monthly settlements and billing
- 4. Delegate authority to the Interim Chief Executive Officer to update the NEM policy consistent with the approved Board actions

# 14. Review and Provide Direction to Staff on Legislative Position for AB 1139

Recommendation:

- 1. Receive and file the Community Advisory Committee's recommended position on AB 1139
- 2. Adopt a position on AB 1139

#### 15. Renewable Power Purchase Agreement with IP Oberon, LLC

Recommendation: Approve the Long-term Renewable Power Purchase Agreement with IP Oberon, LLC and authorize the Interim CEO to execute the agreement.

#### 16. Renewable Power Purchase Agreement with JVR Energy Park, LLC

Recommendation: Approve the Long-term Renewable Power Purchase Agreement with JVR Energy Park, LLC and authorize the Interim CEO to execute the agreement.

#### **Director Comments**

Board Members may briefly provide information to other members of the Board and the public, ask questions of staff, request an item to be placed on a future agenda, or report on conferences, events, or activities related to SDCP business. There is to be no discussion or action taken on comments made by Directors unless authorized by law.

### Reports by Management and General Counsel

SDCP Management and General Counsel may briefly provide information to the Board and the public. The Board may engage in discussion if the specific subject matter of the report is identified below, but the Board may not take any action other than to place the matter on a future agenda. Otherwise, there is to be no discussion or action taken unless authorized by law.

#### **ADJOURNMENT**

# Compliance with the Americans with Disabilities Act

SDCP Board of Directors meetings comply with the protections and prohibitions of the Americans with Disabilities Act. Individuals with a disability who require a modification or accommodation, including auxiliary aids or services, in order to participate in the public meeting may contact (888) 382-0169 or info@sdcommunitypower.org. Requests for disability-related modifications or accommodations require different lead times and should be provided at least 72-hours in advance of the public meeting.

### Availability of Board Documents

Copies of the agenda and agenda packet available at https://sdcommunitypower.org/resources/meeting-notes/. Late-arriving documents related to a Board meeting item which are distributed to a majority of the Members prior to or during the Board meeting are available for public review as required by law. Previously, public records were available for inspection at the City of San Diego Sustainability Department, located at 1200 Third Ave., Suite 1800, San Diego, CA 92101. However, due to the Governor's Executive Orders N-25-20 and N-29-20 and the need for social distancing, in-person inspection is now suspended. Public records, including agenda-related documents, can instead be requested electronically at info@sdcommunitypower.org or by mail to SDCP, 815 E Street, Suite 12716, San Diego, CA 92112. The documents may also be posted at the above website.



# SAN DIEGO COMMUNITY POWER (SDCP) BOARD OF DIRECTORS

San Diego City Administration Building, 12th Floor 202 "C" Street San Diego, CA 92101

#### **MINUTES**

March 25, 2021

This meeting was conducted utilizing teleconferencing and electronic means consistent with State of California Executive Order N-29-20 dated March 17, 2020, regarding the COVID-19 pandemic.

The Board minutes are prepared and ordered to correspond to the Board Agenda. Agenda Items can be taken out of order during the meeting.

The Agenda Items were considered in the order presented.

# **WELCOME**

# **CALL TO ORDER**

Chair Mosca (Encinitas) called the SDCP Board of Directors meeting to order at 5:03 p.m.

# **PLEDGE OF ALLEGIANCE**

Chair Mosca (Encinitas) led the Pledge of Allegiance.

### **ROLL CALL**

PRESENT: Chair Mosca (Encinitas), Vice Chair Padilla (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Alternate Director LaCava

(San Diego)

ABSENT: Director Montgomery Steppe (San Diego)

Also Present: Interim Chief Executive Officer ("CEO") Carnahan, Chief Operating Officer

("COO") Hooven, General Counsel Baron, Interim Board Clerk Wiegelman

# ITEMS TO BE ADDED, WITHDRAWN, OR REORDERED ON THE AGENDA

There were no additions or deletions to the agenda.

# **PUBLIC COMMENTS**

There were no comments.

### **CONSENT CALENDAR**

(Items 1 through 2)

1. Approval of the minutes of the Regular and Special Meetings of the Board of Directors of San Diego Community Power held on February 25, 2021

Approved.

2. Treasurer's Report – Presentation of Financial Results for 2020/21 Period ended 1/31/21

Received and filed.

<u>ACTION</u>: Motioned by Director Baber (La Mesa) and seconded by Director Dedina (Imperial Beach) to approve Consent Calendar Items 1 through 2. The motion carried by the following vote:

Vote: 5-0

Yes: Chair Mosca (Encinitas), Vice Chair Padilla (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Alternate Director LaCava

(San Diego)

No: None Abstained: None Absent: None

## **REGULAR AGENDA**

3. Operations and Administration Report from the Interim Chief Executive Officer

Interim CEO Carnahan provided an update on staff discussions with San Diego Gas and Electric (SDG&E), Net Energy Metering, the search for SDCP office space, the status of the various vendor requests for proposals ("RFP") and other solicitations, the implementation of the organization plan, the hiring and recruitment efforts, and.

COO Hooven provided an update on the billing system and the hiring and recruitment efforts and announced the following new hires:

- Lucas Utouh, Director of Data Analytics and Account Services
- Lee Friedman, Account Services Manager
- Nelson Lomeli, Program Manager

Power Services Director Vosburg provided an update on the purchase efforts for renewable energy, complying with the Resource Adequacy requirements, and the purchase of SDCP's market energy needs in accordance with its Energy Risk Management Policy.

Board questions and comments ensued.

Director of Regulatory and Legislative Affairs Fernandez and Ty Tosdal, Tosdal APC, provided a PowerPoint presentation on emergency reliability, SDG&E's elimination of seasonal rates, SDG&E's General Rate Case Phase II, Net Energy Metering 3.0, Disadvantaged Communities Green Tariff, Utility Cost and Affordability Report, and other energy regulatory affairs as they relate to the interests of SDCP.

Following Board questions and comments, no action was taken.

# 4. Committee Reports

Community Advisory Committee ("CAC") Vice Chair Hammond provided an update on the proceedings of the CAC.

Following Board questions and comments, no action was taken.

# 5. Market Update and Direction to Staff Regarding 2021 Rates

CEO Carnahan provided a PowerPoint presentation on the timeline for the approval of rates, the 2020-2021 market conditions, the pro forma financial model, and the rate-setting options.

Board questions and comments ensued.

ACTION: Motioned by Chair Mosca (Encinitas) and seconded by Alternate Director LaCava (San Diego) to: (1) receive the market update and direct staff to present revised 2021 rates to the SDCP Board of Directors for adoption on April 22, 2021 to be effective with SDCP's Phase 2 enrollment on June 1, 2021; and (2) direct staff to target generation rates that result in at least a 1% discount to corresponding service from SDG&E and a planned reserve margin contribution of at least 5%. The motion carried by the following vote:

Vote: 5-0

Yes:

Chair Mosca (Encinitas), Vice Chair Padilla (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Alternate Director LaCava

(San Diego)

No: None Abstained: None Absent: None

### 6. Approval of Support for Senate Bill 612

Director of Regulatory and Legislative Affairs Fernandez provided an overview of Senate Bill 612 and the purpose for supporting Senate Bill 612.

Board questions and comments ensued.

<u>ACTION</u>: Motioned by Vice Chair Padilla (Chula Vista) and seconded by Director Dedina (Imperial Beach) to adopt a support position for Senate Bill 612 (Portatino): the Ratepayer Equity Act. The motion carried by the following vote:

Vote: 5-0

Yes: Chair Mosca (Encinitas), Vice Chair Padilla (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Alternate Director LaCava

(San Diego)

No: None Abstained: None Absent: None

### **DIRECTOR COMMENTS**

There were no comments.

#### REPORTS BY MANAGEMENT AND GENERAL COUNSEL

There were no reports.

#### <u>ADJOURNMENT</u>

Chair Mosca (Encinitas) adjourned the meeting at 6:38 p.m.

Megan Wiegelman, CMC Interim Board Clerk

Prepared by:

Kimberly Isley, Executive Assistant



# SAN DIEGO COMMUNITY POWER (SDCP) BOARD OF DIRECTORS

San Diego City Administration Building, 12th Floor 202 "C" Street San Diego, CA 92101

#### **MINUTES**

April 22, 2021

This meeting was conducted utilizing teleconferencing and electronic means consistent with State of California Executive Order N-29-20 dated March 17, 2020, regarding the COVID-19 pandemic.

The Board minutes are prepared and ordered to correspond to the Board Agenda. Agenda Items can be taken out of order during the meeting.

The Agenda Items were considered in the order presented.

# **WELCOME**

# **CALL TO ORDER**

Chair Mosca (Encinitas) called the SDCP Board of Directors meeting to order at 5:01 p.m.

# **PLEDGE OF ALLEGIANCE**

Chair Mosca (Encinitas) led the Pledge of Allegiance.

### **ROLL CALL**

PRESENT: Chair Mosca (Encinitas), Alternate Director McCann (Chula Vista), Director

Baber (La Mesa), Director Dedina (Imperial Beach), and Director Montgomery

Steppe (San Diego)

ABSENT: Vice Chair Padilla (Chula Vista)

Also Present: Interim Chief Executive Officer ("CEO") Carnahan, Chief Operating Officer

("COO") Hooven, General Counsel Norvell, Executive Assistant Isley, and

La Mesa Deputy City Clerk Richards-Crawford

#### ITEMS TO BE ADDED, WITHDRAWN, OR REORDERED ON THE AGENDA

Item 1, approval of the minutes of the Regular Meeting of the Board of Directors of San Diego Community Power held on March 25, 2021, was withdrawn from the Agenda.

### **PUBLIC COMMENTS**

There were no comments.

# **CONSENT CALENDAR**

(Items 1 through 3)

1. Approval of the minutes of the Regular Meeting of the Board of Directors of San Diego Community Power held on March 25, 2021

Withdrawn.

2. Presentation of Financial Results for 2020/21 Period ended 2/28/21 by Michael Maher, CPA

Received and filed.

3. Announcement of appointment of SDCP Representative and Alternate to the La Mesa Environmental Sustainability Commission by Chief Operating Officer, Cody Hooven

Received and filed.

<u>ACTION</u>: Motioned by Director Baber (La Mesa) and seconded by Alternate Director McCann (San Diego) to approve Consent Calendar Items 2 through 3. The motion carried by the following vote:

Vote: 5-0

Yes: Chair Mosca (Encinitas), Alternate Director McCann (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Director Montgomery Steppe (San

Diego)

No: None Abstained: None Absent: None

#### **REGULAR AGENDA**

# 4. Operations and Administration Report from the Interim Chief Executive Officer

Interim CEO Carnahan provided an update on staff discussions with the County of San Diego regarding the County's interest in joining SDCP. Director Baber (La Mesa) volunteered to represent the Board of Directors with these continued discussions along with the SDCP Executive Team. Interim CEO Carnahan also reported on efforts to hire a facilitator and schedule a Board Strategic Planning Session.

Board questions and comments ensued.

Matthew Vasilakis, Climate Action Campaign, spoke on the prospect of the County of San Diego joining SDCP.

Interim CEO Carnahan provided an update on hiring and recruitment efforts and announced the following new hire:

Eric Washington, Chief Financial Officer

Following Board questions and comments, no action was taken.

### 5. Update on Regulatory and Legislative Affairs

Regulatory and Legislative Affairs Director Fernandez provided a PowerPoint presentation on the Power Charge Indifference Adjustment ("PCIA"), the proposed PCIA decision, SB 612: the Ratepayer Equity Act, summer power reliability, critical peak pricing, and Net Energy Metering ("NEM") including the California Public Utilities Commission ("CPUC") Proceeding and AB 1139: NEM.

Board questions and comments ensued.

Matthew Vasilakis, Climate Action Campaign, spoke regarding NEM, solar energy, and equitable access to solar energy.

Tara Hammond, Community Advisory Committee ("CAC"), spoke regarding NEM, solar energy, equitable access to solar energy, and AB 1139.

Following Board questions and comments, no action was taken.

#### 6. Committee Reports

CAC Chair Price provided an update on the proceedings of the CAC.

Interim CEO Carnahan provided an update on the proceedings of the Finance and Risk Management Committee.

Following Board questions and comments, no action was taken.

#### 7. Adopt Updated Rate Schedule to be Effective June 1, 2021

Data Analytics and Account Services Director Utouh provided a PowerPoint presentation on the timeline of rate related events, SDG&E's PCIA history, the analyses and financial model used to determine the updated rate schedule, and the updated rate schedule to become effective June 1, 2021.

Board questions and comments ensued.

<u>ACTION</u>: Motioned by Director Baber (La Mesa) and seconded by Director Montgomery Steppe (San Diego) to: adopt the updated rate schedule to be effective June 1, 2021. The motion carried by the following vote:

Vote: 5-0

Yes: Chair Mosca (Encinitas), Alternate Director McCann (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Director Montgomery Steppe (San

Diego)

No: None Abstained: None Absent: None

### 8. Adopt Phase 3 Customer Enrollment Schedule

Director of Power Services Vosburg provided a PowerPoint presentation on the purpose, background, and scenario analysis of the proposed phase-in schedule for Phase 3 customer enrollment.

Board questions and comments ensued.

<u>ACTION</u>: Motioned by Alternate Director McCann (Chula Vista) and seconded by Director Dedina (Imperial Beach) to adopt the following phase-in schedule for Phase 3 customer enrollment:

• February 2022: Imperial Beach

March 2022: La MesaApril 2022: Encinitas

May 2022: Chula Vista and San Diego

The motion carried by the following vote:

Vote: 5-0

Yes: Chair Mosca (Encinitas), Alternate Director McCann (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Director Montgomery Steppe (San

Diego)

No: None Abstained: None Absent: None

### 9. Adopt a Renewable Power Purchase Agreement with Vikings Energy Farm, LLC

Director of Power Services Vosburg provided a PowerPoint presentation on the long-term California Renewables Portfolio Standard ("RPS") requirements, the long-term RPS Renewable Energy Request for Offers timeline, the Renewable Power Purchase Agreement ("PPA") negotiations, and the PPA with Vikings Energy Farm, LLC.

Board questions and comments ensued.

Micah Mitrosky, IBEW Local 569, spoke in support of the Renewable PPA with Vikings Energy Farm, LLC.

Mohammed Alrai, RAI Energy International, thanked the SDCP Board of Directors and staff for considering RAI Energy International's Vikings Energy Farm project.

<u>ACTION</u>: Motioned by Alternate Director McCann (Chula Vista) and seconded by Director Baber (La Mesa) to adopt the Long-term Renewable Power Purchase Agreement with Vikings Energy Farm, LLC. The motion carried by the following vote:

<u>Vote</u>: 5-0

Yes: Chair Mosca (Encinitas), Alternate Director McCann (Chula Vista), Director Baber

(La Mesa), Director Dedina (Imperial Beach), and Director Montgomery Steppe (San

Diego)

No: None Abstained: None Absent: None

# **DIRECTOR COMMENTS**

There were no comments.

# REPORTS BY MANAGEMENT AND GENERAL COUNSEL

There were no reports.

#### <u>ADJOURNMENT</u>

Chair Mosca (Encinitas) adjourned the meeting at 7:36 p.m.

Megan Wiegelman, CMC Interim Board Clerk

Prepared by:

Kimberly Isley, Executive Assistant



# SAN DIEGO COMMUNITY POWER Staff Report – Item 2

To: San Diego Community Power Board of Directors

From: Eric W. Washington, Chief Financial Officer

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Amendment to Professional Services Agreement with Maher Accountancy

for Accounting Services

Date: May 27, 2021

#### RECOMMENDATION

Approve first amendment to Professional Services Agreement with Maher Accountancy to increase the not-to-exceed amount by \$37,500 to \$241,000 through June 30, 2022 and authorize the Interim Chief Executive Officer to execute the amendment.

#### **BACKGROUND**

According to the Professional Services Agreement dated August 1, 2020, San Diego Community Power (SDCP) enlisted the services of Maher Accountancy to provide monthly accounting services for a nine-month period. The first amend extends the term for an additional fourteen months to June 30, 2022. The First Amendment to Professional Services Agreement is presented in Attachment A.

#### **ANALYSIS AND DISCUSSION**

SDCP's initial agreement with Maher Accountancy in August 2020 was approved with a not-to-exceed limit of \$112,000. In addition to extending the term of the service agreement, the first amendment increases the not-to-exceed limit to \$241,000 and expands the scope of services to include monthly operational assistance and financial statement audit support. The detailed scope of services is presented in Attachment A.

#### **FISCAL IMPACT**

The cost of this action is included in the FY22 proposed budget pending review and final approval by the Board.

#### **ATTACHMENTS**

Attachment A: First Amendment to Professional Services Agreement with Maher Accountancy

# FIRST AMENDMENT TO PROFESSIONAL SERVICES AGREEMENT BETWEEN SAN DIEGO COMMUNITY POWER AND MAHER ACCOUNTANCY

THIS FIRST AMENDMENT (this "Amendment") is entered into as of this May \_\_\_\_\_, 2021 by and between SAN DIEGO COMMUNITY POWER, a California joint powers agency ("SDCP") and MAHER ACCOUNTANCY, a California corporation ("Consultant"). SDCP and Consultant are sometimes individually referred to herein as the "Party" and collectively as the "Parties."

#### RECITALS

WHEREAS, the Parties entered into that certain Professional Services Agreement between San Diego Community Power and Maher Accountancy, dated August 1, 2020 (the "Agreement"); and

WHEREAS, pursuant to the Agreement, Consultant provides accounting services to SDCP; and

WHEREAS, the parties desire to amend the Agreement to extend the term and establish the maximum compensation amount payable to Consultant for its services from May 1, 2021 to June 30, 2022.

NOW, THEREFORE, it is agreed by and between the parties as follows:

- 1. <u>Recitals</u>. The Recitals set forth above are true and correct and are incorporated into the body of this Amendment as though expressly set forth herein.
- 2. <u>Amendment of Section 1.2.</u> Section 1.2 of the Agreement is amended to extend the term of the Agreement to June 30, 2022.
- 3. <u>Amendment of Section 3.1.</u> Section 3.1 of the Agreement is amended to establish the not-to-exceed amount payable by SDCP to Consultant for Consultant's services to \$241,000 for the period covering May 1, 2021 to June 30, 2022.
- 4. <u>Scope of Work and Compensation for Services from May 1, 2020 to June 30, 2022.</u> The Agreement is amended to add Exhibits A-1 (Scope of Services) and C-1 (Payment for Services Rendered), attached hereto and incorporated herein, to apply to Consultant's services for the period covering May 1, 2021 to June 30, 2022.
- 5. <u>Effect of Amendment</u>. Except as expressly set forth in this Amendment, all other sections, provisions, exhibits and commitments of the Agreement remain unchanged and in full force and effect.
- 6. <u>Counterparts</u>. This Amendment may be executed in one or more counterparts, including facsimile counterparts, each of which shall, for all purposes, be deemed an original and all such counterparts, taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this First Amendment to the Professional Services Agreement between San Diego Community Power and Maher Accountancy as of the date first set forth above.

SAN DIEGO COMMUNITY POWER	MAHER ACCOUNTANCY	
N. Dill G. 1		
Name: Bill Carnahan	Name: Michael Maher	
Title: Interim Chief Executive Officer Date:	Title: Vice President and Secretary  Date:	
ATTEST:		
Secretary, SDCP Board of Directors	Name: John Maher	
Secretary, SDCP Board of Directors	Title: President	
	Date:	
APPROVED AS TO FORM:		
SDCP General Counsel		

#### **EXHIBIT A-1**

#### **SCOPE OF SERVICES**

### A. Monthly Financial Operational Assistance:

- 1. Maintain accounting system, accounts payable system and processes.
- 2. Maintain the general ledger with proper support and documentation, including:
  - a. Posting accrued revenue, cash receipts, accounts payable, cash disbursements, payroll, accrued expenses, aggregate customer billings, etc.
  - b. Prepare or maintain the following monthly analysis regarding general ledger account balances:
    - i. Reconciliation to statements from CCA's financial institution for cash activity and balances;
    - ii. Reconciliation of customer data manager reports of customer activity and accounts receivable aging to general ledger;
    - iii. Computation of estimated user fees earned but not billed as of the end of the reporting period;
    - iv. Schedule of depreciation of capital assets;
    - v. Aged schedule of accounts payable;
    - vi. Schedules of details regarding all remaining balance sheet accounts.
- 3. Manage accounts payable: Maher utilizes a cloud-based accounts payable document management system to provide for documentation of management review, proper segregation of duties, and access to source data. Maher ensures that required authorization is documented and that account coding is correct. CCA's staff then authorizes the release of payment, providing an additional safeguard.
- 4. Assist with compliance of fiscal provisions of non-energy vendor contracts for services. Before remitting vendor invoices for management approval, Maher verifies that each vendor invoice is compliant with contract provisions regarding time periods, rates, and financial limits.
- 5. Provide periodic and year-to-date financial statements in compliance with GAAP (without disclosures). The financial statements will be considered a compilation engagement in accordance with the Statements on Standards for Accounting and Review Services promulgated by the AICPA.
- 6. Provide monthly financial statements with comparison to budget.
  - a. Provide timely budget amendments and insight suggestions.
- 7. Filing annual information returns, such as form 1099/1096's.
- 8. Prepare and file various compliance reports for state and local agencies such as user taxes, energy surcharges and state controller reports including financial transaction and government compensation in California.
- 9. Assist in treasury function and assist staff with development of the operating budget.

#### **B.** Financial Statement Audit Support

- 1. Draft financial statements, notes, and MD&A letter
- 2. Prepare audit workpapers
- 3. Coordinate with CCA and auditor.

#### **EXHIBIT C-1**

#### PAYMENT FOR SERVICES RENDERED

# Maximum Limit & Fee Schedule

The total amount for services rendered not to exceed \$241,000.00. (NTE covers 14 months from May 1, 2021 to June 30, 2022.)

For monthly financial operations support, CCA will be billed with a fixed monthly fee of \$16,500.

For financial statement audit report, CCA will be billed a one-time fee of \$10,000 upon completion of the audit.

#### Reimbursable Expenses

Administrative, overhead, secretarial time or overtime, word processing, photocopying, in house printing, insurance and other ordinary business expenses are included within the scope of payment for services and are not reimbursable expenses. CCA user fees and payment issuance costs charged by cloud-based accounts payable services will be borne by CCA.



# SAN DIEGO COMMUNITY POWER Staff Report – Item 3

To: San Diego Community Power Board of Directors

From: Laura Fernandez, Director of Regulatory and Legislative Affairs

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Amendment to Professional Services Agreement with Tosdal APC for

Legal and Regulatory Services

Date: May 27, 2021

#### RECOMMENDATION

Approve Second Amendment to Professional Services Agreement with Tosdal APC to Increase the Not-To-Exceed Amount By \$80,000 For Services Through FY 21, Add a Not-To-Exceed Amount of \$240,000 for FY 22 and Authorize the Interim CEO to Execute The Agreement.

### **BACKGROUND**

In November 2019, Tosdal APC was approved by the Board of Directors to provide energy regulatory counsel and legal services with a not-to-exceed amount of \$200,000. Tosdal, APC has extensive experience in the energy and regulatory advocacy space, including with Community Choice Aggregation (CCA) programs in California. In October of 2020, the Board approved increasing the contract by \$100,000 for a total amount not to exceed \$300,000 through June 30, 2021.

#### **ANALYSIS AND DISCUSSION**

Staff recommends increasing Tosdal APC's contract by \$80,000 for services through June 30, 2021. The reasons for this increase include efforts by Tosdal APC above and beyond the efforts that were anticipated in October of 2020 due to the critical nature of CPUC regulatory decisions relative to SDCP's financial position, as well as increased scope of work to include the following:

- Increased effort related to the filing of an Appeal related to the System RA Citation
- Increased effort supporting development of SDCP programs, such as the Disadvantaged Community-Green Tariff/Community Solar-Green Tariff program
- Increased effort required by PCIA-related activities

Staff also recommends adding a not-to-exceed amount of \$240,000 for FY 22. The FY22 budget, which will be presented to the Board for approval at the June 2020 meeting, has \$240,000 set aside for energy regulatory services from Tosdal APC.

# **FISCAL IMPACT**

Cost of this action includes a total amount not to exceed \$320,000 through June 30, 2022. Funding is available in the proposed FY22 budget.

# **ATTACHMENTS**

Attachment A: Second Amendment to Engagement Letter between SDCP and Tosdal, APC.

# SECOND AMENDMENT TO ENGAGEMENT LETTER BETWEEN SAN DIEGO COMMUNITY POWER AND TOSDAL, APC

THIS SECOND AMENDMENT (this "Amendment") is entered into as of this \_\_\_\_\_ day of May, 2021, by and between SAN DIEGO COMMUNITY POWER, a California joint powers agency ("SDCP") and TOSDAL, APC, a professional corporation ("Tosdal APC"). SDCP and Tosdal APC are sometimes individually referred to herein as the "Party" and collectively as the "Parties."

#### **RECITALS**

WHEREAS, SDCP (then called the "San Diego Regional Community Choice Energy Authority") and Tosdal APC entered into that certain Engagement Letter dated November 18, 2019, and a First Amendment to Engagement Letter dated \_\_\_\_\_\_\_, 2020 (collectively, the "Agreement"); and

WHEREAS, pursuant to the Agreement, Tosdal APC provides advice and representation in connection with energy regulatory matters before the California Public Utilities Commission, California Energy Commission, and the California Independent System Operator, in addition to related issues facing community choice energy programs; and

WHEREAS, the Parties desire to amend the Agreement to adjust the maximum amount payable to Tosdal APC for its services during SDCP's current fiscal year, extend the term of the Agreement for the next fiscal year, and establish the maximum amount payable for the next fiscal year.

NOW, THEREFORE, it is agreed by and between the Parties as follows:

- 1. <u>Recitals</u>. The Recitals set forth above are true and correct and are incorporated into the body of this Amendment as though expressly set forth herein.
- 2. <u>Extension of Term.</u> The term of the Agreement is hereby extended until June 30, 2022.
- 3. <u>Not-To-Exceed Amount for Current Fiscal Year.</u> For the period of SDCP's 2020-2021 fiscal year (July 1, 2020 June 30, 2021), the not-to-exceed amount payable by SDCP to Tosdal APC under the Agreement shall be \$380,000.
- 4. <u>Not-To-Exceed Amount for Next Fiscal Year.</u> For the period of SDCP's 2021-2022 fiscal year (July 1, 2021 June 30, 2022), the not-to-exceed amount payable by SDCP to Tosdal APC under the Agreement shall be \$240,000.
- 5. <u>Effect of Amendment</u>. Except as expressly set forth in this Amendment, all other sections, provisions, exhibits and commitments of the Agreement remain unchanged and in full force and effect.

6. <u>Counterparts</u>. This Amendment may be executed in one or more counterparts, including facsimile counterparts, each of which shall, for all purposes, be deemed an original and all such counterparts, taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Second Amendment to the Engagement Letter between San Diego Community Power and Tosdal APC as of the date first set forth above.

SAN DIEGO COMMUNITY POWER	TOSDAL APC	
Name: Bill Carnahan Title: Interim Chief Executive Officer Date:	Name: Ty Tosdal Title: Partner Date:	
ATTEST:		
Secretary, SDCP Board of Directors		
APPROVED AS TO FORM:		
SDCP General Counsel		



# SAN DIEGO COMMUNITY POWER Staff Report – Item 4

To: San Diego Community Power Board of Directors

From: Laura Fernandez, Director of Regulatory and Legislative Affairs

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Amendment to Professional Services Agreement with NewGen Strategies

and Solutions, LLC for Regulatory Support and Rate-related Analysis

Date: May 27, 2021

### **RECOMMENDATION**

Approve Second Amendment to Professional Services Agreement with NewGen Strategies and Solutions, LLC to Increase the Not-To-Exceed Amount By \$260,000, Extend Agreement Term Through FY 22 and Authorize the Interim CEO to Execute the Amendment.

### **BACKGROUND**

In December 2020, SDCP approved a contract with NewGen Strategies and Solutions, LLC for services related to reviewing SDG&E's 2021 Energy Resource Recovery Account (ERRA) forecast proceeding, the 2021 Power Charge Indifference Adjustment (PCIA) proceeding and the 2020 forecasted year-end Portfolio Allocation Balancing Account (PABA). All of these proceedings impact the cost competitiveness of SDCP's service.

#### ANALYSIS AND DISCUSSION

Staff recommends increasing NewGen Strategies and Solutions, LLC contract by \$260,000 for services through June 30, 2022. The reasons for this increase include expanded scope of work to include the following:

- 2022 ERRA Forecast
- 2020 ERRA Compliance
- Supporting development of SDCP programs, such as the Disadvantaged Community-Green Tariff/Community Solar-Green Tariff program
- Additional regulatory and analytical support as requested by SDCP

#### **FISCAL IMPACT**

Cost of this action includes a total amount not to exceed \$260,000 through June 30, 2022. Funding is available in the proposed FY22 budget.

# **ATTACHMENTS**

Attachment A: Second Amendment to Professional Services Agreement Between San Diego Community Power and NewGen Strategies and Solutions, LLC

# SECOND AMENDMENT TO PROFESSIONAL SERVICES AGREEMENT BETWEEN SAN DIEGO COMMUNITY POWER AND NEWGEN STRATEGIES AND SOLUTIONS, LLC

THIS SECOND AMENDMENT ("Second Amendment") is entered into as of this May 2021 by and between SAN DIEGO COMMUNITY POWER, a California joint powers authority ("SDCP") and NEWGEN STRATEGIES AND SOLUTIONS, LLC, a Colorado limited liability company ("Consultant"). SDCP and Consultant are sometimes individually referred to herein as the "Party" and collectively as the "Parties."

### **RECITALS**

- A. The Parties entered into that certain *Professional Services Agreement*, dated July 16, 2020 and a *First Amendment to Professional Services Agreement*, dated December 23, 2020 (collectively, the "**Agreement**").
- B. Pursuant to the Agreement, Consultant provides certain Services that include community choice aggregation regulatory filing review and analysis services to SDCP for certain California Public Utilities Commission proceedings.
- C. The Parties desire to amend the Agreement for Consultant to provide additional regulatory Services for 2021 and receive compensation for the additional services.

# **AGREEMENT**

NOW, THEREFORE, it is agreed by and between the parties as follows:

- 1. <u>Amendment of Section 1.1</u>. Consultant will provide additional Services related to SDG&E's 2021 ERRA applications as described in <u>Attachment A</u>, attached hereto. Furthermore, Consultant will provide regulatory and analytical support to SDCP in other matters as requested by SDCP and upon mutual agreement by SDCP and Consultant.
- 2. <u>Amendment of Section 1.2</u>. Section 1.2 of the Agreement is amended to extend the term of the Agreement to June 30, 2022.
- 3. <u>Additional Compensation</u>. Consultant shall be entitled to compensation for the additional Services as set forth in Attachment A and Paragraph 1 of this Second Amendment in an amount not-to-exceed \$260,000.
- 4. <u>Amendment of Section 2.4</u>. Section 2.4 of the Agreement is amended to update the key personnel for performance of Services. The key personnel listed in the Agreement are amended to include the following:

Brian Dickman, Executive Consultant Dave Webb, Executive Consultant Natalie Accardo, Senior Consultant

- 4. <u>Effect of Amendment</u>. Except as expressly set forth in this Second Amendment, the Agreement shall remain unmodified and in full force and effect.
- 5. <u>Capitalized Terms</u>. Any capitalized terms not defined herein shall have the meanings set forth in the Agreement.
- 6. <u>Counterparts</u>. This Amendment may be executed in one or more counterparts, including facsimile counterparts, each of which shall, for all purposes, be deemed an original and all such counterparts, taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this Second Amendment as of the date first set forth above.

# SAN DIEGO COMMUNITY POWER, a California joint powers authority

# NEWGEN STRATEGIES AND SOLUTIONS, LLC

Name: Bill Carnahan	Name: Tony Georgis
Title: Interim Chief Executive Officer	Title: Managing Director
Date:	Date:
ATTEST:	
ATTEST.	
G GDGDD 1 CD	
Secretary, SDCP Board of Directors	
APPROVED AS TO FORM:	
SDCP General Counsel	



# SAN DIEGO COMMUNITY POWER Staff Report – Item 5

To: San Diego Community Power Board of Directors

From: Laura Fernandez, Director of Regulatory and Legislative Affairs

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Amendment to Professional Services Agreement with Keyes & Fox LLP

for Legal and Regulatory Services

Date: May 27, 2021

#### RECOMMENDATION

Approve Third Amendment to Professional Services Agreement with Keyes & Fox LLP to Increase the Not-To-Exceed Amount by \$37,500 and Authorize the Interim CEO To Execute the Amendment.

#### **BACKGROUND**

Keyes & Fox LLP has extensive experience supporting community choice aggregators in Energy Resource Recovery Account (ERRA) forecast proceedings. On July 28, 2020, SDCP executed a Professional Services Agreement with Keyes & Fox LLP with a not-to-exceed amount of \$50,000. On November 12, 2020, SDCP approved a Joint Representation Agreement by and between SDCP, Clean Energy Alliance (CEA) and Keyes & Fox LLP for legal and regulatory advocacy services related to SDG&E's 2021 ERRA forecast proceeding. This Joint Representation Agreement was revised on January 20, 2021, but the not-to-exceed amount did not change. The Joint Representation Agreement was revised again on February 9, 2021 to include legal representation of SDCP and CEA for SDG&E's 2022 ERRA Forecast proceeding, with a revised not-to-exceed amount of \$112,500.

#### **ANALYSIS AND DISCUSSION**

Staff recommends increasing the not-to-exceed amount of the Joint Representation Agreement to \$150,000 for SDCP. This amendment also adds three additional matters to the scope of the legal services:

- 1) SDG&E's 2020 ERRA Compliance Proceeding (not yet docketed);
- 2) Proceeding No. A. 21-05-006, the Expedited Application of SDG&E Under the ERRA Trigger Mechanism; and
- 3) SDG&E's upcoming sales forecast proceeding (not yet docketed).

These proceedings impact the cost competitiveness of SDCP's service.

# **FISCAL IMPACT**

Cost of this action includes a total amount not to exceed \$150,000 through June 30, 2022. Funding is available in the proposed FY22 budget.

# **ATTACHMENTS**

Attachment A: Third Amendment to Joint Representation Agreement Between Keyes & Fox LLP, San Diego Community Power and Clean Energy Alliance Re Application 20-04-014

# THIRD AMENDMENT TO JOINT REPRESENTATION AGREEMENT BETWEEN KEYES & FOX LLP, SAN DIEGO COMMUNITY POWER AND CLEAN ENERGY ALLIANCE RE APPLICATION 20-04-014

This Third Amendment applies to that specific "Joint Representation Agreement Between Keyes & Fox LLP, San Diego Community Power and Clean Energy Alliance re Application 20-04-014, which was initially executed on November 12, 2020. ("JRA"), and then revised on January 20, 2021 and February 9, 2021 to provide legal representation to San Diego Community Power ("SDCP") and Clean Energy Alliance ("CEA") before the California Public Utilities Commission ("Commission") in Application 20-04-014.

This Amendment is made to change to the not-to-exceed amount in Section 3.c. of that JRA to \$150,000 for SDCP and \$150,000 for CEA. This amendment also adds three additional matters to the scope of the Legal Services: 1) SDG&E's 2020 ERRA Compliance Proceeding (not yet docketed); 2) Proceeding No. A.21-05-006, the Expedited Application of San Diego Gas & Electric Company (U 902 E) Under the Energy Resource Recovery Account Trigger Mechanism; and 3) SDG&E's upcoming sales forecast proceeding (not yet docketed).

By:	By:
Tim Lindl Partner	Bill Carnahan Interim Chief Executive Officer
Keyes & Fox LLP	San Diego Community Power
Date: May 20, 2021	Date:
By:	
Barbara Boswell	
Interim Chief Executive Officer	
Clean Energy Alliance	
Date:	



# SAN DIEGO COMMUNITY POWER Staff Report – Item 6

To: San Diego Community Power Board of Directors

From: Bill Carnahan, Interim Chief Executive Officer

Subject: Approval of Amendment to Engagement Letter with Best Best & Krieger in

the amount of \$300,000 for services through FY 22

Date: May 27, 2021

#### RECOMMENDATION

Approve amendment to engagement letter with Best Best & Krieger for \$300,000 through June 30, 2022 and authorize the Interim Chief Executive Officer to execute the contract.

#### **BACKGROUND**

In November 2019, Best Best & Krieger (BB&K) was approved by the Board of Directors to provide General Counsel legal services for a not-to-exceed amount of \$120,000. BB&K has extensive experience with municipal/public agencies as well as Community Choice Aggregation agencies in California.

Then in August 2020, the Board of Directors approved BB&K's engagement letter to be amended through the end of Fiscal Year 2021 in the amount of \$120,000 for general counsel services and an additional \$120,000 for legal review of power supply and other vendor contracts.

#### **ANALYSIS AND DISCUSSION**

The FY22 budget, which will be presented to the Board for approval at the June 2020 meeting, has the \$300,000 set aside for both general counsel and legal review of contracts services. BB&K has been an integral part of the early success of San Diego Community Power and is intimately familiar with the workings of the organization. Staff therefore recommends amending their professional services agreement to retain them for the next fiscal year.

# **FISCAL IMPACT**

Cost of this action includes a total amount not to exceed \$300,000 until June 30, 2022. Funding is available in the proposed FY22 budget.

#### **ATTACHMENTS**

Attachment A: Amended Professional Services Agreement with Best Best & Krieger.

Indian Wells (760) 568-2611 Irvine (949) 263-2600 Los Angeles

Los Angeles (213) 617-8100 Manhattan Beach

(310) 643-8448 Ontario (909) 989-8584 BEST BEST & KRIEGER BATTORNEYS AT LAW

18101 Von Karman Avenue, Suite 1000, Irvine, CA 92612 Phone: (949) 263-2600 | Fax: (949) 260-0972 | www.bbklaw.com Riverside (951) 686-1450 Sacramento (916) 325-4000 San Diego (619) 525-1300 Walnut Creek (925) 977-3300 Washington, DC (202) 785-0600

**Ryan M. F. Baron** (949) 263-6568 ryan.baron@bbklaw.com File No. 55682.00001

May 21, 2021

Bill Carnahan Interim Chief Executive Officer San Diego Community Power

Re: General Counsel Services for San Diego Community Power

Dear Mr. Carnahan:

# ABOUT OUR REPRESENTATION

Best Best & Krieger LLP is pleased to enter into this Amended Engagement Letter dated May 27, 2021 with San Diego Community Power ("SDCP," formerly known as San Diego Regional Community Choice Energy Authority). Specifically, we are pleased to continue providing General Counsel legal services to SDCP, including:

- Prepare any required legal filings with County or state agencies that may be required by law
- Attendance at the regular Board of Directors ("Board") meetings and any special meetings and workshops as required by the Chief Executive Officer or Chair of the Board
- Brown Act, Conflict of Interest and Public Records Act advice and representation
- Preparation and/or review of consultant and vendor contracts
- Advice and preparation of documents related to personnel matters
- Advice to the Chief Executive Officer and designated staff on administrative and operational matters
- Research and advice on operational/pubic agency legal questions asked by the Board, Chief Executive Officer and designated staff



Bill Carnahan May 21, 2021 Page 2

• Advice and assistance on other legal matters as may be assigned by the Chief Executive Officer

Legal services may also include specialized legal services requested by SDCP, including but not limited to power procurement. This letter constitutes our updated agreement setting the terms of our representation. For the period of July 1, 2021, through June 30, 2022, the total not-to-exceed amount under this Agreement is \$300,000.

# CONFIDENTIALITY AND ABSENCE OF CONFLICTS

An attorney-client relationship requires mutual trust between the client and the attorney. It is understood that communications exclusively between counsel and the client are confidential and protected by the attorney-client privilege.

To also assure mutuality of trust, we have maintained a conflict of interest index. The California Rules of Professional Conduct defines whether a past or present relationship with any party prevents us from representing SDCP. Similarly, SDCP's name will be included in our list of clients to ensure we comply with the Rules of Professional Conduct with respect to your firm.

We have checked the following names against our client index: the San Diego Regional Community Choice Energy Authority, including its member agencies, the Cities of San Diego, Chula Vista, La Mesa, Encinitas, and Imperial Beach. Under this agreement, an attorney-client relationship is only established with SDCP and not any of its member agencies. Based on that check, we can represent SDCP. Please review the list to see if any other persons or entities should be included. If you do not tell us to the contrary, we will assume that this list is complete and accurate. We request that you update this list for us if there are any changes in the future.

#### YOUR OBLIGATIONS ABOUT FEES AND BILLINGS

For general legal services, the current rate is \$330 per hour for Partners and Of Counsel, \$279 per hour for Associates, and \$168 per hour for Paralegals. General legal services will include the General Counsel scope of work discussed above as well as attendance at meetings, agenda and document review, routine contracts, government ethics and open meetings laws, and entity incorporation.

Should SDCP desire additional specialized services, the current rate is \$401 per hour for Partners and Of Counsel, \$320 per hour for Associates, and \$178 per hour for Paralegals. Special legal services includes complex matters such as regulatory advice and advocacy, power procurement, litigation, CEQA document review, public finance, and other complex matters.



Bill Carnahan May 21, 2021 Page 3

Please note that rates for Howard Golub are \$605 per hour due to his unique background and experience.

Other billing rates are described in the memorandum attached to this letter which is entitled "Best Best & Krieger LLP's Billing Policies." It also describes the other aspects of our firm's billing policies. You should consider the Billing Policies memorandum part of this agreement as it binds both of us. For that reason, you should read it carefully.

# **INSURANCE**

We are also pleased to let you know that Best & Krieger LLP carries errors and omissions insurance with Lloyd's of London. After a standard deductible, this insurance provides coverage beyond what is required by the State of California.

# HOW THIS AGREEMENT MAY BE TERMINATED

You, of course, have the right to end our services at any time. If you do so, you will be responsible for the payment of fees and costs accrued but not yet paid, plus reasonable fees and costs in transferring the case to you or your new counsel. By the same token, we reserve the right to terminate our services to you upon written notice, order of the court, or in accordance with our attached Billing Policies memorandum. This could happen if you fail to pay our fees and costs as agreed, fail to cooperate with us in this matter, or if we determine we cannot continue to represent you for ethical or practical concerns.

#### **CLIENT FILE**

If you do not request the return of your file, we will retain your file for five years. After five years, we may have your file destroyed. If you would like your file maintained for more than five years or returned, you must make separate arrangements with us.

#### THANK YOU

On a personal note, we are pleased to continue to represent SDCP. If you have any questions at any time about our services or billings, please do not hesitate to call me.



Bill Carnahan May 21, 2021 Page 4

If this letter meets with your approval, please sign and date it, and return the original to us. We have enclosed a separate signed copy of this letter for your records.

Sincerely,

Ryan M. F. Baron of BEST BEST & KRIEGER LLP

AGREEI	O AND ACCEPTED:	
By:		
Dated:		

## BEST BEST & KRIEGER LLP'S BILLING POLICIES

Our century of experience has shown that the attorney-client relationship works best when there is mutual understanding about fees, expenses, billing and payment terms. Therefore, this statement is intended to explain our billing policies and procedures. Clients are encouraged to discuss with us any questions they have about these policies and procedures. Clients may direct specific questions about a bill to the attorney with whom the client works or to our Accounts Receivable Department. Any specific billing arrangements different from those set forth below will be confirmed in a separate written agreement between the client and the firm.

# Fees for Professional Services

Unless a flat fee is set forth in our engagement letter with a client, our fees for the legal work we will undertake will be based in substantial part on time spent by personnel in our office on that client's behalf. In special circumstances which will be discussed with the client and agreed upon in writing, fees will be based upon the novelty or difficulty of the matter, or the time or other special limitations imposed by the client.

Hourly rates are set to reflect the skill and experience of the attorney or other legal personnel rendering services on the client's behalf. Time is accrued on an incremental basis for such matters as telephone calls (minimum .3 hour) and letters (minimum .5 hour), and on an actual basis for all other work. Our attorneys are currently billed at rates from \$255 to \$750 per hour, and our administrative assistants, law clerks, litigation analysts, research analysts, and paralegals are billed at rates from \$70 to \$290 per hour. These hourly rates are reviewed annually to accommodate rising firm costs and to reflect changes in attorney status as lawyers attain new levels of legal experience. Any increases resulting from such reviews will be instituted automatically and will apply to each affected client, after advance notice.

Non-Attorney Personnel: BBK may employ the services of non-attorney personnel under the supervision of a BBK attorney in order to perform services called for in the legal services agreement. The most common non-attorney personnel utilized are paralegals. Other types of non-attorney personnel include, but are not limited to, case clerks, IT analysts, and specialty consultants. The client agrees that BBK may use such non-attorney personnel to perform its services when it is reasonably necessary in the judgment of the responsible BBK

attorney. Hourly fees for non-attorney personnel will be charged at the rate then in effect for such personnel. A copy of BBK's current rates and titles for non-attorney personnel will be provided upon request. Except for paralegals, BBK will not incur more than \$575 in fees for a non-attorney's work on a client matter without first confirming by email or written correspondence with the client the intended use of the non-attorney and the hourly rate for that person.

# Fees For Other Services, Costs and Expenses

We attempt to serve all our clients with the most effective support systems available. Therefore, in addition to fees for professional legal services, we also charge separately for some other services and expenses to the extent of their use by individual clients. These charges include but are not limited to, mileage at the current IRS approved rate per mile, extraordinary telephone and document delivery charges, copying charges, computerized research, court filing fees and other court-related expenditures including court reporter and transcription fees. No separate charge is made for secretarial or word processing services; those costs are included within the above hourly rates.

ESI: BBK provides Electronically Stored Information (ESI") services for matters requiring ESI support — typically litigation or threatened litigation matters. BBK shall receive payment for ESI support, if needed, at BBK's then current rates. A copy of BBK's current rates for such services will be provided upon request. BBK shall not incur costs for ESI support on a particular matter without first confirming by email or written correspondence with the client that the client agrees such services are necessary for the matter at hand.

We may need to advance costs and incur expenses on your behalf on an ongoing basis. These items are separate and apart from attorneys' fees and, as they are out-of-pocket charges, we need to have sufficient funds on hand from you to pay them when due. We will advise the client from time to time when we expect items of significant cost to be incurred, and it is required that the client send us advances to cover those costs before they are due.

## Advance Deposit Toward Fees And Costs

Because new client matters involve both a substantial undertaking by our firm and the establishment of client credit with our accounting office, we require an advance payment from clients. The amount of this advance deposit is determined on a case-by-case basis discussed first with the client, and is specified in our engagement letter.

Upon receipt, the advance deposit will be deposited into the firm's client trust account. Our monthly billings will reflect such applications of the advance deposit to costs and not to attorney's fees (unless otherwise noted in our accompanying engagement letter). At the end of engagement, we will apply any remaining balance first to costs and then to fees. We also reserve the right to require increases or renewals of these advanced deposits.

By signing the initial engagement letter, each client is agreeing that trust account balances may be withdrawn and applied to costs as they are incurred and to our billings, when we issue our invoice to the client. If we succeed in resolving your matter before the amounts deposited are used, any balance will be promptly refunded.

# Monthly Invoices and Payment

Best Best & Krieger LLP provides our clients with monthly invoices for legal services performed and expenses incurred. Invoices are due and payable upon receipt.

Each monthly invoice reflects both professional and other fees for services rendered through the end of the prior month, as well as expenses incurred on the client's behalf that have been processed by the end of the prior month. Processing of some expenses is delayed until the next month and billed thereafter.

Our fees are not contingent upon any aspect of the matter and are due upon receipt. All billings are due and payable within the days of presentation unless the full amount is covered by the balance of an advance held in our trust account. If a bill is not paid within 30 days, a late charge of one percent per month on the unpaid invoice shall be added to the balance owed, commencing with the next statement and continuing until paid.

It is our policy to treat every question about a bill promptly and fairly. It is also our policy that if a client does not pay an invoice within 60 days of mailing, we assume the client is, for whatever reason, refusing to pay. We reserve the right to terminate our engagement and withdraw as attorney of record whenever our invoices are not paid. If an invoice is 60 days late, however, we may advise the client by letter that the client must pay the invoice within 14 days or the firm will take appropriate steps to withdraw as attorney of record. If the delay is caused by a problem in the invoice, we must rely upon the client to raise that with us during the 14-day period. This same policy applies to fee arrangements which require the client to replenish fee deposits or make deposits for anticipated costs.

From time to time clients have questions about the format of the bill or description of work performed. If you have any such questions, please ask them when you receive the bill so we may address them on a current basis.

# Changes in Fee Arrangements and Budgets

It may be necessary under certain circumstances for a client to increase the size of required advances for fees after the commencement of our engagement and depending upon the scope of the work. For example, prior to a protracted trial or hearing, the firm may require a further advance payment to the firm's trust account sufficient to cover expected fees. Any such changes in fee arrangements will be discussed with the client and mutually agreed in writing.

Because of the uncertainties involved, any estimates of anticipated fees that we provide at the request of a client for budgeting purposes, or otherwise, can only be an approximation of potential fees.

BEST BEST & KRIEGER LLP



# SAN DIEGO COMMUNITY POWER Staff Report – Item 7

To: San Diego Community Power Board of Directors

From: Lee Friedman, Key Accounts Manager

Nelson Lomeli, Program Manager

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Amendment to Professional Services Agreement with Civilian, Inc. for

Marketing and Communication Services

Date: May 27, 2021

#### RECOMMENDATION

Recommendation: Approve first amendment to professional services agreement with Civilian, Inc. in the amount of \$143,000 for marketing and communications services, and authorize the Interim CEO to execute the agreement.

# **BACKGROUND**

Through a competitive bid process, San Diego Community Power (SDCP) has enlisted Civilian, Inc to manage an array of marketing activities to drive awareness, spark community engagement, and minimize opt-outs as SDCP enrolls customers over the coming months. As SDCP begins its Phase 2 enrollment, SDCP will commence its marketing outreach which includes a paid media strategy developed and managed by Civilian.

#### **ANALYSIS AND DISCUSSION**

Staff and Civilian have achieved many milestones and tasks in the first year of marketing and communications efforts. Some tasks have required more effort than anticipated in the first year, with expected reduction in effort for year 2 of Civilian's contract, such as website hosting or creation of launch event materials. An increase in efforts or new efforts have come up that may have either not been contemplated in the original cost estimates or staff see need for additional support based on anticipated beneficial impacts, such as paid media or website functionality.

# Paid Media Services (\$60,000)

With a marketing strategy now in place, staff and Civilian are recommending an allocation of \$60,000 dollars for paid media services related to the Phase 2 enrollment of Commercial and Industrial customers. The marketing materials were developed to appeal to our commercial and industrial customers by focusing on the conceptual ideas of *Local* 

*Pride* and *Win-Win*, which, together, will promote SDCP services as good for business and the community.

To build SDCP's brand recognition, Civilian has recommended paid advertising be spent in traditional print media, social media, radio, paid search (Google) and Spanish language media. The Spanish media materials will be checked for cultural, and not just literal, accuracy.

Additionally, Civilian has recommended to allocate \$17,000 dollars of the paid media budget specifically for co-branded marketing with Key Accounts (up to 5 potential partners) who choose to opt-up to Power100. These co-branding arrangements would be mutually beneficial, as SDCP builds a recognizable identity through co-branding with trusted and valued local institutions, and our co-branding partners will be able to extol their commitments to clean and renewable energy.

Below is a summary flow chart of the medial channels, timing, and associated cost with the Phase 2 paid media campaign:

Civilian			S	DCF	P P	nase	2 C			rcia dia F			ndu	stri	al La	aur	ıch			SANI CO PO	MMUNITY WER
				MAY			June			July			August						Est.		
Media Channel	Language	26	3	10	17	24	31	7	14	21	28	5	12	19	26	2	9	16	Total Spend	СРМ	Impressions
San Diego Union Tribune:	English								Week	of 6/14					7/31				\$5.882	\$14.71	400,000
(Sponsored Content)								\$2,6	614			\$2,	614			\$6	654		\$5,552	• • • • • • • • • • • • • • • • • • • •	100,000
Voice & Viewpoint	English						6/3												\$2,414	\$96.56	25,000
(1/2 Page)								\$2,4	414												·
KPBS Public Radio (:15 Audio)	English						6/1								7/31				\$10,500	\$15.00	700,000
(. 15 Addio)								\$5,2	250			\$3,	500			\$1	,750				
San Diego Business Journal	English							6/7											\$2,647	\$120.32	22,000
(Full Page)								\$2,6	647												
Facebook / Instagram (Sponsored Posts)	English						Week of						504		7/31	•			\$3,556	\$8.24	366,869
(oponsoreu i osis)								\$1,	581			\$1,	581			\$3	395				
Paid Search (Google)	English						Week of		200			0.4	200		7/31	0/	147		\$2,853	\$44	55,396
(Google)								\$1,2	268			\$1,	268			\$3	317				
LinkedIn (Sponsored Posts)	English						Week of								7/31				\$3,500	\$17.42	170,746
(Sponsored Posts)								\$1,	556			\$1,	556			\$3	389				
El Latino	Spanish								6/18										\$3,353	\$83.82	40,000
(Full Page)	opus.							\$3,3	353										\$0,000	\$00.0Z	40,000
Univision	Spanish							6/7						7/25					\$8,294	\$19.42	427,000
Cinvision	opunisn							\$8,2	294										90,294	ψ1∂.4Z	427,000
LAN TOTAL																			\$43,000	\$28.40	1,513,869
O-BRANDED MEDIA SUPPO	ORT (5 PARTNERS)																		\$17,000		
OTAL PAID MEDIA																			\$60,000		

Concurrent with the marketing outreach, SDCP will also be looking at its opt-out/opt-up metrics and name recognition. Understanding the potential correlation with our marketing outreach and its impact on customer behavior will give SDCP insight into best practices as we design our Phase 3 residential marketing strategy.

# Additional Labor Costs (\$83,000)

Civilian's scope of services outlines the following six tasks:

- 1. Agency Branding, Design, Messaging and Identity
- 2. Web Design, Content Development, and Maintenance
- 3. Community Outreach and Stakeholder Engagement
- 4. Marketing and Advertising Campaign
- 5. Media Relations and Public Affairs
- 6. Project Management/Performance Metrics

With an average monthly rate of about \$47,000, Civilian will need an additional \$83,000 to finish out the assigned tasks. The increased costs are due to several factors. First, additional enhancements to the SDCP website, including several pages still in development, have pushed task #2 over budget. Secondly, the costs of the Municipal Launch Event were not in the original scope of the Civilian budget, and have impacted remaining balances for tasks #3 and #6. Finally, SDCP has staff assigned additional work and research to Civilian in advance of the Phase 2 enrollment to ensure a successful roll-out to our commercial and industrial customers.

# **FISCAL IMPACT**

Approval of this amendment will increase the Civilian, Inc. contract by \$143,000.

#### **ATTACHMENTS**

Attachment A: Amendment to Professional Services Agreement with Civilian, Inc.

# FIRST AMENDMENT TO PROFESSIONAL SERVICES AGREEMENT BETWEEN SAN DIEGO COMMUNITY POWER AND CIVILIAN, INC.

THIS FIRST AMENDMENT (this "Amendment") is entered into as of this May \_\_\_\_\_, 2021 by and between SAN DIEGO COMMUNITY POWER, a California joint powers agency ("SDCP") and CIVILIAN, INC., a California corporation, ("Consultant"). SDCP and Consultant are sometimes individually referred to herein as the "Party" and collectively as the "Parties."

#### **RECITALS**

WHEREAS, the Parties entered into that certain Professional Services Agreement between San Diego Community Power and Civilian, Inc., dated August 1, 2020 (the "Agreement") with a term from August 1, 2020 to June 30, 2022; and

WHEREAS, pursuant to the Agreement, Consultant provides marketing and communications services to SDCP; and

WHEREAS, the parties desire to amend the Agreement to increase the maximum compensation amount payable to Consultant for its services.

NOW, THEREFORE, it is agreed by and between the parties as follows:

- 1. <u>Recitals</u>. The Recitals set forth above are true and correct and are incorporated into the body of this Amendment as though expressly set forth herein.
- 2. <u>Amendment of Section 3.1.</u> Section 3.1 of the Agreement is amended to increase the not-to-exceed amount payable by SDCP to Consultant for Consultant's services by \$143,000 (for a total not-to-exceed amount of \$918,680 under the Agreement).
- 3. <u>Effect of Amendment</u>. Except as expressly set forth in this Amendment, all other sections, provisions, exhibits and commitments of the Agreement remain unchanged and in full force and effect.
- 4. <u>Counterparts</u>. This Amendment may be executed in one or more counterparts, including facsimile counterparts, each of which shall, for all purposes, be deemed an original and all such counterparts, taken together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties have executed this First Amendment to the Professional Services Agreement between San Diego Community Power and Civilian, Inc., as of the date first set forth above.

SAN DIEGO COMMUNITY POWER	CIVILIAN, INC.
Name: Bill Carnahan Title: Interim Chief Executive Officer	Name: Stacey Smith Title: Chief Executive Officer
Date:	Date:
ATTEST:	
Secretary, SDCP Board of Directors	
APPROVED AS TO FORM:	
SDCP General Counsel	



# SAN DIEGO COMMUNITY POWER Staff Report – Item 8

To: San Diego Community Power Board of Directors

From: Sebastian Sarria, Program and Policy Manager

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Amendment to Professional Services Agreement with Neyenesch Printers

in the amount of \$277,000 for services through FY22

Date: May 27, 2021

#### RECOMMENDATION

Approve amendment to professional services agreement with Neyenesch Printers for \$277,000 through June 30, 2022 and authorize the Interim Chief Executive Officer to execute the contract.

#### **BACKGROUND**

In November 2020, SDCP conducted an informal bidding process as outlined in our Purchasing Policy to seek a printing and mailing vendor for required customer mailers. After reviewing several proposals, staff recommended moving forward with Neyenesch Printers due to their long tenure as a local family-owned business in the community and demonstrated history of delivering quality printing and mailing services.

In December 2020, SDCP contracted with Neyenesch Printers to conduct printing and mailing services for the Phase 1 and 2 enrollment phases with an end date of June 30, 2021. Since then, Neyenesch has provided high-quality work and has been retained by Clean Energy Alliance for their own printing and mailing needs.

# **ANALYSIS AND DISCUSSION**

In FY22, SDCP will continue to have printing and mailing needs. Due to the familiarity and high-quality work provided by Neyenesch, as well as immediate printing needs of SDCP, staff recommends continuing to work with them for this upcoming fiscal year.

#### **FISCAL IMPACT**

Cost of this action includes a total amount not to exceed \$277,000 through June 30, 2022. Funding is available in the proposed FY22 budget.

#### **ATTACHMENTS**

Attachment A: Professional Services Agreement with Neyenesch Printers

# SAN DIEGO COMMUNITY POWER PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement ("Agreement") is made and entered into this 1st day of July, 2021, by and between SAN DIEGO COMMUNITY POWER, a California joint powers agency ("SDCP") and Neyenesch Printers a California corporation ("Consultant"). SDCP and Consultant are sometimes individually referred to as "Party" and collectively as "Parties."

# **RECITALS**

- A. Consultant desires to perform and assume responsibility for the provision of certain professional services required by SDCP on the terms and conditions set forth in this Agreement. Consultant represents that it is experienced in providing **mail and printing services**, is licensed in the State of California, and is familiar with the plans of SDCP.
- B. SDCP desires to engage Consultant to render such professional services for the **mail and printing services** ("**Project**") as set forth in this Agreement.

# **AGREEMENT**

# 1. Scope of Services and Term.

- 1.1 <u>General Scope of Services</u>. Consultant promises and agrees to furnish to SDCP all labor, materials, tools, equipment, services, and incidental and customary work necessary to fully and adequately supply the **mailing and printing** services necessary for the Project ("**Services**"). The Services are more particularly described in <u>Exhibit A</u> attached hereto, and which are stated in the proposal to SDCP. All Services shall be subject to, and performed in accordance with, this Agreement, the exhibits attached hereto, and all applicable local, state and federal laws, rules and regulations.
- 1.2 <u>Term.</u> The term of this Agreement shall be from **July 1, 2021** to **June 30, 2022**, unless earlier terminated as provided herein. Consultant shall complete the Services within the term of this Agreement and shall meet any other established schedules and deadlines.

# 2. Responsibilities of Consultant.

2.1 <u>Control and Payment of Subordinates; Independent Contractor</u>. The Services shall be performed by Consultant or under its supervision. Consultant will determine the means, methods and details of performing the Services subject to the requirements of this Agreement. SDCP retains Consultant on an independent contractor basis and not as an employee. Consultant retains the right to perform similar or different services for others during the term of this Agreement. Any additional personnel performing the Services under this Agreement on behalf of Consultant shall also not be employees of SDCP and shall at all times be under Consultant's exclusive direction and control. Consultant shall pay all wages, salaries, and other amounts due

such personnel in connection with their performance of Services under this Agreement and as required by law. Consultant shall be responsible for all reports and obligations respecting such additional personnel, including, but not limited to: social security taxes, income tax withholding, unemployment insurance, disability insurance, and workers' compensation insurance.

- 2.2 <u>Schedule of Services</u>. Consultant shall perform the Services expeditiously, within the term of this Agreement, and in accordance with the Schedule of Services set forth in <u>Exhibit B</u> attached hereto. Consultant represents that it has the professional and technical personnel required to perform the Services in conformance with such conditions. In order to facilitate Consultant's conformance with the Schedule, SDCP shall respond to Consultant's submittals in a timely manner. Upon request of SDCP, Consultant shall provide a more detailed schedule of anticipated performance to meet the Schedule of Services.
- 2.3 <u>Conformance to Applicable Requirements</u>. All work prepared by Consultant shall be subject to the approval of SDCP.
- 2.4 <u>Substitution of Key Personnel</u>. Consultant has represented to SDCP that certain key personnel will perform and coordinate the Services under this Agreement. Should one or more of such personnel become unavailable, Consultant may substitute other personnel of at least equal competence upon written approval of SDCP. In the event that SDCP and Consultant cannot agree as to the substitution of key personnel, SDCP shall be entitled to terminate this Agreement for cause. As discussed below, any personnel who fail or refuse to perform the Services in a manner acceptable to SDCP, or who are determined by the SDCP to be uncooperative, incompetent, a threat to the adequate or timely completion of the Project, or a threat to the safety of persons or property, shall be promptly removed from the Project by the Consultant at the request of the SDCP. The key personnel for performance of this Agreement are as follows:

# Kandy Neyenesch, CFO Chris Johnson, Sales Representative

- 2.5 <u>SDCP's Representative</u>. SDCP hereby designates **Bill Carnahan**, **Interim Chief Executive Officer**, or his or her designee, to act as its representative for the performance of this Agreement ("**SDCP's Representative**"). SDCP's Representative shall have the power to act on behalf of SDCP for all purposes under this Agreement. Consultant shall not accept direction or orders from any person other than SDCP's Representative, or designee.
- 2.6 <u>Consultant's Representative</u>. Consultant hereby designates **Chris Johnson**, or his or her designee, to act as its Representative for the performance of this Agreement ("**Consultant's Representative**"). Consultant's Representative shall have full authority to represent and act on behalf of the Consultant for all purposes under this Agreement. The Consultant's Representative shall supervise and direct the Services, using his or her best skill and attention, and shall be responsible for all means, methods, techniques, sequences and procedures and for the satisfactory coordination of all portions of the Services under this Agreement.
  - 2.7 <u>Coordination of Services</u>. Consultant agrees to work closely with SDCP staff in

the performance of Services and shall be available to SDCP's staff, consultants and other staff at all reasonable times.

- Standard of Care; Performance of Employees. Consultant shall perform all Services under this Agreement in a skillful and competent manner, consistent with the standards generally recognized as being employed by professionals in the same discipline in the State of California. Consultant represents and maintains that it is skilled in the professional calling necessary to perform the Services. Consultant warrants that all employees and sub- contractors shall have sufficient skill and experience to perform the Services assigned to them. Finally, Consultant represents that it, its employees and subcontractors have all licenses, permits, qualifications and approvals of whatever nature that are legally required to perform the Services, and that such licenses and approvals shall be maintained throughout the term of this Agreement. As provided for in the indemnification provisions of this Agreement, Consultant shall perform, at its own cost and expense and without reimbursement from SDCP, any services necessary to correct errors or omissions which are caused by the Consultant's failure to comply with the standard of care provided for herein. Any employee of the Consultant or its subcontractors who is determined by SDCP to be uncooperative, incompetent, a threat to the adequate or timely completion of the Project, a threat to the safety of persons or property, or any employee who fails or refuses to perform the Services in a manner acceptable to SDCP, shall be promptly removed from the Project by the Consultant and shall not be re-employed to perform any of the Services or to work on the Project.
- Laws and Regulations. Consultant shall keep itself fully informed of and in compliance with all local, state and federal laws, rules and regulations in any manner affecting the performance of the Project or the Services, including all Cal/OSHA requirements, and shall give all notices required by law. Consultant shall be liable for all violations of such laws and regulations in connection with Services. If the Consultant performs any work knowing it to be contrary to such laws, rules and regulations and without giving written notice to SDCP, Consultant shall be solely responsible for all costs arising therefrom. Consultant shall defend, indemnify and hold SDCP, its officials, directors, officers, employees and agents free and harmless, pursuant to the indemnification provisions of this Agreement, from any claim or liability arising out of any failure or alleged failure to comply with such laws, rules or regulations.

## 2.10 Insurance.

- 2.10.1 <u>Time for Compliance</u>. Consultant shall not commence the Services under this Agreement until it has provided evidence satisfactory to SDCP that it has secured all insurance required under this section, in a form and with insurance companies acceptable to SDCP. In addition, Consultant shall not allow any subcontractor to commence work on any subcontract until it has provided evidence satisfactory to SDCP that the subcontractor has secured all insurance required under this section.
- 2.10.2 <u>Minimum Requirements</u>. Consultant shall, at its expense, procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the

Agreement by the Consultant, its agents, representatives, employees or subcontractors. Consultant shall also require all of its subcontractors to procure and maintain the same insurance for the duration of the Agreement. Such insurance shall meet at least the following minimum levels of coverage:

- (A) <u>Minimum Scope of Insurance</u>. Coverage shall be at least as broad as the latest version of the following: (1) *General Liability*: Insurance Services Office Commercial General Liability coverage (occurrence form CG 0001 or exact equivalent); (2) *Automobile Liability*: Insurance Services Office Business Auto Coverage (form CA 0001, code 1 (any auto) or exact equivalent); and (3) *Workers' Compensation and Employer's Liability*: Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.
  - (B) <u>Minimum Limits of Insurance</u>. Consultant shall maintain limits no less than: (1) *General Liability:* \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with general aggregate limit is used, either the general aggregate limit shall apply separately to this Agreement/location or the general aggregate limit shall be twice the required occurrence limit; (2) *Automobile Liability:* \$1,000,000 per accident for bodily injury and property damage; and (3) *Workers' Compensation and Employer's Liability:* Workers' Compensation limits as required by the Labor Code of the State of California. Employer's Liability limits of \$1,000,000 per accident for bodily injury or disease.
- 2.10.3 <u>Insurance Endorsements</u>. The insurance policies shall contain the following provisions, or Consultant shall provide endorsements on forms supplied or approved by SDCP to add the following provisions to the insurance policies:

# (A) <u>General Liability</u>.

- (i) Commercial General Liability Insurance must include coverage for (1) Bodily Injury and Property Damage; (2) Personal Injury/Advertising Injury; (3) Premises/Operations Liability; (4) Aggregate Limits that Apply per Project; (5) Explosion, Collapse and Underground (UCX) exclusion deleted; (6) Contractual Liability with respect to this Agreement; (7) Broad Form Property Damage; and (8) Independent Consultants Coverage.
- (ii) The policy shall contain no endorsements or provisions limiting coverage for (1) contractual liability; (2) cross liability exclusion for claims or suits by one insured against another; or (3) contain any other exclusion contrary to the Agreement.
- (iii) The policy shall give SDCP, its directors, officials, officers, employees, and agents insured status using ISO endorsement forms 20 10 10 01 and 20 37 10 01, or endorsements providing the exact same coverage.
- (iv) The additional insured coverage under the policy shall be "primary and non-contributory" and will not seek contribution from SDCP's insurance or self-

insurance and shall be at least as broad as CG 20 01 04 13, or endorsements providing the exact same coverage.

(B) <u>Automobile Liability</u>. The automobile liability policy shall be endorsed to state that: (1) SDCP, its directors, officials, officers, employees, agents and volunteers shall be covered as additional insureds with respect to the ownership, operation, maintenance, use, loading or unloading of any auto owned, leased, hired or borrowed by the Consultant or for which the Consultant is responsible; and (2) the insurance coverage shall be primary insurance as respects SDCP, its directors, officials, officers, employees, agents and volunteers, or if excess, shall stand in an unbroken chain of coverage excess of the Consultant's scheduled underlying coverage. Any insurance or self-insurance maintained by SDCP, its directors, officials, officers, employees, agents and volunteers shall be excess of the Consultant's insurance and shall not be called upon to contribute with it in any way.

# (C) <u>Workers' Compensation and Employers Liability Coverage</u>.

- (i) Consultant certifies that it is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and Consultant will comply with such provisions before commencing work under this Agreement.
- (ii) The insurer shall agree to waive all rights of subrogation against SDCP, its directors, officials, officers, employees, agents and volunteers for losses paid under the terms of the insurance policy which arise from work performed by the Consultant.
- (D) All Coverages. Defense costs shall be payable in addition to the limits set forth hereunder. Requirements of specific coverage or limits contained in this section are not intended as a limitation on coverage, limits, or other requirement, or a waiver of any coverage normally provided by any insurance. It shall be a requirement under this Agreement that any available insurance proceeds broader than or in excess of the specified minimum insurance coverage requirements and/or limits set forth herein shall be available to SDCP, its directors, officials, officers, employees and agents as additional insureds under said policies. Furthermore, the requirements for coverage and limits shall be (1) the minimum coverage and limits specified in this Agreement; or (2) the broader coverage and maximum limits of coverage of any Insurance policy or proceeds available to the named insured; whichever is greater.
- (i) The limits of insurance required in this Agreement may be satisfied by a combination of primary and umbrella or excess insurance. Any umbrella or excess insurance shall contain or be endorsed to contain a provision that such coverage shall also apply on a primary and non-contributory basis for the benefit of SDCP (if agreed to in a written contract or agreement) before SDCP's own insurance or self-insurance shall be called upon to protect it as a named insured. The umbrella/excess policy shall be provided on a "following form" basis with coverage at least as broad as provided on the underlying policy(ies).
  - (ii) Consultant shall provide SDCP at least thirty (30) days

prior written notice of cancellation of any policy required by this Agreement, except that the Consultant shall provide at least ten (10) days prior written notice of cancellation of any such policy due to non-payment of premium. If any of the required coverage is cancelled or expires during the term of this Agreement, the Consultant shall deliver renewal certificate(s) including the General Liability Additional Insured Endorsement to SDCP at least ten (10) days prior to the effective date of cancellation or expiration.

- (iii) The retroactive date (if any) of each policy is to be no later than the effective date of this Agreement. Consultant shall maintain such coverage continuously for a period of at least three years after the completion of the work under this Agreement. Consultant shall purchase a one (1) year extended reporting period A) if the retroactive date is advanced past the effective date of this Agreement; B) if the policy is cancelled or not renewed; or C) if the policy is replaced by another claims-made policy with a retroactive date subsequent to the effective date of this Agreement.
- (iv) The foregoing requirements as to the types and limits of insurance coverage to be maintained by Consultant, and any approval of said insurance by SDCP, is not intended to and shall not in any manner limit or qualify the liabilities and obligations otherwise assumed by the Consultant pursuant to this Agreement, including but not limited to, the provisions concerning indemnification.
- (v) If at any time during the life of the Agreement, any policy of insurance required under this Agreement does not comply with these specifications or is canceled and not replaced, SDCP has the right but not the duty to obtain the insurance it deems necessary and any premium paid by SDCP will be promptly reimbursed by Consultant or SDCP will withhold amounts sufficient to pay premium from Consultant payments. In the alternative, SDCP may cancel this Agreement. SDCP may require the Consultant to provide complete copies of all insurance policies in effect for the duration of the Project.
- (vi) Neither SDCP nor any of its directors, officials, officers, employees or agents shall be personally responsible for any liability arising under or by virtue of this Agreement.
- 2.10.4 <u>Separation of Insureds; No Special Limitations</u>. All insurance required by this Section shall contain standard separation of insureds provisions. In addition, such insurance shall not contain any special limitations on the scope of protection afforded to SDCP, its directors, officials, officers, employees, agents and volunteers.
- 2.10.5 <u>Deductibles and Self-Insurance Retentions</u>. Any deductibles or self-insured retentions must be declared to and approved by SDCP. Consultant shall guarantee that, at the option of SDCP, either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects SDCP, its directors, officials, officers, employees, agents and volunteers; or (2) the Consultant shall procure a bond guaranteeing payment of losses and related investigation costs, claims and administrative and defense expenses.
  - 2.10.6 Acceptability of Insurers. Insurance is to be placed with insurers with a

current A.M. Best's rating of no less than A:VII, licensed to do business in California, and satisfactory to SDCP.

- 2.10.7 <u>Verification of Coverage</u>. Consultant shall furnish SDCP with original certificates of insurance and endorsements effecting coverage required by this Agreement on forms satisfactory to SDCP. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf and shall be on forms provided by SDCP if requested. All certificates and endorsements must be received and approved by SDCP before work commences. SDCP reserves the right to require complete, certified copies of all required insurance policies, at any time.
- 2.10.8 <u>Subcontractor Insurance Requirements</u>. Consultant shall not allow any subcontractors to commence work on any subcontract until they have provided evidence satisfactory to SDCP that they have secured all insurance required under this section. Policies of commercial general liability insurance provided by such subcontractors shall be endorsed to name SDCP as an additional insured using ISO form CG 20 38 04 13 or an endorsement providing the exact same coverage. If requested by Consultant, SDCP may approve different scopes or minimum limits of insurance for particular subcontractors.
- 2.10.9 <u>Safety</u>. Consultant shall execute and maintain its work so as to avoid injury or damage to any person or property. In carrying out its Services, the Consultant shall at all times be in compliance with all applicable local, state and federal laws, rules and regulations, and shall exercise all necessary precautions for the safety of employees appropriate to the nature of the work and the conditions under which the work is to be performed. Safety precautions as applicable shall include, but shall not be limited to: (A) adequate life protection and life-saving equipment and procedures; (B) instructions in accident prevention for all employees and subcontractors, such as safe walkways, scaffolds, fall protection ladders, bridges, gang planks, confined space procedures, trenching and shoring, equipment and other safety devices, equipment and wearing apparel as are necessary or lawfully required to prevent accidents or injuries; and (C) adequate facilities for the proper inspection and maintenance of all safety measures.

# 3. Fees and Payments.

- 3.1 <u>Compensation</u>. Consultant shall receive compensation, including authorized reimbursements, for all Services rendered under this Agreement at the rates set forth in <u>Exhibit C</u>, attached hereto. The total compensation shall not exceed \$100,000 without written approval of SDCP's **Interim Chief Executive Officer**. Extra Work may be authorized, as described below, and, if authorized, said Extra Work will be compensated at the rates and manner set forth in this Agreement.
- 3.2 <u>Payment of Compensation</u>. Consultant shall submit to SDCP a monthly itemized statement which indicates work completed and hours of Services rendered by Consultant. The statement shall describe the amount of Services and supplies provided since the initial commencement date, or since the start of the subsequent billing periods, as appropriate, through the date of the statement. SDCP shall, within 45 days of receiving such statement, review the

statement and pay all approved charges thereon.

- 3.3 <u>Reimbursement for Expenses</u>. Consultant shall not be reimbursed for any expenses unless authorized in writing by SDCP.
- 3.4 <u>Extra Work</u>. At any time during the term of this Agreement, SDCP may request that Consultant perform Extra Work. As used herein, "**Extra Work**" means any work which is determined by SDCP to be necessary for the proper completion of the Project, but which the Parties did not reasonably anticipate would be necessary at the execution of this Agreement. Consultant shall not perform, nor be compensated for, Extra Work without written authorization from SDCP's Representative.
- 4. **Accounting Records.** Consultant shall maintain complete and accurate records with respect to all costs and expenses incurred under this Agreement. All such records shall be clearly identifiable. Consultant shall allow a representative of SDCP during normal business hours to examine, audit, and make transcripts or copies of such records and any other documents created pursuant to this Agreement. Consultant shall allow inspection of all work, data, documents, proceedings, and activities related to the Agreement for a period of three (3) years from the date of final payment under this Agreement.

#### 5. General Provisions.

# 5.1 Termination of Agreement.

- 5.1.1 Grounds for Termination. SDCP may, by written notice to Consultant, terminate the whole or any part of this Agreement at any time and without cause by giving written notice to Consultant of such termination, and specifying the effective date thereof, at least seven (7) days before the effective date of such termination. Upon termination, Consultant shall be compensated only for those services which have been adequately rendered to SDCP, and Consultant shall be entitled to no further compensation. Consultant may not terminate this Agreement except for cause. For purposes of this Agreement the term "cause" shall mean the failure of payment of undisputed charges pursuant to the agreed schedule after written notice and fifteen (15) days opportunity for SDCP to cure, or the inability to work with an SDCP representative in the reasonable discretion of Consultant after three (3) written warnings have gone unheeded and SDCP fails to designate an alternate representative.
- 5.1.2 <u>Effect of Termination</u>. If this Agreement is terminated as provided herein, SDCP may require Consultant to provide all finished or unfinished Documents and Data and other information of any kind prepared by Consultant in connection with the performance of Services under this Agreement. Consultant shall be required to provide such documents and other information within fifteen (15) days of the request.
- 5.1.3 <u>Additional Services</u>. In the event this Agreement is terminated in whole or in part as provided herein, SDCP may procure, upon such terms and in such manner as it may determine appropriate, services similar to those terminated.

5.2 <u>Delivery of Notices</u>. All notices permitted or required under this Agreement shall be given to the respective Parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

**Consultant:** Neyenesch Printers, Inc.

Attn: Kandy Neyenesch, CFO

2750 Kettner Blvd. San Diego, CA 92101

**SDCP:** San Diego Community Power

Attn: Interim Chief Executive Officer

815 E Street, Suite 12716 San Diego, CA 92101

Such notice shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the Party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

# 5.3 Ownership of Materials and Confidentiality.

- 5.3.1 Documents & Data; Licensing of Intellectual Property. This Agreement creates a non-exclusive and perpetual license for SDCP to copy, use, modify, reuse, or sublicense any and all copyrights, designs, and other intellectual property embodied in plans, specifications, studies, drawings, estimates, and other documents or works of authorship fixed in any tangible medium of expression, including but not limited to, physical drawings or data magnetically or otherwise recorded on computer diskettes, which are prepared or caused to be prepared by Consultant under this Agreement ("Documents & Data"). Consultant shall require all subcontractors to agree in writing that SDCP is granted a non-exclusive and perpetual license for any Documents & Data the subcontractor prepares under this Agreement. Consultant represents and warrants that Consultant has the legal right to license any and all Documents & Data. Consultant makes no such representation and warranty in regard to Documents & Data which were prepared by design professionals other than Consultant or provided to Consultant by SDCP. SDCP shall not be limited in any way in its use of the Documents & Data at any time, provided that any such use not within the purposes intended by this Agreement shall be at SDCP's sole risk.
- 5.3.2 <u>Intellectual Property</u>. In addition, SDCP shall have and retain all right, title and interest (including copyright, patent, trade secret and other proprietary rights) in all plans, specifications, studies, drawings, estimates, materials, data, computer programs or software and source code, enhancements, documents, and any and all works of authorship fixed in any tangible medium or expression, including but not limited to, physical drawings or other data magnetically or otherwise recorded on computer media ("**Intellectual Property**") prepared or developed by or on behalf of Consultant under this Agreement as well as any other such Intellectual Property prepared or developed by or on behalf of Consultant under this Agreement.

SDCP shall have and retain all right, title and interest in Intellectual Property developed or modified under this Agreement whether or not paid for wholly or in part by SDCP, whether or not developed in conjunction with Consultant, and whether or not developed by Consultant. Consultant will execute separate written assignments of any and all rights to the above referenced Intellectual Property upon request of SDCP.

Consultant shall also be responsible to obtain in writing separate written assignments from any subcontractors or agents of Consultant of any and all right to the above referenced Intellectual Property. Should Consultant, either during or following termination of this Agreement, desire to use any of the above-referenced Intellectual Property, it shall first obtain the written approval of the SDCP.

All materials and documents which were developed or prepared by the Consultant for general use prior to the execution of this Agreement and which are not the copyright of any other party or publicly available and any other computer applications, shall continue to be the property of the Consultant. However, unless otherwise identified and stated prior to execution of this Agreement, Consultant represents and warrants that it has the right to grant the exclusive and perpetual license for all such Intellectual Property as provided herein.

SDCP further is granted by Consultant a non-exclusive and perpetual license to copy, use, modify or sub-license any and all Intellectual Property otherwise owned by Consultant which is the basis or foundation for any derivative, collective, insurrectional, or supplemental work created under this Agreement.

- 5.3.3 <u>Confidentiality</u>. All ideas, memoranda, specifications, plans, procedures, drawings, descriptions, computer program data, input record data, written information, and other Documents and Data either created by or provided to Consultant in connection with the performance of this Agreement shall be held confidential by Consultant. Such materials shall not, without the prior written consent of SDCP, be used by Consultant for any purposes other than the performance of the Services. Nor shall such materials be disclosed to any person or entity not connected with the performance of the Services or the Project. Nothing furnished to Consultant which is otherwise known to Consultant or is generally known, or has become known, to the related industry shall be deemed confidential. Consultant shall not use SDCP's name or insignia, photographs of the Project, or any publicity pertaining to the Services or the Project in any magazine, trade paper, newspaper, television or radio production or other similar medium without the prior written consent of SDCP.
- 5.3.4 <u>Infringement Indemnification</u>. Consultant shall defend, indemnify and hold SDCP, its directors, officials, officers, employees, volunteers and agents free and harmless, pursuant to the indemnification provisions of this Agreement, for any alleged infringement of any patent, copyright, trade secret, trade name, trademark, or any other proprietary right of any person or entity in consequence of the use on the Project by SDCP of the Documents & Data, including any method, process, product, or concept specified or depicted.
- 5.4 <u>Cooperation; Further Acts</u>. The Parties shall fully cooperate with one another and shall take any additional acts or sign any additional documents as may be necessary, appropriate

or convenient to attain the purposes of this Agreement.

5.5 <u>Attorney's Fees</u>. If either Party commences an action against the other Party, either legal, administrative or otherwise, arising out of or in connection with this Agreement, the prevailing party in such litigation shall be entitled to have and recover from the losing party reasonable attorney's fees and all other costs of such action.

# 5.6 Indemnification.

- 5.6.1 To the fullest extent permitted by law, Consultant shall defend (with counsel of SDCP's choosing), indemnify and hold SDCP, its officials, officers, employees, volunteers, and agents free and harmless from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury of any kind, in law or equity, to property or persons, including wrongful death, in any manner arising out of, pertaining to, or incident to any acts, errors or omissions, or willful misconduct of Consultant, its officials, officers, employees, subcontractors, consultants or agents in connection with the performance of the Consultants services under the Project or this Agreement, including without limitation the payment of all damages, expert witness fees and attorney's fees and other related costs and expenses. Consultant shall defend, at Consultant's own cost, expense and risk, any and all such aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against SDCP, its directors, officials, officers, employees, agents or volunteers. Consultant shall pay and satisfy any judgment, award or decree that may be rendered against SDCP or its directors, officials, officers, employees, agents or volunteers, in any such suit, action or other legal proceeding. Consultant shall reimburse SDCP and its directors, officials, officers, consultants, employees, agents and/or volunteers, for any and all legal expenses and costs, including reasonable attorneys' fees, incurred by each of them in connection therewith or in enforcing the indemnity herein provided. Consultant's' obligation to indemnify shall not be restricted to insurance proceeds, if any, received by Consultant or SDCP, its officials, officers, employees, agents, or volunteers. This section shall survive any expiration or termination of this Agreement.
- 5.7 <u>Entire Agreement</u>. This Agreement contains the entire Agreement of the Parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements. This Agreement may only be modified by a writing signed by both Parties.
- 5.8 <u>Governing Law</u>. This Agreement shall be governed by the laws of the State of California. Venue shall be in San Diego County.
- 5.9 <u>Time of Essence</u>. Time is of the essence for each and every provision of this Agreement.
- 5.10 <u>SDCP's Right to Employ Other Consultants</u>. SDCP reserves right to employ other consultants in connection with this Project.
- 5.11 <u>Successors and Assigns</u>. This Agreement shall be binding on the successors and assigns of the Parties.

- 5.12 <u>Assignment or Transfer</u>. Consultant shall not assign, hypothecate, or transfer, either directly or by operation of law, this Agreement or any interest herein without the prior written consent of SDCP. Any attempt to do so shall be null and void, and any assignees, hypothecates or transferees shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer.
- 5.13 <u>Construction; References; Captions.</u> Since the Parties or their agents have participated fully in the preparation of this Agreement, the language of this Agreement shall be construed simply, according to its fair meaning, and not strictly for or against any Party. Any term referencing time, days or period for performance shall be deemed calendar days and not work days. All references to Consultant include all personnel, employees, agents, and subcontractors of Consultant, except as otherwise specified in this Agreement. All references to SDCP include its elected officials, officers, employees, agents, and volunteers except as otherwise specified in this Agreement. The captions of the various articles and paragraphs are for convenience and ease of reference only, and do not define, limit, augment, or describe the scope, content, or intent of this Agreement.
- 5.14 <u>Amendment; Modification</u>. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing and signed by both Parties.
- 5.15 <u>Waiver</u>. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a Party shall give the other Party any contractual rights by custom, estoppel, or otherwise.
- 5.16 <u>No Third Party Beneficiaries</u>. There are no intended third party beneficiaries of any right or obligation assumed by the Parties.
- 5.17 <u>Invalidity</u>; <u>Severability</u>. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.
- 5.18 Prohibited Interests. Consultant maintains and warrants that it has not employed nor retained any company or person, other than a bona fide employee working solely for Consultant, to solicit or secure this Agreement. Further, Consultant warrants that it has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Consultant, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, SDCP shall have the right to rescind this Agreement without liability. For the term of this Agreement, no member, officer or employee of SDCP, during the term of his or her service with SDCP, shall have any direct interest in this Agreement, or obtain any present or anticipated material benefit arising therefrom.
- 5.19 <u>Equal Opportunity Employment and Subcontracting</u>. Consultant represents that it is an equal opportunity employer and it shall not discriminate on the basis of race, gender, gender expression, gender identity, religion, national origin, ethnicity, sexual orientation, age, or

disability in the solicitation, selection, hiring, or treatment of applicants, employees, subcontractors, vendors, or suppliers. Such non-discrimination shall include, but not be limited to, all activities related to initial employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination. Further, Consultant shall provide equal opportunity for subcontractors to participate in subcontracting opportunities.

- 5.20 <u>Labor Certification</u>. By its signature hereunder, Consultant certifies that it is aware of the provisions of Section 3700 of the California Labor Code which requires every employer to be insured against liability for Workers' Compensation, or to undertake self-insurance in accordance with the provisions of that Code, and agrees to comply with such provisions before commencing the performance of the Services.
- 5.21 <u>Authority to Enter Agreement</u>. Consultant has all requisite power and authority to conduct its business and to execute, deliver, and perform the Agreement. Each Party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and bind each respective Party.
- 5.22 <u>Counterparts</u>. This Agreement may be signed in counterparts, each of which shall constitute an original.
- 5.23 <u>Subcontracting</u>. Consultant shall not subcontract any portion of the work required by this Agreement, except as expressly stated herein, without prior written approval of SDCP. Subcontracts, if any, shall contain a provision making them subject to all provisions stipulated in this Agreement.
- 5.24 <u>Additional Terms and Conditions</u>. Additional terms and conditions are attached hereto and incorporated herein as <u>Exhibit D</u>. If any part of Exhibit D is inconsistent with the express terms of this Agreement, the terms of this Agreement shall control.

[SIGNATURES ON FOLLOWING PAGE]

# SIGNATURE PAGE TO SAN DIEGO COMMUNITY POWER PROFESSIONAL SERVICES AGREEMENT

IN WITNESS WHEREOF, the Parties have made and executed this Agreement as of the date first written above.

NEVENESCH DDINTEDS INC

SAN DIEGO COMMUNITITIOWER	NETENESCHTRINTERS, INC.
By:Name:Title:	By:
ATTEST:	
Secretary, SDCP Board of Directors	
APPROVED AS TO FORM:	
SDCP General Counsel	

\*A corporation requires the signatures of two corporate officers.

SAN DIECO COMMUNITY DOWED

One signature shall be that of the Chairman of Board, the President or any Vice President, and the second signature (on the attest line) shall be that of the Secretary, any Assistant Secretary, the Chief Financial Officer or any Assistant Treasurer of such corporation.

If the above persons are not the intended signators, evidence of signature authority shall be provided to SDCP.

# EXHIBIT A

## **SCOPE OF SERVICES**

Conduct printing and mailing services for direct mail drops, new move-ins, courtesy letters, the Power Content Label, and the Joint Rate Comparison mailer. The direct mail drops will cover the second half of Phase 2 enrollment. New move-ins will cover new accounts that are enrolled in SDCP's service territory. The Power Content Label shall be a mailer that gets sent in the August 2021 timeframe to all existing customers. Lastly, the Joint Rate Comparison mailer is a mailer that is a joint effort with SDG&E that will be sent either September or October 2021. In 2022, direct mail will cover Phase 3 enrollment which shall begin with the city of Imperial Beach in February, La Mesa in March, Encinitas in April, and Chula Vista and San Diego in May.

Additional printing and mailing may be needed and shall be requested in advance by SDCP.

# EXHIBIT B

# SCHEDULE OF SERVICES

Consultant agrees	s to conduct printing	g and mailing	services for	the duration	of the contract	ending
on June 30, 2022.						

# EXHIBIT C

# **COMPENSATION BILLING RATES**

Name	Title	Hourly	v Rate

# **EXHIBIT D**

#### ADDITIONAL TERMS AND CONDITIONS

The Parties have read the Additional Terms & Conditions in this Exhibit and agree to abide by them, except to the extent that they conflict with the terms and conditions of the Agreement. All statements in SDCP's application are true and complete and are made for the purpose of obtaining credit. Any subsequent purchase or purchases made by SDCP shall be subject to the Agreement (including these Additional Terms & Conditions). All terms and conditions of this agreement are to be performed in San Diego, California. Delinquency charges at the rate of 1.5% per month will be charged on all balances remaining unpaid 30 days from the date said amounts are incurred.

#### 1. QUOTATION

A quotation not accepted within 30 days may be changed.

#### 2. ORDERS

Acceptance of orders is subject to credit approval and contingencies such as fire, water, strikes, theft, vandalism, acts of God, and other causes beyond the provider's control. Canceled orders require compensation for incurred costs and related obligations.

3. EXPERIMENTAL WORK

Experimental or preliminary work performed at customer's request will be charged to the customer at the provider's current rates. This work cannot be used without the provider's written consent.

#### 4. CREATIVE WORK

Sketches, copy, dummies, and all other creative work developed or furnished by the provider are the provider's exclusive property. The provider must give written approval for all use of this work and for any derivation of ideas from it.

#### 5. ACCURACY OF SPECIFICATIONS

Quotations are based on the accuracy of the specifications provided. The provider can re-quote a job at time of submission if copy, film, tapes, disks, or other input materials do not conform to the information on which the original quotation was based.

#### 6. VENUE

In the event of suit regarding this contract, then venue and jurisdiction therefore shall be in either the Superior or Municipal Court, as appropriate, of the County of San Diego, California. The parties agree and stipulate that the essential terms of this contract are to be performed in said county.

#### 7. ELECTRONIC MANUSCRÍPT OR IMAGE

It is the customer's responsibility to maintain a copy of the original file. The provider is not responsible for accidental damage to media supplied by the customer or for the accuracy of furnished input or final output. Until digital input can be evaluated by the provider, no claims or promises are made about the provider's ability to work with jobs submitted in digital format, and no liability is assumed for problems that may arise. Any additional translating, editing, or programming needed to utilize customer-supplied files will be charged at prevailing rates.8. ALTERATIONS/CORRECTIONS

Customer alterations include all work performed in addition to the original specifications. All such work will be charged at the provider's current rates.

#### 9. PREPRESS PROOFS

The provider will submit prepress proofs along with original copy for the customer's review and approval. Corrections will be returned to the provider on a "master set" marked "O.K.", "O.K. with corrections", or "Revised proof required" and signed by the customer. Until the master set is received, no additional work will be performed. The provider will not be responsible for undetected production errors if proofs are not required by the customer; the work is printed per the customer's O.K.; and requests for changes are communicated orally.

## 10. PRESS PROOFS

Press proofs will not be furnished unless they have been required in writing in the provider's quotation. A press sheet can be submitted for the customer's approval as long as the customer is present at the press during make-ready. Any press time lost or alterations/corrections made because of the customer's delay or change of mind will be charged at the provider's current rates.

#### 11. COLOR PROOFING

Because of differences in equipment, paper, inks, and other pressroom operations, a reasonable variation in color between color proofs and the completed job is to be expected. When variation of this kind occurs, it will be considered acceptable performance. 12. OVER-RUNS OR UNDER-RUNS

Over-runs or under-runs will not exceed 10% of the quantity ordered. The provider will bill for actual quantity delivered within this tolerance. If the customer requires a guaranteed quantity the percentage of tolerance must be stated at the time of quotation.

13. CUSTOMER'S PROPERTY

The provider will only maintain fire and extended coverage on property belonging to the customer while the property is in the provider's possession. The provider's liability for this property will not exceed the amount recoverable from insurance. Additional insurance coverage may be obtained if it is requested in writing, and if the premium is paid to the provider.

#### 14. DELIVERY

Unless otherwise specified, the price quoted is for a single shipment, without storage, F.O.B. provider's platform. Proposals are based on continuous and uninterrupted delivery of the complete order. If the specifications state otherwise, the provider will charge accordingly at current rates. Charges for delivery of materials and supplies from the customer to the provider, or from the customer's supplier to the provider, are not included in quotations unless specified. Title for finished work passes to the customer upon delivery to the carrier at shipping point; or upon mailing of invoices for the finished work or its segments, whichever occurs first.

#### 15. PRODUCTION SCHEDULES

Production schedules will be established and followed by both the customer and the provider. In the event that production schedules are not adhered to by the customer, delivery dates will be subject to re-negotiation. There will be no liability or penalty for delays due to state of war, riot, civil disorder, fire, strikes, accidents, action of government or civil authority, acts of God, or

other causes beyond the control of the provider. In such cases, schedules will be extended by an amount of time equal to delay incurred.

#### 16. CUSTOMER-FURNISHED MATERIALS

Materials furnished by customers or their suppliers are verified by delivery tickets. The provider bears no responsibility for discrepancies between delivery tickets and actual counts. Customer-supplied paper must be delivered according to specifications furnished by the provider. These specifications will include correct weight, thickness, pick resistance, and other technical requirements. Artwork, film, color separations, special dies, tapes, disks, or other materials furnished by the customer must be usable by the provider without alteration or repair. Items not meeting this requirement will be repaired by the customer, or by the provider at the provider's current rates.

#### 17. OUTSIDE PURCHASES

Unless otherwise agreed in writing, all outside purchases as required or authorized by the customer, are chargeable.

#### 18. TERMS/CLAIMS/LIENS

Terms of payment are whatever has been agreed to by both parties. Claims for defects, damages, or shortages must be made by the customer in writing no later than 10 calendar days after delivery. If no such claim is made, the provider and the customer will understand that the job has been accepted. By accepting the job, the customer acknowledges that the provider's performance has fully satisfied all terms, conditions, and specifications. The provider's liability will be limited to the quoted selling price for defective goods, without additional liability for special or consequential damages. As security for payment of any undisputed sum due under the terms of an agreement (and after notice and 15-day opportunity to cure has been provided), the provider has the right to hold and place a lien on all customer property in the provider's possession. This right

applies even if credit has been extended, notes have been accepted, trade acceptances have been made, or payment has been guaranteed. If payment is not made, the customer is liable for all collection costs incurred.

- a. Disclaimer of implied Warranties: Provider warrants that the work is as described in the purchase order. The customer understands that all sketches, copy, dummies, and
- preparatory work shown to the customer are intended only to illustrate the general type and quality of the work. They are not intended to represent the actual work performed.
- b. Disclaimer of Implied Warranties: The provider warrants only that the work will conform to the description contained in the purchase order. Under no

circumstances will the provider be liable for special or consequential damages

#### 20. INDEMNIFICATION

The customer agrees to indemnify, defend (with counsel of customer's choosing) and hold the provider harmless from claims, demands, actions, damages, and proceedings (collectively, "Claims") for copyright infringement, libel, or violations of a third party's right to privacy only to the extent such Claims arise from content submitted by the customer. Provider shall provide customer with prompt notice of a Claim under legal this paragraph.

The provider reserves the right to use his or her sole discretion

in refusing to print anything he or she deems illegal, libelous, scandalous, improper, or infringing upon copyright law.

#### 21. STORAGE

The provider will retain intermediate materials until the related end product has been accepted by the customer. If requested by the customer, intermediate materials will be stored for an additional period at additional charge. The provider is not liable for loss or damage to stored material beyond what is recoverable by the provider's fire and extended insurance coverage.

# 22. TĂXES

All amounts due for taxes and assessments will be added to the customer's invoice and are the responsibility of the customer. No tax exemption will be granted unless the customer's "Exemption Certificate" (or other official proof of exemption) accompanies the purchase order. If after the customer has paid the invoice, it is determined that more tax is due, then the customer must promptly remit the required taxes to the taxing authority, or immediately reimburse the provider for any additional taxes paid.

#### 23. TELECOMMUNICATIONS

Unless otherwise agreed, the customer will pay for all transmission charges. The provider is not responsible for any errors, omissions, or extra costs resulting from faults in the transmission.



# SAN DIEGO COMMUNITY POWER Staff Report – Item 9

To: San Diego Community Power Board of Directors

From: Bill Carnahan, Interim Chief Executive Officer

Subject: Operations and Administration Report from the Interim Chief Executive

Officer

Date: May 27, 2021

\_\_\_\_\_

## RECOMMENDATION

Receive and file update on various operational and administration activities.

#### **BACKGROUND**

Staff will provide regular updates to the Board of Directors regarding San Diego Community Power's (SDCP) organizational development, administration, start-up and operating activities. The following is a brief overview of this month's discussion items, which are informational only.

## **ANALYSIS AND DISCUSSION**

# A) General Administrative Updates

San Diego County – As reported in the last Board meeting, the San Diego County Board of Supervisors took a step toward having unincorporated areas of the county to join one of the two community choice aggregation programs in the region, one being San Diego Community Power. The Supervisors adopted a set of six principles that would make up any Joint Powers Authority the county would sign with a prospective CCA. The SDCP Interim CEO and COO cosigned a letter stating that SDCP "is looking forward to talking to the county. The proposed Guiding Principles largely mirror SDCP's own principles."

Staff, along with Board member volunteer, Bill Baber, have been preparing responses to the various questions raised by the County and have engaged PEA to conduct an economic analysis of the impacts of having the County as a SDCP member.

The SDCP Staff will provide an update on the status of these efforts as a regular agenda item.

**Strategic Planning** – Lisa Gordon has been engaged to lead our Strategic Planning effort as our Facilitator. She has distributed surveys to the Board, Staff and Community Advisory Committee to solicit views on various subjects related to

the Strategic Planning effort. Original plans were to complete the process with a Strategic Planning session in May or June but that is becoming problematic so we may complete other tasks in the interim and reschedule the session to Fall. Once we have a revised plan we will report back.

# B) Staffing

Chief Finance Officer, Eric Washington, is now onboard and will be introduced at the meeting. Interviews are complete for two positions in the Power Services group with the Director of External Affairs and Finance Manager up next. We are now about halfway through the filling of all the positions in the two-year staffing plan. All of those positions are funded in the draft 21/22 Budget to be presented at the Board meeting. A copy of the current Organization Chart is a part of the agenda packet for reference.

# C) Power Resources

# Renewable Energy:

Negotiations for short-listed contracts selected through SDCP's long-term renewables portfolio standard solicitation are nearing completion. Three long-term contracts were reviewed with FRMC last week. One of them is presented for your Board's approval as Agenda Item #9 during this meeting. The other two will be presented in May, potentially followed by another long-term contract or two to round out negotiation of contracts that originated in last year's Long-term RPS RFO.

Staff continue to negotiate an EEI Master Agreement with and purchase of renewable energy from SDG&E pursuant to bilateral discussions and consistent with previous direction from the Board.

Staff completed solicitations for short-term renewable, carbon-free energy to meet a portion of SDCP's near-term energy needs while the new-build facilities its currently negotiating with are under development. Contracting pursuant to that solicitation is underway.

# Resource Adequacy:

As previously discussed, SDCP filed a request with the CPUC seeking a waiver of penalties for year-ahead Local RA obligations that SDCP was not able to fulfill. The CPUC granted SDCP's Waiver request on Dec 30, 2020.

Staff completed a solicitation for short-term resource adequacy to meet a portion of SDCP's "balance of 2021" capacity needs. Contracting pursuant to that solicitation is underway, and SDCP continues procurement efforts as necessary to close short positions. SDCP's ability to comply with RA requirements is subject to availability constraints in the San Diego area market.

# Risk Management:

Consistent with its Energy Risk Management Policy, SDCP has contracted for a significant majority of its market energy needs for 2021 and has started layering in some purchases for 2022-2024.

# D) Back Office Operations

As our back-office data manager, Calpine has deployed a back-end bill comparison tool that allows utilization of historical data for all our Commercial and Industrial customers from 2019 and 2020 to perform bill comparisons using our Board approved rates effective on 6/1/2021 compared to the existing SDG&E's rates effective on 3/1/2021. This tool allows for Staff to run bill comparisons en masse without asking customers to provide copies of their bills. The end user customer bill comparison tool on our website that allows customers to self-serve in running their own bill comparison analysis using information on their bills has also been updated to reflect Board approved rates effective on 6/1/2021. This tool is accessible on our website via:

https://bill-compare.communityenergysolutions.com/ui-v2/home/4/2/1

From an operations perspective, SDCP Staff and Calpine have worked together to create a reporting dashboard of customer actions to opt-out or opt-up to Power100. The below charts summarize these actions accordingly:

# **Opt Outs**

Opt Outs by TOT	February	March	April	May - MTD	2021 YTD Grand Total
CITY OF CHULA VISTA	2	32	1	0	35
CITY OF ENCINITAS	0	0	3	0	3
CITY OF IMPERIAL BEACH	0	0	0	0	0
CITY OF LA MESA	0	0	15	0	15
CITY OF SAN DIEGO	14	7	43	2	66
Grand Total	16	39	62	2	119

Opt Outs by Class Code	February	March	April	May - MTD	2021 YTD Grand Total
Residential	0	0	0	0	0
Commercial/Industrial	16	39	62	2	119
Grand Total	16	39	62	2	119

Opt Outs by Reason	February	March	April	May - MTD	2021 YTD Grand Total
Concerns about Government-Run Power Agency	0	0	2	0	2
Decline to Provide	0	4	19	1	24
Dislike being automatically enrolled	0	0	28	1	29
Have renewable Energy Reliability Concerns	0	0	0	0	0
Other	1	35	2	0	38
Rate or Cost Concerns	15	0	11	0	26
Service or Billing Concerns	0	0	0	0	0
Grand Total	16	39	62	2	119

Opt Outs by Method	February	March	April	May - MTD	2021 YTD Grand Total
CSR	0	35	31	0	66
IVR	0	0	1	0	1
Web	16	4	30	2	52
Grand Total	16	39	62	2	119

# **Opt Ups to Power100**

Opt Ups by TOT	February	March	April	May - MTD	2021 - YTD Grand Total
CITY OF CHULA VISTA	0	65	0	0	65
CITY OF ENCINITAS	0	18	0	0	18
CITY OF IMPERIAL BEACH	0	0	0	0	0
CITY OF LA MESA	0	0	12	0	12
CITY OF SAN DIEGO	0	134	1	0	135
Grand Total	0	217	13	0	230

Opt Ups by Class Code	February	March	April	May - MTD	2021 - YTD Grand Total
Residential	0	2	0	0	2
Commercial/Industrial	0	215	13	0	228
Grand Total	0	217	13	0	230

Opt Ups by Method	February	March	April	May - MTD	2021 - YTD Grand Total
CSR	0	217	11	0	228
IVR	0	0	0	0	0
Web	0	0	2	0	2
Grand Total	0	217	13	0	230

# E) Retirement Plan

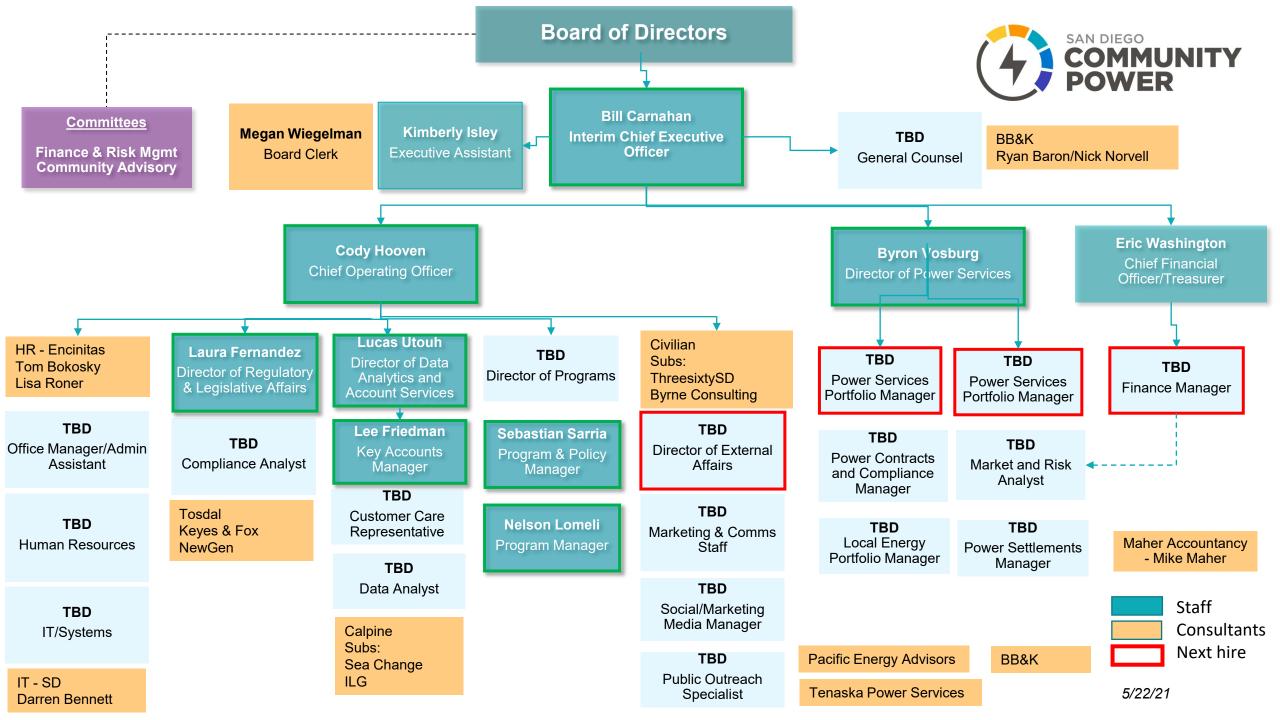
SDCP has selected Benefit Resource's Inc. (BRI) as the third-party administrator for SDCP's retirement plan. BRI will implement a 457(b)/401(a) plan. BRI and Scott Tomei from PWA Financial will work to establish accounts at Empower Retirement. SDCP staff has already met with Scott Tomei from PWA Financial to select the initial fund lineup for the 457(b)/401(a) plan. The selected fund line-up includes a variety of funds, including funds that prioritize Environmental, Social and Corporate Governance (ESG) investing. All of the funds were evaluated for certain specified criteria, including fossil fuel exposure. The ESG/fossil free funds will be offered alongside low-cost index funds as well as other well performing managed funds.

# **FISCAL IMPACT**

N/A

## **ATTACHMENTS**

Attachment A: SDCP Organization Chart





# SAN DIEGO COMMUNITY POWER Staff Report – Item 10

To: San Diego Community Power Board of Directors

From: Laura Fernandez, Director of Regulatory and Legislative Affairs

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Update on Regulatory and Legislative Affairs

Date: May 27, 2021

## RECOMMENDATION

Receive and file update on regulatory and legislative affairs.

## **BACKGROUND**

Staff will provide regular updates to the Board of Directors regarding SDCP's regulatory and legislative engagement. The following is an overview of this month's discussion items, which are informational only.

# A) Final Decision Issued in Phase 2 of Power Charge Indifference Adjustment (PCIA) Rulemaking

The PCIA is a surcharge on all customers that is intended to collect the above-market costs of the investor-owned utilities' (IOU) legacy resources. The PCIA is intended to reflect the difference between the IOUs' above-market costs related to legacy power supply commitments, including third-party energy contracts and operating costs for utility owned generation, and today's market value for those resources. While Community Choice Aggregators (CCAs) and direct access customers continue to pay a significant share of the costs for these resources, their ability to access the benefits depends on the willingness of the IOU – at its sole discretion – to sell or allocate the resource.

The inequity surrounding access to the benefits of the legacy resources has been long recognized by regulators and stakeholders. The California Public Utilities Commission (CPUC) first initiated a proceeding to resolve this issue in 2017 and identified optimization of IOU portfolio management to minimize stranded costs as one of the issues to be addressed. The CPUC directed CalCCA, Southern California Edison, and Commercial Energy (the "co-chairs" of what was called Working Group 3) to develop a joint proposal that represented their respective groups. The joint proposal was

presented to the CPUC in February 2020 and was not given any procedural consideration for over one year.

As reported during the last Board meeting, on April 5, 2021, the CPUC issued the long-awaited Phase 2 <u>Proposed Decision</u> (PD) on the PCIA Cap and Portfolio Optimization track after more than one year since the Working Group 3 (WG3) co-chairs filed the joint proposal. The PD proposed to:

- Adopt voluntary allocation market offer (VAMO) of Renewables Portfolio Standard (RPS) allocations for 2023 implementation;
- Decline to adopt the WG3 proposal for Resource Adequacy (RA);
- Decline to approve the WG3 proposal on greenhouse-gas (GHG)-free resources.

The California Community Choice Association (<u>CalCCA</u>), and SDCP filed <u>opening</u> and <u>reply</u> comments on the PD. On May 20, 2021, the Commissioners voted unanimously in support of the PD, with a few important modifications. The <u>final decision</u> permits Load-Serving Entities (LSE), including CCAs to resell their allocated resources with rules to be set in RPS proceeding. The final decision also clarifies that SDG&E must leave its 2021 PCIA rates and rate adders in effect through 2021, and implement removal of the PCIA cap in rates effective January 1, 2022. Both of these are revisions that were advocated for by SDCP staff and both of these changes represent important victories for SDCP. The final decision orders the other IOUs to remove the PCIA cap and trigger immediately. However, keeping the PCIA rate cap in place for 2021 will help mitigate rate uncertainty and volatility for SDCP and SDG&E customers. Moreover, the ability to resell RPS allocations is an important portfolio management tool, especially for new CCAs like SDCP.

# B) SB 612 (Ratepayer Equity Act) – Heads to Senate Floor for Vote Next Week

As discussed during the last two SDCP Board meetings, while all customers bear cost responsibility for legacy resources, only IOU customers have the right to access the benefits of these resources, such as renewable energy, GHG-free energy, and RA. SB 612 would resolve this inequity by enshrining equal access to benefits into statute. Given that the PCIA final decision discussed above rejects the majority of the WG3 proposal and falls short of creating ratepayer equity, legislative action is the only way to ensure fair and equitable outcomes for all ratepayers, not just IOU bundled customers. SB 612 ensures fair and equal access to the benefits of legacy contracts resources for all customers and ensures that IOU portfolios are managed to maximize value and reduce unnecessary costs for all customers. While the PCIA final decision adopts a VAMO for RPS allocations, it rejects the WG3 proposal for RA and GHG-free resources. SB 612 would require SDG&E to offer an allocation of not just RPS, but also RA and any GHG free resources.

CalCCA is sponsoring the bill and seeking support from all CCAs and their member agencies. In March, SDCP voted to take a support position for SB 612. The cities of La

Mesa, Encinitas, Chula Vista and Imperial Beach have also submitted support letters for SB 612. The County of San Diego also submitted a letter in support of SB 612.

The PCIA represents approximately 37% of operating costs (before financing) for fiscal year 2021, 42% of operating costs for fiscal year 2022, and 44% of operating costs for fiscal year 2023. SB 612 would reduce overall costs by ensuring that SDCP is able to access legacy resources that are currently being paid for through the PCIA.

More information can be found here: <a href="https://cal-cca.org/sb-612/">https://cal-cca.org/sb-612/</a>.

SDCP needs additional support to ensure that SB 612 will have enough support votes to make it off of the Senate floor. June 4, 2021, is the last day for SB 612 to pass out of the Senate.

# C) SDG&E Application for Approval of 2022 Electric Procurement Revenue Requirement Forecasts

On April 15, 2021, SDG&E filed its <u>Application</u> for Approval of its 2022 Electric Procurement Revenue Requirement Forecasts and GHG-related forecasts. SDG&E requests approval of a total 2022 forecasted revenue requirement of \$693.090 million. In the application, SDG&E notes that these changes, if approved as is, would decrease the current system average rate by 4.752 cents per kilowatt hour, or 17.28%. A typical non-California Alternative Rates for Energy (CARE) residential customer using 425 kilowatt-hours (kWh) would see a monthly bill decrease of 16.62%, or \$22.15 (from \$133.30 to \$111.15). A typical CARE residential customer using 425 kWh could see a monthly bill decrease of 16.62%, or \$14.40 (from \$86.64 to \$72.25). These rates would be implemented on January 1, 2022. However, SDG&E also notes in its application that these projections could change if the CPUC approves SDG&E's request to update its authorized sales in its forthcoming standalone 2022 sales forecast application.

SDCP filed a <u>protest</u> to the application on May 21, 2021. In the protest, SDCP noted that in the 2021 Energy Resources Recovery Account (ERRA) Forecast Application, SDG&E refused to calculate the 2021 commodity rate forecast using an updated retail sales forecast that was consistent with the 2021 bundled energy requirements forecast used to derive the ERRA revenue requirement. The stale sales forecast employed by SDG&E to calculate bundled commodity rates failed to account for significant CCA load departure in early 2021, resulting in an artificially low bundled customer rate forecast. Despite acknowledging the misaligned data in its 2021 commodity rate forecast, SDG&E claimed that it was required to use the outdated sales forecast because it was the most recent forecast approved by the CPUC. The CPUC, however, rejected SDG&E's arguments. SDCP notes in the protest that SDG&E once again declines to use the most recent sales forecast to calculate the commodity rate for the 2022 ERRA forecast.

The bottom line is that although the large decrease in the revenue requirements leads to a reported decrease in both total bundled rates (decrease of 17.8%) and bundled commodity rates (decrease of 35%), these rate reductions are overstated, because

SDG&E has not yet incorporated its updated 2022 sales forecast into the calculation of bundled rates.

This proceeding is just in its beginning stages and only after the separate 2022 sales forecast proceeding is complete will SDG&E integrate its most recent sales forecast into its 2022 ERRA rates. Therefore, this proceeding will not be complete until much later in 2021.

# D) Proposed Decision in Direct Access Rulemaking

After a long hibernation, the rulemaking related to Direct Access reopening issues awoke with the issuance of a Proposed Decision on May 14, 2021. In short, the Proposed Decision finds that, since the required findings in Senate Bill (SB) 235 cannot all be made, the CPUC cannot and does not recommend that Direct Access be reopened at this time.

As context, SB 235 was adopted in 2018, amending Public Utilities Code Section 365.1 relating to Direct Access. In Phase 1 of the Direct Access Reopening proceeding, the CPUC reopened 4,000 gigawatt hours to Direct Access in Decision19-05-043. The CPUC and parties have been discussing how the CPUC could adopt remaining elements of SB 235, which contemplated further reopening of Direct Access if various conditions and findings were met. The four findings that must be met are as follows with respect to recommendations to reopen Direct Access, as cited in the Proposed Decision:

- 1. The recommendations are consistent with the state's GHG emission reduction goals.
- 2. The recommendations do not increase criteria air pollutants and toxic air contaminants.
- 3. The recommendations ensure electric system reliability.
- 4. The recommendations do not cause undue shifting of costs to bundled service customers of an electrical corporation or to direct transaction customers.

The Proposed Decision cites reliability events and forecasts for additional generation in recommending against expansion at this time. The Proposed Decision states "expanded direct access would result in further fragmentation of the market and raises serious electric system reliability concerns. These reliability concerns, coupled with Direct Access providers' primary reliance on unspecified power sources, form the basis for the Commission's recommendation against expansion of Direct Access." The Proposed Decision also cites CalCCA's concerns regarding the ability of CCAs to remain financially viable and maintain their own long-term contracts if there is a significant risk that load will migrate to Direct Access following expansion.

Opening comments on the Proposed Decision are due on June 3, and the CPUC expects to address the Proposed Decision at its June 24 business meeting. SDCP staff are coordinating with CalCCA on opening comments.

## E) Provider of Last Resort (POLR) Rulemaking

On March 25, 2021, the CPUC opened a rulemaking to implement Senate Bill 520 and address other matters related to POLR. Pursuant to SB 520, each IOU is the POLR in its service territory. In this rulemaking, the CPUC will establish cost allocation and recovery for the POLR and will also take steps to ensure that electrical service will be provided to customers without disruption in the event an LSE fails to provide or denies service to a retail end-use customer.

Opening comments were filed on April 26 by a wide range of parties, including CalCCA and SDG&E. CalCCA argued that the POLR should provide service for a short duration (three – six months) from short term procurement with costs allocated to those that receive POLR service. CalCCA also suggested that the CPUC should examine ways in which retail providers could voluntarily take on customer service from defaulting load-serving entities (LSEs) in a "next to last provider" arrangement which could obviate or reduce the need for a POLR. SDG&E similarly argued that use of the POLR should be limited to situations where an LSE becomes insolvent or otherwise faces an operational inability to serve. SDG&E also argued that the POLR should be a "bridge" to service until customers are moved to a permanent LSE, and that therefore the POLR should not be required to undertake front-stop procurement, since this would result in unnecessary costs and could create procurement challenges for other LSEs.

A prehearing conference will be held on June 11.



# SAN DIEGO COMMUNITY POWER Staff Report – Item 11

To: San Diego Community Power Board of Directors

From: Cody Hooven, Chief Operating Officer

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Discussion and Direction on Potential New Members to SDCP and Input

on Response Letter to County of San Diego

Date: March 27, 2021

## RECOMMENDATION

1. Discuss considerations of adding new member jurisdictions to SDCP and provide direction to staff.

2. Provide input to staff on the draft response letter to the County of San Diego

#### **BACKGROUND**

At the time San Diego Community Power (SDCP) was formed, there were several other municipalities in the region exploring the feasibility of community choice. The Joint Powers Authority (JPA) Agreement contemplates the addition of new members, and Section 2.4 of the JPA agreement refences new members, as described below.

Section 2.4 **Addition of Parties**. After the initial formation of the Authority by the Founding Members, any incorporated municipality, county, or other public agency authorized to be a community choice aggregator under Public Utilities Code Section 331.1 located within the service territory of the IOU may apply to and become a member of the Authority if all the following conditions are met:

- 2.4.1 The adoption by a two-thirds vote of the Board satisfying the requirements described in Section 4.11 (Board Voting) of this Agreement, of a resolution authorizing membership into the Authority;
- 2.4.2 The adoption by the public agency of a CCA ordinance as required by Public Utilities Code Section 366.2(c)(12) and approval and execution of this Agreement and other necessary program agreements by the public agency;
- 2.4.3 Payment of a membership fee, if any, as may be required by the Board to cover Authority costs incurred in connection with adding the new party; and

2.4.4 Satisfaction of any other reasonable conditions established by the Board.

Pursuant to this Section 2.4 (Addition of Parties), all Parties shall be required to commence electric service as soon as is practicable within statutory and regulatory requirements, as determined by the Board and Authority management, as a condition to becoming a Party to this Agreement.

The County of San Diego (County) has submitted a letter including updated Guiding Principles and additional questions to SDCP regarding potential membership. The County, and potentially several other municipalities are exploring community choice further therefore staff is presenting information here for the Board's consideration.

#### ANALYSIS AND DISCUSSION

## General

Staff have researched the practices of other community choice aggregation (CCA) programs in California to understand if there are best practices to expansion of membership. A summary of that research is below:

- Many CCAs have expanded
- Limited expansion policies available; typically, an ad hoc analysis of data and Board direction is provided
- Common practice is to review consistency between the existing CCA and the new member and ensure mission alignment and positive or neutral impacts are expected from the addition of customers
- Financial considerations include different rates for different vintage years (power chare indifference adjustment, PCIA, costs set by year of load departure), reserves built up prior to new member joining, etc.

For any potential new member, staff recommend several considerations be explored through a pro forma analysis and summary report for any potential member. This report would explore:

- New members alignment with principles outlined in SDCP's JPA Agreement, (e.g., environmental, social, and economic goals agreed to by the Founding Members of SDCP)
- Financial impacts/benefits to existing customers
- Financial impacts/benefits to new member jurisdiction
- Cost and effort of this pro forma analysis not-to-exceed amount of \$30,000 for analysis and summary report to be funded by SDCP and reimbursed by a potential member should they choose not to pursue membership after they request initiation of the analysis. Note: the Board may choose to create a standard of waiving this cost to potential new members at their discretion. For example, this could be waived for smaller cities with general funds or populations below a certain level.

## County of San Diego

Staff have reviewed the County's updated Guiding Principles and believe there is alignment with the principles outlined in SDCP's JPA Agreement. The financial impact to new customers and existing customers will be determined upon completion of the

analysis. A draft letter in response to the County is attached for Board review, and responds to additional questions submitted by the County. Staff have received the necessary load data from the County to begin the pro forma analysis, which will be provide further information once complete.

## **FISCAL IMPACT**

A maximum estimated cost of \$30,000 for the pro forma analysis and summary report of County data. This amount is within the authority of the CEO.

## **ATTACHMENTS**

Attachment A: Letter received from the County Attachment B: Draft Response to County



MARKO MEDVED, PE, CEM DIRECTOR (858) 694-2527

5560 OVERLAND AVENUE, SUITE 410, SAN DIEGO, CA 92123

NICOLE J. ALEJANDRE ASSISTANT DIRECTOR (858) 694-3885

April 18, 2021

Bill Carnahan Interim CEO San Diego Community Power

RE: Request for CCE Information

Mr. Carnahan,

On April 6, 2021, the County Board of Supervisors approved a new set of CCE Guiding Principles and directed County staff to begin discussions with the two recently formed local CCEs (San Diego Community Power and Clean Energy Alliance) about a possible partnership. To commence discussions with San Diego Community Power, we are writing to formally request information relevant to our Board of Supervisors' consideration of how to best effectuate its CCE Guiding Principles.

County staff intends to return to the Board of Supervisors this summer with an analysis of options for joining one of the existing local CCEs in accordance with the Guiding Principles. This would allow our Board the opportunity to decide whether the County should join one of the CCEs in 2021, with a launch of unincorporated accounts in 2023. To facilitate this decision, the County requests the following information.

Please provide information detailing how your Joint Powers Agreement, Board-approved policies, and any other relevant official documents and Board actions support the following County Guiding Principles:

## **Guiding Principles**

- 1. Prioritize social equity and environmental stewardship.
- 2. Provide cost competitiveness compared to the incumbent utility.



- 3. Achieve 100% renewable electricity by 2030; encourage within-County buildout of renewable energy, battery storage, and energy efficiency programs; and prioritize Category 1 renewable energy.
- 4. Support requirements for prevailing wages, as defined in California Labor Code section 1770 et seq., and skilled and trained workforce, as defined in California Public Contract Code section 2601, for CCE-owned generation, feed-in-tariff, and energy efficiency projects.
- 5. Encourage the development of an equitable jobs pipeline for individuals from communities of concern; the use of a bid evaluation policy prioritizing the selection of new local renewable energy and storage projects; and the workforce development criteria prioritizing the use of State-certified apprenticeship and proper assignment of work to crafts that traditionally perform the work, as permitted by applicable law.
- 6. Limit General Fund Liability.

In addition, we have the following specific questions:

- 1. What are your anticipated rate discounts versus SDGE?
- 2. What is the anticipated "membership fee", if any, that would be required under Section 2.4.3 of the Joint Powers Agreement? Are there any other payment requirements to join?
- 3. Aside from any payments required in connection with joining the JPA, are there any current or anticipated payment obligations of JPA Members?
- 4. What liabilities would the County be expected to incur by joining the JPA?
- 5. Will you offer the same rate for all members or is there going to be a "newcomers" rate?
- 6. Please explain the process and any deadlines for the County to join in 2021?
- 7. If the County were to join in 2021, how do you anticipate the rollout going in 2023? All at once or in phases?
- 8. What functions would County staff be expected to perform after joining the JPA?
- 9. Please provide your most recent proforma budget.

If possible, please respond with the requested information prior to June 1, 2021. All responses should be emailed to <a href="mailto:Charles.marchesano@sdcounty.ca.gov">Charles.marchesano@sdcounty.ca.gov</a>. Please also feel free to contact me at (858) 699-3502.

Sincerely,

Charley Marchesano Chief, Energy and Sustainability Program Department of General Services County of San Diego

Charles Marchesano

(858) 694-2987 office (858) 699-3502 cell



To: Charley Marchesano
Chief, Energy and Sustainability Program
County of San Diego
Via Email

Re: Response to San Diego County Request for CCE Information

Dear Mr. Marchesano,

San Diego Community Power (SDCP) is pleased to respond to the County of San Diego's request for information to assist in its consideration of joining either SDCP or Clean Energy Alliance. Below you will find background information on SDCP, key considerations for any city or county seeking membership, and a response to questions submitted by the County in a letter dated April 18, 2021. We look forward to further discussions once an analysis of County customer and energy load data is completed.

SDCP was formed on October 1, 2019 and began serving its first customers in March of this year. The Board is made up of one mayor or city councilmember from the five member cities, with an alternate for each. Once fully launched, SDCP will be serving approximately 770,000 customer accounts and 6,000 gigawatt-hours per year, making it the second largest community choice program in California. Our Board has demonstrated a collaborative approach to every decision through in-depth policy discussions that include our staff, our Community Advisory Committee, and the public.

To-date, SDCP has achieved many significant milestones. We now have 10 full-time employees, including an Interim CEO, Chief Operating Officer, Chief Financial Officer, Director of Power Services, Director of Regulatory and Legislative Affairs, Director and Managers in Data Analytics and Account Services or Programs. With this new talent on board, we've successfully: engaged in proceedings at the Public Utilities Commission that resulted in benefits to all ratepayers; built an energy resources portfolio that manages our near-term financial and reliability risk and ensures delivery of clean, renewable energy; and began key account customer engagement to ensure customers receive support they need; and, identification and implementation of local community energy programs. We anticipate filling in an additional 16 critical staffing roles in FY22 including internship opportunities in the Fall.

Unique among community choice programs, SDCP received private collateral to secure our credit facility with River City bank in April 2020 rather than relying on the general funds of our member cities. We currently have a \$35 million credit facility. Our administrative operating costs (e.g., personnel, professional services, marketing and outreach) are only about 4% of our total operating expenses in FY22.

True to our commitments to our communities, we have already approved three new build, long-term renewable energy projects. These three projects achieve 350 megawatts (MW) of solar and 220MW of battery storage in San Diego, Imperial, and Riverside Counties providing enough power for nearly 200,000 homes annually. Our substantial customer demand allows us to contract for a diversity of projects – in location and resources – leading to improved risk management, energy reliability, and other economic benefits such as job creation. Another key element of our portfolio development is programs to incentivize distributed generation within our member cities.

It is important for all members to share a common vision of the goals and objectives of the JPA. When considering joining SDCP, we recommend the County review SDCP's JPA Agreement, including the recitals that provide insight into our organization's goals and priorities. Next is the consideration of how a member agency can support the goals of building local, renewable energy through their own policies and authority. Last, a key benefit of SDCP to our own customers and the region as a whole is ratepayer advocacy in the legislative and regulatory arena, so further support and alignment from member agencies on issues that affect their constituents can often be beneficial.

To conclude, while still a young organization, SDCP has successfully launched initial service to customers and is providing value to its founding members. The value we bring to our members is through the economies of scale achieved, greater influence with local elected officials and regulatory agencies, and a diversity in the communities we serve. We welcome the opportunity to support the County in exploration of community choice as a pathway to achieve its own climate action goals and seek benefits for its ratepayers.

Sincerely,

Bill Carnahan Interim CEO

Cc: Cody Hooven, COO, SDCP SDCP Board of Directors Below lists each County Guiding Principle followed by references to highlight agreement and consistency with SDCP policy.

1. County Guiding Principle – Prioritize social equity and environmental stewardship.

**SDCP:** JPA Agreement Recitals 6(d) "Develop an aggregate electric supply portfolio with overall lower greenhouse gas (GHG) emissions than the IOU, and one that supports near-term achievement of the Parties' greenhouse gas reduction goals and renewable electricity goals." Recitals 6(m) "Pursue purposeful and focused investment in communities of concern, prioritization of local renewable power, workforce development, and policies and programs centered on economic, environmental, and social equity." See also Recital 6(j), (k), and (l).

SDCP Inclusive and Sustainable Workforce Policy Section 1(b)(iii) on Supply Chain (Goods and Services), "Engage in efforts to reach communities of concern, to ensure an inclusive pool of potential suppliers." Section 3 on Reporting of Diverse Business Enterprises and Inclusive and Sustainable Workforce, "...vendors and project developers shall report on the number of women, minority, disabled veteran employees performing work for SDCP."

**2.** County Guiding Principle – Provide cost competitiveness compared to the incumbent utility.

**SDCP:** JPA Agreement Recital 6(b) "Provide electric generation rates to all ratepayers that are lower or at least competitive with those offered by the Investor-Owned Utility (IOU), San Diego Gas & Electric (SDG&E)."

SDCP's base product, PowerOn, is currently 1% less expensive than SDG&E while providing a superior product. PowerOn is 50% renewable and additional 5% greenhouse gas free while SDG&E's portfolio is 31% renewable.

**3.** County Guiding Principle 3) Achieve 100% renewable electricity by 2030; encourage within-County buildout of renewable energy, battery storage, and energy efficiency programs; and prioritize Category 1 renewable energy.

**SDCP:** JPA Agreement Recital 6(c) "[achieve and sustain] 100 percent renewable energy availability and usage, at competitive rates, within the territory by no later than 2035, and then beyond." Recital 3: "[foster] local economic benefits such as job creation, local energy programs and local power development." Recital 6(e) "Prioritize the use and development of local, cost-effective renewable and distributed energy resources in ways that encourage and support local power development and storage." Section 6.4 "[SDCP] shall provide its customers energy primarily from Category 1 eligible renewable resources...[and] avoid the procurement of energy from Category 2 or 3 to the extent feasible."

As of this month, SDCP will have approved three power purchase agreements for new-build renewable energy projects in Southern California, with one in San Diego County. All three are Category 1 power.

**4.** County Guiding Principle – Support requirements for prevailing wages, as defined in California Labor Code section 1770 et seq., and skilled and trained workforce, as defined in California Public Contract Code section 2601, for CCE-owned generation, feed-in-tariff, and energy efficiency projects.

**SDCP:** JPA Agreement Recitals 6(h) "Demonstrate quantifiable economic benefits to the region including prevailing wage jobs, local workforce development, economic development programs, new energy programs, and increased local energy investments."

SDCP Inclusive and Sustainable Workforce Policy Section 2(c) on Feed-In Tariff "SDCP will require contractors and subcontractors performing work on any SDCP Feed-In Tariff project to pay at least the prevailing rate of wages."

5. County Guiding Principle – Encourage the development of an equitable jobs pipeline for individuals from communities of concern; the use of a bid evaluation policy prioritizing the selection of new local renewable energy and storage projects; and the workforce development criteria prioritizing the use of State-certified apprenticeship and proper assignment of work to crafts that traditionally perform the work, as permitted by applicable law.

**SDCP:** JPA Agreement Recital 6(i) "To the extent authorized by law, support a stable, skilled, and trained workforce through a variety of mechanisms, including neutrality agreements, that are designed to ensure quality workmanship at fair and competitive rates and which benefit local residents by delivering cost-effective clean energy programs and projects." Recital 6(j) "Promote supplier and workforce diversity, including returning veterans and those from regional disadvantaged and under-represented communities of concern, to reflect the diversity of the region."

SDCP Inclusive and Sustainable Workforce Policy Section 2(a)(iii) on PPAs states "Support the use of State of California approved apprenticeship programs." Section 2(c) on FIT, "SDCP will encourage construction contractors or subcontractors to its Feed-In Tariff program to utilize local businesses, local apprenticeship programs, fair compensation practices including proper assignment of work to crafts that traditionally perform the work, and the use of a skilled and trained workforce."

**6.** County Guiding Principle – Limit General Fund Liability.

**SDCP:** JPA Agreement Section 3.5, "The debts, liabilities, and obligations of the Authority shall not be the debts, liabilities, and obligations of any of the Parties unless a Party agrees in writing to assume any of the debts, liabilities and obligations of the Authority with the approval of its Governing Body, in its sole discretion."

SDCP received private investor collateral rather than general fund of its member cities in order to secure a \$35 million credit facility from River City Bank in May 2020.

## **Additional County questions**

1. What are your anticipated rate discounts versus SDGE?

**SDCP**: Our generation rates are currently 1% below SDG&E as of June 2021, inclusive of PCIA, for electricity that is significantly higher in renewable content.

2. What is the anticipated "membership fee", if any, that would be required? Are there any other payment requirements to join?

**SDCP**: Currently this is an open item that will need to be determined by our Board. A pro forma analysis of the County's electricity profile is underway and will determine further costs that could be incurred by SDCP customers resulting in the addition of the County and benefits that may offset those costs. This analysis has an estimated not-to-exceed cost of \$30,000 for the analysis and summary report. This will be funded by SDCP and reimbursed by a potential member should they choose not to pursue membership after they request initiation of the analysis.

3. Aside from any payments required in connection with joining the JPA, are there any current or anticipated payment obligations of JPA Members?

SDCP: No.

4. What liabilities would the County be expected to incur by joining the JPA?

**SDCP**: Aside from an initial financial assessment as described in #2, SDCP's JPA Agreement states: any debts, liabilities and obligations of the Authority shall not be the debts, liabilities, and obligations of any of the Parities unless a Party agrees in writing to assume any of the debts...: See further provisions of the JPA Agreement for additional information (Section 7.3.4 and Section 8).

5. Will you offer the same rate for all members or is there going to be a "newcomers"? rate?

**SDCP**: It is not anticipated that generation rates would differ among members. However, there is fee that is outside SDCP's control, the Power Charge Indifference Adjustment or PCIA, that is determined based on the year the load departs bundled service with SDG&E. Therefore, that fee would be different for any new customers that are served each year.

- 6. Please explain the process and any deadlines for the County to join in 2021? **SDCP**: Below is a proposed timeline.
  - County
    - o By June 30
      - COMPLETE Provide most recent 3 years of data

- Commitment to pay fee for analysis if needed
- o By October 31
  - Adopt JPA Agreement
  - COMPLETE Adopt CCA ordinance as required by law
  - Name a Director and Alternate
- SDCP
  - o By June 30
    - Policy Set fee for evaluation and criteria or determine if fee needed
  - By August 15
    - IN PROCESS Complete pro forma analysis
  - By September 30
    - Present findings and seek Board approval of new member
    - Determination of financial impact to SDCP of new member and mitigations, if needed
  - By November 30
    - Amendment and Board approval of Implementation Plan for submission to CPUC (file no later than Jan. 2, 2022)
  - o January 1, 2023 or later
    - Start service for the County, enrollment schedule TBD
- 7. If the County were to join in 2021, how do you anticipate the rollout going in 2023?
  All at once or in phases?

**SDCP**: This will be determined based on the pro forma analysis, operational needs, and market impacts, in consultation with the County staff. The Board has discretion in this decision; staff recommend enrollment as soon as is financially and operationally reasonable.

- 8. What functions would County staff be expected to perform after joining the JPA? **SDCP**: Beyond Board responsibilities, there are no function requirements after joining SDCP for member agency staff. SDCP staff meet regularly with our member agency staff to maintain communication between the organizations. This is a higher priority at launch while there is a need for coordination on account enrollment, rate questions, etc. We would invite staff from the County to join those meetings should they join SDCP.
  - 9. Please provide your most recent proforma budget.

SDCP: See below.

## **Current SDCP Pro Forma**

Year Type

Annual Pro Forma Projections San Diego Community Power 12-May-21

·	Year Ending:	2021	2022	2023	2024	2025
I. Revenue						
Base Retail Revenue		26,427,830	316,478,007	464,498,372	465,392,704	467,719,667
Power100 Premium		124,602	1,842,853	2,834,530	2,841,319	2,855,526
Subtotal Operating Revenue		26,552,433	318,320,860	467,332,902	468,234,023	470,575,193
II. Operating Expenses						
Power Supply		29,561,844	284,304,178	398,178,895	385,755,930	375,487,097
Staff		1,500,000	4,500,000	4,635,000	4,774,050	4,917,272
Professional/Technical services		630,120	831,306	909,753	932,574	956,493
Legal		240,000	300,000	309,000	318,270	327,818
Communications, Mktg, Enrollment		687,998	3,315,021	1,660,276	1,677,597	1,698,317
Other General and Administrative		365,000	420,000	432,600	445,578	458,945
Regulatory and CalCCA Fees		410,000	895,000	921,850	949,506	977,991
Data Management		-	1,621,251	8,190,524	8,771,773	8,902,686
Utility Service Fees		23,664	768,508	3,046,375	3,145,725	3,256,294
Uncollectibles/Other		84,286	1,484,776	2,091,421	2,033,855	1,984,915
<b>Subtotal Operating Expenses</b>		33,502,911	298,440,040	420,375,694	408,804,858	398,967,827
Operating Margin	_	(6,950,479)	19,880,820	46,957,208	59,429,165	71,607,366
III. Financing						
Interest		375,000	857,820	715,471	545,067	370,354
Principal		-	2,752,650	6,724,411	6,894,461	7,068,812
Subtotal Financing		375,000	3,610,470	7,439,883	7,439,528	7,439,165
Operating Margin Less Financing		(7,325,479)	16,270,350	39,517,325	51,989,636	64,168,201
IV. Cash From Financing		35,000,000	-	-	-	-
V. Other Uses						
CPUC and CAISO Deposits		1,275,000	-	-	-	-
Collateral Deposits		5,000,000			-	-
Subtotal Other Uses		6,275,000	-	-	-	-
VI. Net Surplus/(Deficit)		21,399,521	16,270,350	39,517,325	51,989,636	64,168,201
VII. Cumulative Net Surplus		20,697,021	36,967,371	76,484,696	128,474,332	192,642,533

Fiscal



# SAN DIEGO COMMUNITY POWER Staff Report – Item 12

To: San Diego Community Power Board of Directors

From: Cody Hooven, Chief Operating Officer

Mike Maher, Maher Accountancy

Eric Washington, Chief Financial Officer

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Approval of Fiscal Year 2021 Budget Amendment and Review Proposed

Fiscal Year 2022 Budget

Date: May 27, 2021

## **RECOMMENDATION**

1. Approve the FY21 budget amendment.

2. Review the proposed FY22 budget.

## **BACKGROUND**

Sections 4.6.2 and 7.1 of San Diego Community Power (SDCP's) JPA Agreement specify that SDCP shall adopt an annual budget with a fiscal year that runs July 1-June 30th, unless otherwise amended by the Board via resolution. At its inaugural meeting on October 31, 2019, the Board adopted an administrative implementation budget, followed by an inaugural fiscal year 2021 budget (FY21) in June 2020.

Since then, SDCP has grown in staffing and consultant resources and has refined the budget format to provide a structure that is more consistent with a public agency expense budget format. The overarching categories are operating revenues, expenses, non-operating revenues and expenses, changes in net position, and other miscellaneous items (e.g., working capital, collateral postings).

Staff worked with Maher Accountancy to build and update a detailed bottom-up budget workbook. This includes the latest power resources pro forma. As SDCP is still in startup mode with evolving costs and reliance on projections about customer rate scenarios and market price forecasts, both an amendment to the FY21 budget as well as a proposed FY22 budget are presented here.

## ANALYSIS AND DISCUSSION

FY21 Amendment

The FY21 amended budget presented here seeks to make adjustments to the budget originally presented to the Board in June 2020. With nearly a full year of operations in place, costs have varied from what was projected at the time the inaugural budget was adopted. While this is to be expected for an organization just launching, the net difference between the original budget and the amended budget presented here is positive. Overall, revenues were higher than projected and expenses were lower. An overview of general updates is below.

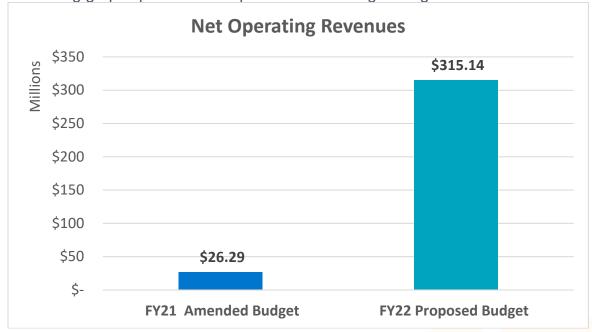
- Revenues Adjust operating revenues from sales of electricity to customers included in Phase 1 and the beginning of Phase 2
- Expenses
  - Cost of energy adjusted downward and are more reflective of actual costs
  - Personnel costs were lower than projected, slower hiring
  - Professional services costs were higher than originally projected due to expanded regulatory activity (both legal and technical support for ERRA, PCIA, etc.), and higher legal contract support
  - Marketing and Outreach costs increased due to higher start up costs for brand development, website design, launch video, and printing costs
  - General and Administration costs lower due to no incurred rental expenses and no travel expenses
- Changes in net position improved from a (-\$14.6M) projected loss to a (-\$7.4M) projected loss, primarily due to higher revenues and lower costs of energy. A loss is expected for the first year of operations.

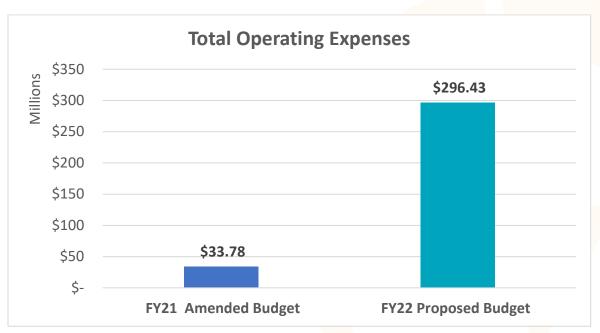
## FY22 Proposed Budget

The FY22 proposed budget presented here seeks to solicit feedback from the Board prior to final adoption of the FY22 budget at its June 2021 meeting. In FY22, SDCP will be nearly completely operational with residential customers enrolling in the latter half of the fiscal year. An overview of key revenues and expenses are below.

- Revenues Allow for revenues from sales of electricity to customers for Phase 1,
   2, and the beginning of Phase 3. Assumptions include opt outs and rates.
- Expenses
  - Cost of energy higher due to customer enrollment
  - Personnel
    - Hired 10 employees in FY21, plans to increase to approximately 24 in FY22 including development of an intern program with two intern positions. (See Attachment C: Updated Organizational Chart)
  - Professional services increased primarily due to initiation of fees paid to Calpine and SDG&E. We have also added funding to provide member city grants that support electrification and climate action efforts.
  - Marketing and Outreach proposing to expand in this area to cover paid media, additional printing costs, and outreach to communities.
  - General and Administration increased staffing and general operations (rent, travel, insurance, etc.)
- Net position approximately \$17.7M. Staff will present the Board with a proposed reserve policy in the coming months.

The following graphs provide a comparison of the budgeted figures for FY21 and FY22.





## Next steps

Approve the amended FY21 budget. Provide feedback on the FY22 proposed budget for incorporation in to the final FY22 for presented for adoption at the June 2021 Board meeting.

#### **COMMITTEE REVIEW**

The Finance and Risk Management Committee reviewed the FY21 budget amendment and FY22 proposed budget at their meeting on May 18, 2021 and recommended that it advance to the full Board for approval at its June, 2021 meeting.

## **FISCAL IMPACT**

FY21 amended budget adjustment results in an improved net position from a -\$14.6M deficit to a -\$7.8M deficit. FY22 shows a net position of \$17.7M.

## **ATTACHMENTS**

Attachment A: FY21 Budget Amendment Summary Attachment B: FY22 Proposed Budget Summary

## SAN DIEGO COMMUNITY POWER PROPOSED BUDGET AMENDMENT Fiscal Year July 1, 2020 through June 30, 2021

	FY 2021 Original Budget *	Amendments	Proposed Amended Budget	Description of change
OPERATING REVENUES				<u> </u>
Gross Ratepayer Revenues	\$ 22,688,892	\$ 3,863,541	\$ 26,552,433	Increased for customer enrollment and volume projections
(Less 1% Uncollectible Customer Accounts)	\$ (56,722)	\$ (208,802)	\$ (265,524)	Decreased due to more conservative uncollectible assumption (1/4% to 1%)
Net Operating Revenues	22,632,170	3,654,739	26,286,908	
OPERATING EXPENSES				
Cost of Energy	\$ 32,511,279	\$ (2,949,279)	\$ 29,562,000	Decreased based on actual costs
Personnel Costs	1,500,000	(312,000)	1,188,000	Decreased due to timing of new hires throughout the year
Professional Services and Consultants	1,336,768	675,232	2,012,000	Increased to better align with known costs and contracted services
Marketing and Outreach	549,000	247,000	796,000	Increased to better align with known costs and contracted services
General and Administration	365,000	(145,000)	220,000	Decreased due to lower costs
Total Operating Expenses	36,262,047	(2,484,047)	33,778,000	
Operating Income (Loss)	\$ (13,629,877)		\$ (7,491,092)	
NON-OPERATING REVENUES (EXPENSES)				
Interest and Related Expenses	(1,048,000)	691,000	(357,000)	Descreased to align with anticipated debt levels. Interest only, no principal payments.
Total Non-Operating Revenues (Expenses)	\$ (1,048,000)	\$ 691,000	\$ (357,000)	
CHANGE IN NET POSITION	\$ (14,677,877)	\$ 691,000	\$ (7,848,092)	
Non-Budgeted Cash Inflows (Outflows)				
Working capital from River City Bank	\$ 24,600,000	\$ (600,000)	\$ 24,000,000	Adjust loan draws to available balance
Collateral postings	(5,500,000)		(5,500,000)	Collateral on energy deals, CAISO and related
Total Other Sources and Uses	19,100,000	(600,000)	18,500,000	

<sup>\*</sup> Reclassifications have been made from the original budget to align with the amended budget categories.

# SAN DIEGO COMMUNITY POWER PROPOSED BUDGET

## Fiscal Year July 1, 2021 through June 30, 2022

	Amended FY 2021 Budget	Proposed FY 2022 Budget	Changes	Description of change
OPERATING REVENUES				
Gross Ratepayer Revenues	\$ 26,552,433	\$ 318,320,860	\$ 291,768,428	Increased due to enrolling customers in Phase 1, 2, and 3
(Less 1% Uncollectible Customer Accounts)	\$ (265,524)	\$ (3,183,209)	\$ (3,448,733)	
Net Operating Revenues	26,286,908	315,137,652	288,319,695	
OPERATING EXPENSES				
Cost of Energy	\$ 29,562,000	\$ 284,304,000	\$ 254,742,000	Increased due to enrolling customers in Phase 1, 2, and 3
Personnel Costs	1,188,000	4,885,000	3,697,000	Adjusted for anticipated timing of new hires throughout the year
Professional Services and Consultants	2,012,000	4,981,000	2,969,000	Major categories are Data Manager fees (Calpine) and SDG&E service fees
Marketing and Outreach	796,000	1,417,000	621,000	Larger outreach and community presence anticipated; includes pilot member city grants
General and Administration	220,000	845,000	625,000	Increase to accommodate increasing industry membership, rent, and insurance
Total Operating Expenses	33,778,000	296,432,000	262,654,000	
Operating Income (Loss)	\$ (7,491,092)	\$ 18,705,652	\$ 25,665,695	
NON-OPERATING REVENUES (EXPENSES)				
Interest and Related Expenses	\$ (357,000)	\$ (978,000)	\$ (621,000)	Adjust to align with anticipated debt levels. Interest only, no principal payments.
Total Non-Operating Revenues (Expenses)	\$ (357,000)	\$ (978,000)	\$ (621,000)	
CHANGE IN NET POSITION	\$ (7,848,092)	\$ 17,727,652	\$ 25,044,695	
Non-Budgeted Cash Inflows (Outflows) Working capital from River City Bank	\$ 24,000,000	\$ 10,000,000	\$ (14,000,000)	Adjust loan draws to align with expected needs and available balance



# SAN DIEGO COMMUNITY POWER Staff Report – Item 13

To: San Diego Community Power Board of Directors

From: Nelson Lomeli, Program Manager

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Approval of Updates to the Net Energy Metering (NEM) Program & Amend

the NEM Program Policy

Date: May 27, 2021

#### RECOMMENDATION

1. Establish a Net Surplus Compensation Rate (NSC) for Net Energy Metering (NEM) customers that matches San Diego Gas & Electric's (SDG&E) monthly NSC rate plus \$0.0075/kWh adder.

- 2. Establish a Net Surplus Compensation limit of \$2,500 per account per relevant period.
- 3. Establish monthly settlements and billing for all NEM customers.
- 4. Delegate authority to the Interim Chief Executive Officer or his designee to update the NEM policy consistent with the above Board actions.

## **BACKGROUND**

<u>What is Net Energy Metering and How Does it Work?</u> Net Energy Metering ("NEM") is a statewide program available to customers that install an onsite renewable energy generation system, like rooftop solar. This program allows customers to reduce their electricity consumption and bills.

NEM allows customers who generate their own energy ("customer-generators") to serve their energy needs directly onsite and to receive a financial credit on their electric bills for any surplus energy fed back to their utility. In technical terms, the excess energy is paid at the customer's otherwise applicable rate schedule and time-of-use period. This credit is reflected as a negative number on the bill.

<u>For example:</u> if a commercial customer is on the time metered small general service rate schedule, A-TOU, and they are generating and exporting electricity in the summer during the 12:00 PM – 4:00 PM timeframe, every kWh of electricity exported would be paid at \$0.2205 (the A-TOU rate for that time period).

Every billing period, the utility determines how much electricity was exported and how much electricity was consumed at each time-of-use period. If the generation credits

exceed the usage consumption charges, a customer receives a credit on their bill which will be applied to future usage costs within the relevant period. If a customer's consumption charges exceed the generation credits, a consumption charge is applied on the bill.

<u>True-Up and Billing:</u> Over the course of 12 months, a period commonly referred to as the Relevant Period, the utility tracks how many generation credits or consumption charges a customer accrues each month and banks them. At the end of the 12 months, the utility engages in a reconciliation process called True-Up where all the credits, all the charges, minimum bill payments, and any adjustments are summed. If the customer has more consumption charges than generation credits, the customer is sent a bill for the outstanding charges. However, if the customer has more generation credits than consumption charges, the customer does not owe anything, the credits are zeroed out, and their net usage is trued-up.

During the Net Usage True-Up process, the utility also determines how much net electricity was either exported or consumed during the 12-months. They sum up all the monthly net generation and monthly net consumption to determine a final net amount for the year. If the customer was a net consumer (i.e., they consumed more electricity from the utility than they exported) the customer does not receive any compensation. However, if the customer was a net generator (i.e., they exported more electricity than they consumed in the year), they will then get compensated using the utility's monthly Net Surplus Compensation (NSC) rate.

Net Surplus Compensation: When a customer exports more electricity to the grid than they consumed during the relevant period, the customer is eligible to receive compensation. The amount of compensation is determined based on the utility's monthly Net Surplus Compensation (NSC) Rate, which varies every month and is based on the wholesale prices of electricity. The California Public Utilities Commission defines it as a rolling average based on the utility's Default Load Aggregation Point (DLAP) price from 7 a.m. to 5 p.m.) multiplied by the annual net usage exported by the customer. For the month of May 2021, SDG&E's NSC rate is \$0.02702/kWh.

## Example:

Annual net generation = -450 kWh
May 2021 Net Surplus Compensation Rate = \$0.02702 per kWh
Total Compensation = \$12.16

#### **ANALYSIS AND DISCUSSION**

<u>Current NEM Customers:</u> Based on data from SDG&E, SDCP will be enrolling over 89,800 existing NEM accounts into our NEM program in Summer 2022. The table below shows the breakdown of NEM accounts across SDCP's service territory.

Jurisdiction	Number of Accounts	Percent
City of Imperial Beach	573	0.6%
City of La Mesa	3,426	3.8%
City of Encinitas	4,425	4.9%
City of Chula Vista	13,209	14.7%
City of San Diego	68,188	75.9%
Total	89,821	

The vast majority of NEM accounts (~98%) are residential with commercial and industrial making up the remaining ~2%.

Customer Class	Number of Accounts	Percent	
Residential	87936	97.9%	
Commercial	1,839	2.0%	
Industrial	46	0.1%	
Total	89,821		

Low-income customers enrolled in the California Alternative Rates for Energy (CARE) program or the Family Electric Rate Assistance (FERA) program, which provides discounted rates, make up 9% of NEM accounts.

An analysis conducted by Pacific Energy Advisors on our NEM customers determined that 34% of our NEM accounts are net generators with an average production of 1,770 kWh per a 12-month relevant period.

## 1. Establishing a Net Surplus Compensation Rate for SDCP:

As part of SDCP's Net Energy Metering Program, staff is recommending adoption of a Net Surplus Compensation rate that is set to match SDG&E's monthly NSC Rate with a \$0.0075/kWh adder.

It is important to note that the NSC rate is only utilized at the end of a customer's trueup and only if they are net generators of electricity in the relevant period. It is <u>not</u> factored in during the monthly billing cycles.

Staff evaluated the NEM true up process across the CCA landscape and found that the majority of CCAs use the NSC method, but the rates vary. Most CCAs set their NSC rate by benchmarking to the utilities' NSC rate but provide an additional adder incentive to their customers. As part of our due diligence, Staff analyzed the following options:

- Setting the NSC rate at parity to the utility's NSC rate.
  - Staff did not recommend this option at it does not provide an incentive for customers to stay with SDCP and does not differentiate between us and the utility.
- Setting the NSC rate at double the utility's NSC rate.
  - Staff is not recommending this option as it will superficially inflate the value of electricity exported and expose our customers to millions of dollars in payment obligations.
- Compensating NEM customers at their retail credit balance.
  - Staff is not recommending this option as it may compensate customers that are not annual net generators of electricity.

Adopting the Staff recommended NSC rate could potentially result in over \$2.8 million in payment obligations to net generating customers. This is a conservative estimate determined by using the maximum SDG&E NSC rate in the last three years (\$0.04452/kWh) plus the \$0.0075/kWh adder. The actual yearly payments to customers will vary depending on several factors including weather, system size, customer behavior, electrification measures, the wholesale market cost of electricity, and the month the customer trues-up. Fiscal impact is discussed in more detail below.

## 2. Establishing an SDCP Net Surplus Compensation Limit:

To protect SDCP and limit the financial risks and impacts to our customers, Staff is recommending the adoption of a Net Surplus Compensation Limit of \$2,500 per account per relevant period. This would mean that individual NEM accounts would not receive more than \$2,500 in compensation for net generation. However, if a customer has multiple NEM accounts, each of those accounts would be limited to \$2,500.

Example: Customer Inc. has two NEM accounts eligible for \$2,500 in compensation. Total paid to customer is \$5,000 (\$2,500 x 2 accounts).

Staff evaluated the compensation limits of other CCAs and found most had a \$5,000 per account per year limit. Staff is recommending a \$2,500 per account per relevant period compensation limit due to the significantly larger number of NEM accounts served by SDCP and the growing number of rooftop solar installations in our area. The compensation limit protects SDCP from volatile wholesale market prices and therefore volatile NSC rates.

Our net generating customers will rarely, if ever, approach the compensation limit. As noted earlier, on average, net generators export 1,770 kWh per relevant period, resulting in an average compensation of \$100.

## 3. Standardizing Settlement & Billing Method:

The current Net Energy Metering Program Policy adopted by the Board in December 2020 makes a distinction between residential and commercial customers when it comes to settlements and billing:

- Residential customers settled and billed on an annual basis.
  - Consumption charges and generation credits are calculated, tracked, and accrued over their 12-month relevant period. At the end of their relevant period, they are trued-up and required to pay any accrued charges in excess of generation credits.
- Commercial customers settled and billed on a monthly basis.
  - Consumption charges and generation credits are calculated, billed, and required to be paid monthly. Any accrued generation credits are applied to the next month's charges. Any remaining generation credits are carried forward to subsequent billing cycle(s) until either the credits are exhausted by consumption charges or an account true-up is performed.

Staff recommends that the Board standardize NEM settlement and billing for all customer classes to a monthly process as described for commercial customers but offer yearly settlement and billing as an option for customers that elect to enroll.

The monthly settlement and billing method is more customer-centric as it allows customers that are net consumers (66% of our NEM accounts) to pay smaller monthly statements instead of one large bill for an entire year's worth of usage. This avoids the bill shock that net consumers can experience when they get their true-up bill and will reduce the potential risk of NEM customers opting out due to the misconception of SDCP increasing their bills.

Monthly settlement and billing align all customer classes to one settlement and billing method, thus simplifying the message to customers.

The Community Advisory Committee suggested, and the Finance and Risk Management Committee recommended, continuing to offer yearly settlement and annual billing to residential NEM customers as an option. All NEM customers would switch to monthly settlement and billing for SDCP generation charges but for those residential customers that wanted to continue receiving yearly settlement and billing statements could elect to do so by notifying SDCP.

# 4. <u>Delegation of authority to amend the NEM Program Policy consistent with Board actions:</u>

With all the Staff recommendations to our existing NEM program as articulated above, the NEM Program Policy that was adopted by the Board in December 2020 will also need to be updated. Therefore, Staff is recommending that the Board delegate authority to the CEO or his designee to amend the NEM Program Policy to reflect the recommended changes should they be approved by the Board in this session.

Attachment A shows the proposed changes to the NEM Program Policy should the Board adopt Staff's recommendation.

## **COMMITTEE REVIEW**

The Community Advisory Committee reviewed and discussed the proposed Net Surplus Compensation Rate, the compensation limit, and the monthly settlement and billing for all NEM customers.

The Committee agreed that the proposed method for setting the Net Surplus Compensation rate was reasonable.

With regards to the Net Surplus Compensation limit of \$2,500 per account per year/relevant period, the Committee agreed that the limit was reasonable.

With regards to the monthly settlement and billing for all NEM customers, the Committee was supportive of the change. Originally, Staff had presented this as monthly "true-up" but changed the wording to "settlement" to better reflect actual mechanics. There was discussion surrounding the effect the change may have for customers with winter month true ups. They suggested offering a yearly settlement and billing true-up for customers that wanted to elect that option if the backend billing ability existed.

The Finance and Risk Management Committee reviewed Staff's proposal and supported the staff recommendations.

## **FISCAL IMPACT**

Using data provided by Pacific Energy Advisors, staff analyzed a few compensation scenarios. Using the highest SDG&E NSC rate in the last year and adding the \$0.0075/kWh adder, Staff estimated that SDCP could potential pay approximately \$2.8 million in net surplus compensation. This is a conservative estimate as it assumes:

- 1. A NSC rate of \$0.05202/kWh
- 2. All net generators receiving cash (check) payment
- 3. All net generators trueing-up and being compensated at the same time.

Using May 2021 SDG&E's NSC of \$0.02702/kWh plus the \$0.0075/kWh adder, Staff estimates approximately \$1.86 million in net surplus compensation. Looking at the 10-year average of SDG&E's NSC of \$0.03570/kWh plus our adder, Staff estimates approximately \$2.33 million in net surplus compensation.

Actual compensation amount will vary depending on several factors including, number of NEM accounts, number of NEM accounts that are net generators, amount of electricity net generated, wholesale prices of electricity, month of true-up, customer system size, customer behavior, and weather. Staff is working to establish projects for compensation estimates before Phase 3 enrollment.

#### **ATTACHMENTS**

Attachment A: NEM Program Policy Upd. 05-27-21



## **Net Energy Metering Program Policy**

**Updated: May 27, 2021** 

#### A. PURPOSE

The Purpose of this Net Energy Metering (NEM) Program Policy (Policy) is to provide a process for how Net Energy Metering (commonly referred to as rooftop solar) customers are enrolled with San Diego Community Power (SDCP).

## **B. APPLICABILITY**

Customers enrolled in San Diego Gas & Electric's (SDG&E) Net Energy Metering Program (SDG&E NEM) will be automatically enrolled in SDCP's NEM Program. Phase-in will occur as stated in Section D below. The Program is applicable for all NEM customers who have Renewable Generation Facilities such as rooftop solar. The facility must be eligible under SDG&E's Schedule NEM – Net Energy Metering or similar tariff option(s) focused on NEM, which may be amended or replaced by SDG&E from time to time. Each customer's eligible Renewable Generating Facility must fall within the capacity limits described in SDG&E's Schedule NEM and must be located on the customer's owned, leased, or rented premises, must be interconnected and operated in parallel with SDG&E's transmission and distribution systems, and must be intended primarily to offset part or all of the customer's own electrical requirements.

This rate schedule will be available on a first-come, first-served basis to customers that provide SDG&E with a completed SDG&E NEM Application and comply with all SDG&E NEM requirements as described in SDG&E's Schedule NEM. This includes, but is not limited to, customers served by NEM-V (Virtual Net Energy Metering), VNM-A (Virtual Net Energy Metering for Multifamily Affordable Housing), VNEM-SOMAH (Virtual Net Energy Metering - Solar on Multifamily Affordable Housing) and Multiple Tariff facilities as described by SDG&E's Schedule NEM.

#### C. TERRITORY

SDCP service area.

## D. INITIAL PHASE-IN

SDCP will phase its NEM customers into service on a monthly basis starting in Phase 3 of Customer Launch. The transition will occur at the conclusion of a NEM customer's relevant period with SDG&E. This approach is to minimize any impacts from when the SDG&E NEM customers' true-ups occur and when SDCP's service begins.

#### E. RATES

All rates charged under this schedule will be in accordance with the customer's otherwise applicable SDCP rate schedule (OAS). A customer served under this schedule is responsible for all charges from its OAS including monthly minimum charges, customer charges, meter charges, facilities charges, demand charges and surcharges, and all other charges owed to SDCP or SDG&E. Charges for energy (kWh) supplied by SDCP will be based on the net metered usage in accordance with this tariff.

#### F. BILLING

1. For a customer with Non-Time of Use (TOU) Rates: If the customer is a "Net Consumer," having overall positive usage during a specific billing cycle, the customer will be billed in accordance with the customer's OAS. If the customer is a "Net Generator,"

having overall negative usage during a specific billing cycle, any net energy production shall be valued in consideration of the customer's OAS. The calculated value of any net energy production shall be credited to the customer according to the OAS.

- 2. For a customer with TOU Rates: If the customer is a Net Consumer during any discrete TOU period reflected within a specific billing cycle, the net kWh consumed during such TOU period shall be billed in accordance with applicable TOU period-specific rates / charges, as described in the customer's OAS. If the customer is a Net Generator during any discrete TOU period reflected within a specific billing cycle, any net energy production shall be valued in consideration of the customer's OAS. The calculated value of such net energy production shall be credited to the customer according to the OAS.
- 3. Monthly Settlement and Billing: All NEM customers will receive a statement in its monthly SDG&E bill indicating any accrued charges for electric energy usage during the current billing cycle. These charges are due and payable on a monthly basis, in accordance with the OAS. A customer who has accrued credits during previous billing cycles will see such credits applied against currently applicable charges, reducing otherwise applicable charges by an equivalent amount to such credits. Any remaining balance reflected on each customer's billing statement shall be carried forward to subsequent billing cycle(s) until either excess credit is sufficient to satisfy the charges or an account true-up is performed. When a customer's net energy production results in an accrued credit balance in excess of currently applicable charges, the value of any net energy production during the billing cycle (in excess of currently applicable charges) shall be valued at the OAS and noted on the customer's bill, including the quantity of any surplus NEM production (measured in kWh), and carried over as a bill credit for use in a subsequent billing cycle(s).
- 4. Optional Yearly Settlement and Billing: Residential customers, as determined by their OAS, may elect to receive yearly settlement and billing by notifying SDCP. They will receive a statement in its monthly SDG&E bill indicating any accrued SDCP charges or credits for electric energy usage or generation during the current billing cycle. Charges are not due and payable; rather, the charges or credits are calculated in accordance with the OAS and tracked over the course of the relevant period. At the end of the relevant period, any accrued charges in excess of generation credits are due and payable on the next bill. If at the end of the relevant period a customer has excess generation credits, they will be paid out in accordance with the SDCP True-up & Cash-Out Process.

## 5. SDCP True-Up & Cash-Out Processes.

a. <u>True-Up</u>: At the end of each NEM customer's relevant period, SDCP will determine whether or not each customer has produced net surplus energy, as measured in kWh, over the most recent 12 billing cycles, or the period of time extending from the customer's commencement of participation in SDCP's NEM program through the end of their relevant period, whichever is shorter (the "True-Up Period"). If the customer has not produced net surplus NEM energy, as measured in kWh, during the True-Up Period, all NEM credits, if any, generated through participation in SDCP's NEM program in excess of currently applicable SDCP charges shall be set to zero and any remaining balance will be due and payable.

However, if a customer has produced net surplus NEM energy, as measured in kWh,

resulting in a credit balance in excess of currently applicable SDCP charges, then SDCP shall compensate such customer a Net Surplus Compensation (NSC) amount equal to the SDCP NSC Rate per kWh, as defined in Section F.5.a.1, multiplied by the quantity of net surplus NEM energy produced by the customer during the True-Up Period, consistent with SDCP's Cash-Out practice.

- 1. SDCP's NSC Rate is equal to the monthly SDG&E's NSC, which is defined by the California Public Utilities Commission as "a simple rolling average of each utility's Default Load Aggregation Point (DLAP) price from 7 a.m. to 5 p.m.", and "calculated monthly based on the hourly day-ahead electricity market price at each utility's DLAP price published on the California Independent System Operator (CAISO) Open Access Same-Time Information System (OASIS,) and ending the twentieth day of each month", of the customer true-up month plus \$0.0075/kWh.
- b. <u>Cash-Out and Payment</u>: At the end of each customer's relevant period, any current customer with an accrued net surplus compensation equal to or greater than \$100, as determined during the applicable True-Up process, will be sent a direct payment by check, up to \$2,500 per account per relevant period. Net surplus compensation less than \$100 will be rolled over into the next relevant period and used to offset future charges. In either scenario, customers will have an equivalent credit removed from their NEM account balance at the time of check issuance or roll-over. All NEM accounts will be reset to zero kWh upon True-up.
  - Payments will be released up to 30 days after true-up billing. Checks will expire 90 calendar days after issuance. If checks expire or are returned to SDCP, customers may request the reissuance of a check and SDCP will make a reasonable effort to reissue the check within 30 days of a customer's request.
- c. <u>Aggregated NEM</u>: Pursuant to California Public Utilities Commission Section 2827(h)(4)(B), aggregated NEM customers are "permanently ineligible to receive net surplus electricity compensation." Therefore, any excess accrued credits over the course of a year under an aggregated NEM account are ineligible for SDCP's Cash-Out as described in Section 5. All other NEM rules apply to aggregated NEM accounts.

#### G. ACCOUNT CLOSURES

Customers who close their electric account through SDG&E, opt out of SDCP and return to bundled service, or move outside of the SDCP service area prior to the end of their relevant period will be trued up according to SDCP's NEM policy. Customer that have produced net surplus NEM energy, as measured in kWh, will be paid out in accordance with the SDCP True-up & Cash-Out Process. Payments will be released 30 days after final billing to allow for any usage revisions and/or adjustments from SDG&E. Checks will expire 90 calendar days after issuance. If checks expire or are returned to SDCP, customers may request the reissuance of a check and SDCP will make a reasonable effort to reissue the check within 30 days of a customer's request. If customer did not produced net surplus NEM energy, as measured in kWh,they will not receive a direct payment.

SDCP reserves the right to work with customers on a case-by-case basis to transfer NEM credits.

## H. SDG&E NEM SERVICES

Customers are subject to the conditions and billing procedures of SDG&E for their non-generation services, as described in SDG&E's applicable NEM tariffs and options addressing NEM service. Customers should be advised that while SDCP may settle out balances for generation on a monthly basis, SDG&E will continue to assess charges for delivery, transmission and other services. Customers are encouraged to review SDG&E's most up-to-date NEM tariffs, which are available at <a href="https://www.sdge.com">www.sdge.com</a>.

#### I. RETURN TO SDG&E BUNDLED SERVICE

Customers with NEM service may opt-out and return to SDG&E bundled service at any time. SDCP will perform a true-up of their account, in consideration of Section 5, at the time of return to SDG&E bundled service, and customers will be subject to SDG&E's then current rates, terms and conditions of service. For details, please visit <a href="https://www.sdge.com">www.sdge.com</a>.



# SAN DIEGO COMMUNITY POWER Staff Report – Item 14

To: San Diego Community Power Board of Directors

From: Laura Fernandez, Director of Regulatory and Legislative Affairs

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Review and Provide Direction to Staff on Legislative Position for AB 1139

Date: May 27, 2021

#### RECOMMENDATIONS

1. Receive and File the Community Advisory Committee's Recommended Position on Assembly Bill (AB) 1139

2. Adopt a Position on AB 1139

#### **BACKGROUND**

Assemblywoman Lorena Gonzalez (D-San Diego) is the author of <u>AB 1139</u>. This bill would require the California Public Utilities Commission (CPUC) to develop a replacement for the Net Energy Metering (NEM) 2.0 tariff, and would require that the large investor-owned utilities (IOUs) offer the new standard contract or tariff beginning no later than December 31, 2023. The bill would also require that a customer that receives service pursuant to the existing statutory NEM tariffs (1.0/2.0) be transferred to the replacement tariff no later than 10 years from the date that customer first received service pursuant to those tariffs. The bill would also eliminate the requirement that the replacement tariff ensure that customer-sited renewable distributed generation continues to grow sustainably. In developing the new standard contract or tariff, the CPUC is required to ensure that there are specific alternatives designed for growth among residential customers in disadvantaged communities.

If the CPUC fails to adopt a replacement NEM tariff by February 1, 2022, this bill would require the CPUC to develop a successor NEM tariff to take effect no later than December 31, 2023, that does specified things, including having interconnection fees and monthly fixed charges based on the cost to interconnect and serve the eligible customer and crediting the eligible customer for any electricity exported to the electrical grid at a rate equal to the hourly wholesale market rate applicable at the time of the export and at the location of the eligible customer.

## **COMMITTEE REVIEW**

AB 1139 was most recently discussed by the Community Advisory Committee on May 14, 2021. The Committee voted unanimously to recommend that the SDCP Board of Directors take a formal "oppose" position on AB 1139. The Community Advisory Committee is concerned that AB 1139 will kill the rooftop solar industry since it would eliminate the 20-year NEM grandfathering protections for 1.2 million California solar customers.

## **ANALYSIS AND DISCUSSION**

Staff supports the recommendation of the Community Advisory Committee.

## **FISCAL IMPACT**

N/A



# SAN DIEGO COMMUNITY POWER Staff Report – Item 15

To: San Diego Community Power Board of Directors

From: Byron Vosburg, Director of Power Services

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Renewable Power Purchase Agreement with IP Oberon, LLC.

Date: May 27, 2021

## RECOMMENDATION

Approve the Long-term Renewable Power Purchase Agreement with IP Oberon, LLC and authorize the Interim CEO to execute the agreement.

#### **BACKGROUND**

As SDCP strives to meet its environmental, financial, and regulatory compliance goals and requirements, long-term power purchase agreements (PPAs) of at least 10 years in duration will become integral components of its energy supply portfolio. Long-term PPAs provide renewable generation facility developers with the certain revenue stream against which they can finance up-front capital requirements, so each long-term PPA that SDCP signs with a developing facility will underpin a new, incremental renewable energy project. In addition, long-term PPAs lock in renewable energy supply around which SDCP can build its power supply portfolio while also providing power supply cost certainty around which SDCP can develop its pro forma financial model.

In response to last year's Long-term Renewable Energy Request for Offers (RFO), SDCP staff received offers from thirty-two suppliers or developers to purchase renewable energy from eighty-four unique project configurations. Staff reviewed these responses with the Ad Hoc Contracts Committee on August 4, 2020 and narrowed them down on August 18, 2020 to a "short-list" of potential projects with which to enter PPA negotiations. Staff reviewed three of these PPAs with the Finance and Risk Management Committee on April 15, 2021. The Vikings Energy Farm PPA was approved by the SDCP Board and executed last month; this month, we present for your review the remaining two PPAs with IP Oberon and JVR Energy Park. Together, these three PPAs represent a combined 340 MW of solar and 220 MW of storage capacity to be developed in Southern California. Generation from these three projects is expected to total 990,000 MWh per year, which is enough to serve approximately 200,000 SDCP customer households.

#### **ANALYSIS AND DISCUSSION**

Staff negotiated the attached PPA for the purchase of renewable energy from IP Oberon, which is a solar project to be developed just outside of Desert Center, CA in Riverside County by Intersect Power, LLC ("Intersect" or "IP").

The project has a guaranteed capacity of 150 MW of solar production capacity. As previously reviewed with the Ad Hoc Contracts Committee, the contract offers competitive energy pricing.

Renewable energy produced by the facility will be an important ~460 GWh/year foundational block of long-term renewable energy deliveries within SDCP's power supply portfolio (~6,000 GWh/year once fully enrolled).

Below is additional information regarding Intersect Power and the draft PPA.

Background – Intersect Power

- Headquartered in San Francisco, CA
- Established in 2016
- Developed 1.7 GW of utility-scale solar in CA and TX
  - Team members have developed 3.7 GW (over 60 projects) of utility-scale solar
- Additional 3 GW in development pipeline in California and Texas

## Contract Overview - IP Oberon, LLC

- Project: 150 MW Solar
- Project location: Desert Center, Riverside County, CA
- Guaranteed commercial operation date: June 30, 2023
- Contract term: 15 years
- Expected annual energy production: approximately 460,000 MWh (equivalent power for approximately 92,000 homes)
- Guaranteed energy production: 85% of projected annual deliveries
- Energy price:
  - Solar Fixed energy price applicable to the full term of the agreement
- No credit or collateral obligations for SDCP
- SDCP would receive financial compensation in the event of seller's failure to successfully achieve certain development milestones

#### **COMMITTEE REVIEW**

This item was recommended for Board approval by the Finance and Risk Management Committee on April 15, 2021.

## FISCAL IMPACT

The competitive energy pricing of the PPA is confidential, but the long-term purchase of renewable energy will provide SDCP with significant value and cost certainty over the term of this PPA

## **ATTACHMENTS**

Attachment A: Renewable Power Purchase Agreement with IP Oberon, LLC

## RENEWABLE POWER PURCHASE AGREEMENT

## **COVER SHEET**

Seller: IP Oberon, LLC, a Delaware limited liability company

**Buyer**: San Diego Community Power, a California joint powers authority

**Description of Facility**: 150 MWac Solar Photovoltaic Generating Facility

## **Milestones**:

Milestone	<b>Date for Completion</b>
Evidence of Site Control	Complete
<b>Executed Interconnection Agreement</b>	Complete
CEC Pre-Certification Obtained	12/30/2021
BLM Decision Record	6/30/2022
Network Upgrades Completed	6/30/2023
<b>Expected Construction Start Date</b>	8/30/2022
<b>Guaranteed Construction Start Date</b>	9/30/2022
Initial Synchronization	5/31/2023
<b>Expected Commercial Operation Date</b>	6/30/2023
<b>Guaranteed Commercial Operation Date</b>	6/30/2023

**<u>Delivery Term</u>**: The period for Product delivery will be for fifteen (15) Contract Years.

## **Expected Energy**:

Contract Year	Expected Energy (MWh)
1	
2	
3	
4	
5	

6	
7	
8	
9	
10	
11	
12	
13	
14	
15	

**Guaranteed Capacity**: 150 MWac

**Delivery Point**: Facility PNode

## **Contract Price**:

The Contract Price shall be the sum of the Energy Price (as defined herein) and the REC Rate (as set forth below).

Contract Year	REC Rate
1 – 15	\$REC

### **Product**:

$\boxtimes$	PV Energy
	Wind Energy
	Energy*
$\boxtimes$	Green Attributes (Portfolio Content Category 1)
	Capacity Attributes (select options below as applicable)
	Energy Only Status
	Full Capacity Deliverability Status (completed)
	Bridge Product
	<u> </u>

**Scheduling Coordinator**: Seller

**<u>Development Security</u>**: As set forth in Section 8.7

**Performance Security**: \$ /kW of Guaranteed Capacity

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#### RENEWABLE POWER PURCHASE AGREEMENT

This Renewable Power Purchase Agreement ("<u>Agreement</u>") is entered into as of \_\_\_\_\_\_\_, 2021 (the "<u>Effective Date</u>"), between San Diego Community Power, a California joint powers authority ("<u>Buyer</u>") and IP Oberon, LLC, a Delaware limited liability company ("<u>Seller</u>"). Buyer and Seller are sometimes referred to herein individually as a "<u>Party</u>" and jointly as the "<u>Parties</u>." All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

#### RECITALS

WHEREAS, Seller intends to develop, design, permit, construct, own or otherwise control, and operate the Facility; and

WHEREAS, Seller desires to sell, and Buyer desires to purchase, on the terms and conditions set forth in this Agreement, the Product;

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

### ARTICLE 1 DEFINITIONS

- 1.1 <u>Contract Definitions</u>. The following terms, when used herein with initial capitalization, shall have the meanings set forth below:
  - "AC" means alternating current.
  - "Accepted Compliance Costs" has the meaning set forth in Section 3.12(c).
  - "Adjusted Energy Production" has the meaning set forth in Exhibit G.
- "Affiliate" means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes of this definition and the definition of "Permitted Transferee", "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least fifty percent (50%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least fifty percent (50%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.

"<u>Agreement</u>" has the meaning set forth in the Preamble and includes any Exhibits, schedules and any written supplements hereto, the Cover Sheet, and any designated collateral, credit support or similar arrangement between the Parties.

- "Available Generating Capacity" means the capacity of the Generating Facility, expressed in whole MWs, that is mechanically available to generate Energy.
- "Bankrupt" means with respect to any entity, such entity that (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar Law, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (f) is generally unable to pay its debts as they fall due.
- "<u>Business Day</u>" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 a.m. and ends at 5:00 p.m. local time for the Party sending a Notice, or payment, or performing a specified action.
  - "Buyer" means San Diego Community Power, a California joint powers authority.
- "<u>Buyer Default</u>" means a failure by Buyer (or its agents) to perform Buyer's obligations hereunder, and includes an Event of Default of Buyer.
  - "Buyer's WREGIS Account" has the meaning set forth in Section 4.6(a).
- "<u>CAISO</u>" means the California Independent System Operator Corporation or any successor entity performing similar functions.
- "<u>CAISO Approved Meter</u>" means a CAISO approved revenue quality meter or meters, CAISO approved data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, all Facility Energy delivered to the Delivery Point.
- "CAISO Grid" has the same meaning as "CAISO Controlled Grid" as defined in the CAISO Tariff.
- "<u>CAISO Operating Order</u>" means the "operating order" defined in Section 37.2.1.1 of the CAISO Tariff.
- "CAISO Tariff" means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.
- "California Renewables Portfolio Standard" or "RPS" means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.

- "Capacity Damages" has the meaning set forth in Exhibit B.
- "<u>CEC</u>" means the California Energy Commission, or any successor agency performing similar statutory functions.
- "CEC Certification and Verification" means that the CEC has certified (or, with respect to periods before the date that is one hundred eighty (180) days following the Commercial Operation Date, that the CEC has pre-certified, as such date may be extended pursuant to Section 3.9) that the Generating Facility is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Facility Energy delivered to the Delivery Point qualifies as generation from an Eligible Renewable Energy Resource.
- "<u>CEC Precertification</u>" means that the CEC has issued a precertification for the Facility indicating that the planned operations of the Facility would comply with applicable CEC requirements for CEC Certification and Verification.
  - "CEQA" means the California Environmental Quality Act.
  - "Claim" has the meaning set forth in Section 16.2.
  - "COD Certificate" has the meaning set forth in Exhibit B.
  - "Collateral Assignment Agreement" has the meaning set forth in Section 14.2.
  - "Commercial Operation" has the meaning set forth in Exhibit B.
  - "Commercial Operation Date" has the meaning set forth in Exhibit B.
- "Commercial Operation Delay Damages" means an amount equal to (a) the Development Security amount required hereunder, divided by (b) one hundred twenty (120).
  - "Compliance Actions" has the meaning set forth in Section 3.12(b).
  - "Compliance Expenditure Cap" has the meaning set forth in Section 3.12(a).
  - "Confidential Information" has the meaning set forth in Section 18.1.
  - "Construction Start" has the meaning set forth in Exhibit B.
  - "Construction Start Date" has the meaning set forth in Exhibit B.
- "Contract Price" has the meaning set forth on the Cover Sheet. To be clear, the Contract Price is equal to the sum of the REC Rate and the Energy Price.
  - "Contract Term" has the meaning set forth in Section 2.1.

- "Contract Year" means a period of twelve (12) consecutive months. The first Contract Year shall commence on the Commercial Operation Date and each subsequent Contract Year shall commence on the anniversary of the Commercial Operation Date.
- "Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the Agreement; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with terminating the Agreement.
- "Cover Sheet" means the cover sheet to this Agreement, which is incorporated into this Agreement.
- "COVID-19" means the epidemic disease designated COVID-19 and the related virus designated SARS-CoV-2 and any mutations thereof, and the efforts of a Governmental Authority to combat such disease.
  - "COVID-19 Delay" has the meaning set forth in Section 10.1(a).
- "CPUC" means the California Public Utilities Commission or any successor agency performing similar statutory functions.
- "Credit Rating" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by S&P or Moody's. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

#### "Curtailment Order" means any of the following:

- (a) CAISO orders, directs, alerts, or provides notice to a Party, including a CAISO Operating Order, that such Party is required to curtail deliveries of Facility Energy for the following reasons: (i) any System Emergency, or (ii) any warning of an anticipated System Emergency, or warning of an imminent condition or situation, which jeopardizes CAISO's electric system integrity or the integrity of other systems to which CAISO is connected;
- (b) a curtailment ordered by the Participating Transmission Owner for reasons including, but not limited to, (i) any situation that affects normal function of the electric system including, but not limited to, any abnormal condition that requires action to prevent circumstances such as equipment damage, loss of load, or abnormal voltage conditions, or (ii) any warning, forecast or anticipation of conditions or situations that jeopardize the Participating Transmission Owner's electric system integrity or the integrity of other systems to which the Participating Transmission Owner is connected;
- (c) a curtailment ordered by CAISO or the Participating Transmission Owner due to scheduled or unscheduled maintenance on the Participating Transmission Owner's transmission facilities that prevents (i) Buyer from receiving or (ii) Seller from delivering Facility Energy to the Delivery Point; or

- (d) a curtailment in accordance with Seller's obligations or limitations under its Interconnection Agreement with the CAISO, Participating Transmission Owner or distribution operator, or other limitations on transfer capability under the Interconnection Agreement.
  - "Curtailed Energy" has the meaning set forth in Section 3.1.
- "<u>Curtailment Period</u>" means the period of time, as measured using current Settlement Intervals, during which Facility Energy from the Facility is reduced pursuant to a Curtailment Order; <u>provided</u> that the Curtailment Period shall be inclusive of the time required for the Generating Facility to ramp down and ramp up.
- "<u>Daily Delay Damages</u>" means an amount equal to (a) the Development Security amount required hereunder, divided by (b) one hundred twenty (120).
- "<u>Damage Payment</u>" means the dollar amount that equals the amount of the Development Security.
  - "Day-Ahead Market" has the meaning set forth in the CAISO Tariff.
  - "Day-Ahead Schedule" has the meaning set forth in the CAISO Tariff.
  - "<u>Defaulting Party</u>" has the meaning set forth in Section 11.1(a).
  - "<u>Deficient Month</u>" has the meaning set forth in Section 4.6(e).
  - "Delivery Point" has the meaning set forth in Exhibit A.
- "<u>Delivery Term</u>" shall mean the period of Contract Years set forth on the Cover Sheet beginning on the Commercial Operation Date, unless terminated earlier in accordance with the terms and conditions of this Agreement.
  - "Development Cure Period" has the meaning set forth in Exhibit B.
- "<u>Development Security</u>" means (i) cash or (ii) a Letter of Credit or (iii) in the sole discretion of Buyer, a Guaranty, in the amount set forth on the Cover Sheet.
  - "<u>Disclosing Party</u>" has the meaning set forth in Section 18.2.
  - "Early Termination Date" has the meaning set forth in Section 11.2(a).
  - "Effective Date" has the meaning set forth on the Preamble.
- "<u>Electrical Losses</u>" means all transmission or transformation losses between the Facility and the Delivery Point.
- "<u>Eligible Renewable Energy Resource</u>" has the meaning set forth in California Public Utilities Code Section 399.12(e) and California Public Resources Code Section 25741(a), as either code provision is amended or supplemented from time to time.

- "Energy" means electrical energy generated by the Generating Facility.
- "Energy Price" means, with respect to any Settlement Period, the LMP at the Delivery Point for such Settlement Period.
  - "Event of Default" has the meaning set forth in Section 11.1.
- "<u>Executed Interconnection Agreement Milestone</u>" means the date for completion of execution of the Interconnection Agreement by Seller and the PTO as set forth on the Cover Sheet.
- "Expected Commercial Operation Date" is the date set forth on the Cover Sheet by which Seller reasonably expects to achieve Commercial Operation.
- "Expected Construction Start Date" is the date set forth on the Cover Sheet by which Seller reasonably expects to achieve Construction Start.
- "<u>Expected Energy</u>" means the quantity of Energy that Seller expects to be able to deliver to Buyer from the Generating Facility during each Contract Year or other time period in the quantity specified on the Cover Sheet.
  - "Facility" means the Generating Facility.
- "<u>Facility Energy</u>" means PV Energy during any Settlement Interval or Settlement Period, net of Electrical Losses and Station Use, as measured by the Facility Meter, which Facility Meter will be adjusted in accordance with CAISO meter requirements and Prudent Operating Practices to account for Electrical Losses and Station Use.
- "<u>Facility Meter</u>" means the CAISO Approved Meter that will measure all Facility Energy.
- "<u>FERC</u>" means the Federal Energy Regulatory Commission or any successor government agency.
  - "Force Majeure Event" has the meaning set forth in Section 10.1.
- "<u>Forced Facility Outage</u>" means an unexpected failure of one or more components of the Facility that prevents Seller from generating Energy or making Facility Energy available at the Delivery Point and that is not the result of a Force Majeure Event.
  - "Forward Certificate Transfers" has the meaning set forth in Section 4.6(a).
- "<u>Future Environmental Attributes</u>" shall mean any and all emissions, air quality or other environmental attributes (other than Green Attributes or Renewable Energy Incentives) under the RPS regulations or under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision,

administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable, now, or in the future, to the generation of electrical energy by the Facility and its displacement of conventional energy generation. Future Environmental Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) Tax Credits associated with the construction or operation of the Facility, or 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, (iv) emission reduction credits encumbered or used by the Facility for compliance with local, state, or federal operating and/or air quality permits or (v) benefits related to habitat, tribes, or soil carbon sequestration.

"Gains" means, 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 this Agreement for the remaining Contract Term, determined in a commercially reasonable manner. Factors used in determining the economic benefit to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., SP-15), all of which should be calculated for the remaining Contract Term, and include the value of Green Attributes.

"Generating Facility" means the solar photovoltaic generating facility described on the Cover Sheet and in Exhibit A, located at the Site and including mechanical equipment and associated facilities and equipment required to deliver Energy to the Delivery Point; provided, that the "Generating Facility" does not include any energy storage facilities interconnected into, or co-located with the solar photovoltaic generating facility or the Shared Facilities.

"Governmental Authority" means any federal, state, provincial, local or municipal government, any political subdivision thereof or any other governmental, congressional or parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau, or entity with authority to bind a Party at law, including CAISO; *provided*, *however*, that "Governmental Authority" shall not in any event include any Party.

"Green Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Facility and its displacement of conventional energy generation. Green Attributes include but are not limited to Renewable Energy Credits, as well as: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or

otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Tags are accumulated on a MWh basis and one Green Tag represents the Green Attributes associated with one (1) MWh of Energy. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) 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 the Facility for compliance with local, state, or federal operating or air quality permits. If the Facility is a biomass or landfill gas facility and Seller receives any tradable Green Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Facility.

"Green Tag Reporting Rights" means the right of a purchaser of renewable energy to report ownership of accumulated "green tags" in compliance with and to the extent permitted by applicable Law and include, without limitation, rights under Section 1605(b) of the Energy Policy Act of 1992, and any present or future federal, state or local certification program or emissions trading program, including pursuant to the WREGIS Operating Rules.

"Guaranteed Capacity" means the amount of generating capacity of the Generating Facility, as measured in MW at the Delivery Point, set forth on the Cover Sheet, as the same may be adjusted pursuant to Section 5(a) of Exhibit B.

"Guaranteed Commercial Operation Date" means the Expected Commercial Operation Date, as such date may be extended by the Development Cure Period.

"<u>Guaranteed Construction Start Date</u>" means the Expected Construction Start Date, as such date may be extended by the Development Cure Period.

"<u>Guaranteed Energy Production</u>" means an amount of Facility Energy, as measured in MWh, equal to the product of the Guaranteed Energy Production Percentage and the total Expected Energy (as set forth on the Cover Sheet) for the applicable Performance Measurement Period.

#### "Guaranteed Energy Production Percentage" means 85%.

"Guarantor" means, with respect to Seller, (a) a Person that is reasonably acceptable to Buyer, or (b) any Person that (i) Buyer does not already have any material credit exposure to under any other agreements, guarantees, or other arrangements at the time its Guaranty is issued, (ii) has an Investment Grade Credit Rating, (iii) has a tangible net worth of at least One Hundred Fifty Million Dollars (\$150,000,000), (iv) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (v) executes and delivers a Guaranty for the benefit of Buyer.

- "<u>Guaranty</u>" means a guaranty from a Guarantor provided for the benefit of Buyer substantially in the form attached as <u>Exhibit L</u>.
- "Imbalance Energy" means the amount of energy in MWh, in any given Settlement Period or Settlement Interval, by which the amount of Facility Energy deviates from the amount of Scheduled Energy.
  - "Indemnifiable Loss(es)" has the meaning set forth in Section 16.1.
  - "Indemnified Group" has the meaning set forth in Section 16.1.
- "<u>Initial Synchronization</u>" means the initial delivery of Facility Energy to the Delivery Point.
  - "Installed Capacity" means the Installed PV Capacity.
- "<u>Installed PV Capacity</u>" means the actual PV generating capacity of the Generating Facility, as measured in MW(ac) at the Delivery Point, that achieves Commercial Operation, as demonstrated by a performance test, adjusted for ambient conditions on the date of the performance test, and evidenced by a certificate substantially in the form attached as <u>Exhibit I</u> hereto.
- "Interconnection Agreement" means the interconnection agreement entered into by Seller pursuant to which the Facility will be interconnected with the Transmission System, and pursuant to which Seller's Interconnection Facilities and any other Interconnection Facilities will be constructed, operated and maintained during the Contract Term.
- "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Facility with the Transmission System in accordance with the Interconnection Agreement.
  - "Interest Rate" has the meaning set forth in Section 8.2.
  - "<u>Inter-SC Trade</u>" or "<u>IST</u>" has the meaning set forth in the CAISO Tariff.
- "<u>Investment Grade Credit Rating</u>" means a Credit Rating of BBB- or higher by S&P or Fitch or Baa3 or higher by Moody's.
- "<u>ITC</u>" means the investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.
- "<u>Joint Powers Act</u>" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).
- "<u>Joint Powers Agreement</u>" means that certain Joint Powers Agreement, dated October 30, 2017, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.

"<u>Law</u>" means any applicable law, statute, rule, regulation, decision, writ, order, decree or judgment, permit or any interpretation thereof, promulgated or issued by a Governmental Authority.

"Lender" means, collectively, any Person (i) providing senior or subordinated development, construction, interim, back leverage or long-term debt, tax equity financing or refinancing for or in connection with the development, construction, purchase, installation or operation of the Facility, whether that financing or refinancing takes the form of private debt (including back-leverage debt or portfolio financing), equity (including tax equity), public debt or any other form (including financing or refinancing provided to a member or other direct or indirect owner of Seller), including any Person directly or indirectly providing financing or refinancing for the Facility, and any trustee or agent or similar representative acting on their behalf, (ii) providing interest rate or commodity protection under an agreement hedging or otherwise mitigating the cost of any of the foregoing obligations, (iii) providing a letter of credit or other credit support for Seller's obligations under this Agreement or (iv) participating in a lease financing (including a sale leaseback or leveraged leasing structure) with respect to the Facility.

"Letter(s) of Credit" means one or more irrevocable, standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank (a) having a Credit Rating of at least BBB from S&P or Baa2 from Moody's or (b) being reasonably acceptable to Buyer, in a form substantially similar to the letter of credit set forth in Exhibit K.

"<u>Licensed Professional Engineer</u>" means an independent, professional engineer selected by Seller and reasonably acceptable to Buyer, licensed in the State of California.

"Locational Marginal Price" or "LMP" has the meaning set forth in the CAISO Tariff.

"Losses" means, 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 termination of this Agreement for the remaining Contract Term, determined in a commercially reasonable manner. Factors used in determining economic loss to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., SP-15), all of which should be calculated for the remaining Contract Term and must include the value of Green Attributes and Renewable Energy Incentives.

"Lost Output" has the meaning set forth in Section 4.5.

"Major Project Development Milestone" has the meaning set forth in Exhibit B.

"Master File" has the meaning set forth in the CAISO Tariff.

"Metering Diagram" means the metering diagram attached hereto as Exhibit N.

- "<u>Milestones</u>" means the development activities for significant permitting, interconnection, financing and construction milestones set forth on the Cover Sheet.
  - "Monthly Delivery Forecast" has the meaning set forth in Section 4.3(b).
  - "Moody's" means Moody's Investors Service, Inc., or its successors.
- "<u>MW</u>" means megawatts in alternating current, unless expressly stated in terms of direct current.
- "<u>MWh</u>" means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.
- "<u>Negative LMP</u>" means, in any Settlement Interval, the Real-Time Market LMP at the Facility's PNode is less than
- "<u>NERC</u>" means the North American Electric Reliability Corporation or any successor entity performing similar functions.
  - "Network Upgrades" has the meaning set forth in the CAISO Tariff.
  - "Non-Defaulting Party" has the meaning set forth in Section 11.2.
- "<u>Notice</u>" shall, unless otherwise specified in the Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, or electronic messaging (e-mail).
  - "Notice of Claim" has the meaning set forth in Section 16.2.
- "<u>Participating Transmission Owner</u>" or "<u>PTO</u>" means an entity that owns, operates and maintains transmission or distribution lines and associated facilities or has entitlements to use certain transmission or distribution lines and associated facilities where the Facility is interconnected. For purposes of this Agreement, the Participating Transmission Owner is set forth in Exhibit A.
  - "Party" or "Parties" has the meaning set forth in the Preamble.
- "Performance Measurement Period" means each two (2) consecutive Contract Years commencing with the first Contract Year so that the first Performance Measurement Period shall include Contract Years 1 and 2. For the avoidance of doubt, Performance Measurement Periods shall overlap, so that if the first Performance Measurement Period is comprised of Contract Years 1 and 2, the second Performance Measurement Period shall be comprised of Contract Years 2 and 3, the third Performance Measurement Period shall be comprised of Contract Years 3 and 4, and so on; provided, however, that a new Performance Measurement Period shall begin following any Performance Measurement Period for which Seller pays any liquidated damages or provides any Replacement Green Attributes under Section 4.5. Thus, for example, if Seller pays any liquidated damages or provides any Replacement Green Attributes under Section 4.5.

for the Performance Measurement Period that is comprised of Contract Years 4 and 5, the next Performance Measurement Period shall be comprised of Contract Years 6 and 7.

"<u>Performance Security</u>" means (i) cash or (ii) a Letter of Credit or (iii) a Guaranty (if permitted by Buyer, in its sole discretion) in the amount set forth on the Cover Sheet.

"Performance Security Expiration Date" has the meaning set forth in Section 8.8.

"<u>Permitted Transferee</u>" means (i) any Affiliate of Seller or (ii) any entity that satisfies, or is controlled by another Person that satisfies, the following requirements:

- (a) A tangible net worth of not less than one hundred million dollars (\$100,000,000) or an Investment Grade Credit Rating; and
- (b) At least three (3) years of experience in the ownership and operations of power generation facilities and energy storage facilities similar to the Facility, or has retained a third-party with such experience to operate the Facility.

"Person" means any individual, sole proprietorship, corporation, limited liability company, limited or general partnership, joint venture, association, joint-stock company, trust, incorporated organization, institution, public benefit corporation, unincorporated organization, government entity or other entity.

"PNode" has the meaning set forth in the CAISO Tariff.

"Planned Outage" has the meaning set forth in Section 4.4(a).

"Portfolio Content Category" means PCC1, PCC2 or PCC3, as applicable.

"Portfolio Content Category 1" or "PCC1" means any Renewable Energy Credit associated with the generation of electricity from an Eligible Renewable Energy Resource consisting of the portfolio content set forth in California Public Utilities Code Section 399.16(b)(1), as may be amended from time to time or as further defined or supplemented by Law.

"<u>Portfolio Content Category 2</u>" or "<u>PCC2</u>" means any Renewable Energy Credit associated with the generation of electricity from an Eligible Renewable Energy Resource consisting of the portfolio content set forth in California Public Utilities Code Section 399.16(b)(2), as may be amended from time to time or as further defined or supplemented by Law.

"<u>Portfolio Content Category 3</u>" or "<u>PCC3</u>" means any Renewable Energy Credit associated with the generation of electricity from an Eligible Renewable Energy Resource consisting of the portfolio content set forth in California Public Utilities Code Section 399.16(b)(3), as may be amended from time to time or as further defined or supplemented by Law.

"Prevailing Wage Requirement" has the meaning set forth in Section 13.4.

"Product" has the meaning set forth on the Cover Sheet.

"Progress Report" means a progress report including the items set forth in Exhibit E.

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

"<u>PTC</u>" means the production tax credit established pursuant to Section 45 of the United States Internal Revenue Code of 1986.

"<u>PV Energy</u>" means Energy that is generated using photo-voltaic cells at the Generating Facility and delivered to the Delivery Point, net of Electrical Losses.

"Real-Time Market" has the meaning set forth in the CAISO Tariff.

"Receiving Party" has the meaning set forth in Section 18.2.

"Receiver" has the meaning set forth in Section 18.5.

"**REC Rate**" has the meaning set forth on the Cover Sheet.

"Remedial Action Plan" has the meaning in Section 2.4.

"Renewable Energy Credit" has the meaning set forth in California Public Utilities Code Section 399.12(h), as may be amended from time to time or as further defined or supplemented by Law.

"Renewable Energy Incentives" means: (a) all federal, state, or local Tax Credits or other Tax benefits associated with the construction, ownership, or production of electricity from the Facility (including credits under Sections 38, 45, 46 and 48 of the Internal Revenue Code of 1986, as amended); (b) any federal, state, or local grants, subsidies or other like benefits relating in any way to the Facility; and (c) any other form of incentive relating in any way to the Facility that is not a Green Attribute or a Future Environmental Attribute.

"Replacement Green Attributes" has the meaning set forth in Exhibit G.

"Requestor" has the meaning set forth in Section 18.5.

"<u>S&P</u>" means the Standard & Poor's Financial Services, LLC (a subsidiary of S&P Global Inc.) or its successor.

"<u>Schedule</u>" has the meaning set forth in the CAISO Tariff, and "<u>Scheduled</u>" has a corollary meaning.

"Scheduled Energy" means the Facility Energy that clears under the applicable CAISO market based on the final Day-Ahead Schedule, FMM Schedule (as defined in the CAISO Tariff), or any other financially binding Schedule, market instruction or dispatch for the Facility for a given period of time implemented in accordance with the CAISO Tariff.

"<u>Scheduling Coordinator</u>" or "<u>SC</u>" means an entity certified by the CAISO as qualifying as a Scheduling Coordinator pursuant to the CAISO Tariff for the purposes of undertaking the functions specified in "Responsibilities of a Scheduling Coordinator," of the CAISO Tariff, as amended from time to time.

"Security Interest" has the meaning set forth in Section 8.9.

"Seller" has the meaning set forth on the Cover Sheet.

"Seller's WREGIS Account" has the meaning set forth in Section 4.6(a).

"Settlement Amount" means the Non-Defaulting Party's Costs and Losses, on the one hand, netted against its Gains, on the other. If the Non-Defaulting Party's Costs and Losses exceed its Gains, then the Settlement Amount shall be an amount owing to the Non-Defaulting Party. If the Non-Defaulting Party's Gains exceed its Costs and Losses, then the Settlement Amount shall be zero dollars (\$0). The Settlement Amount does not include consequential, incidental, punitive, exemplary or indirect or business interruption damages.

"Settlement Interval" has the meaning set forth in the CAISO Tariff.

"Settlement Period" has the meaning set forth in the CAISO Tariff.

"Shared Facilities" means the gen-tie lines, transformers, substations, or other equipment, permits, contract rights, and other assets and property (real or personal), in each case, as necessary to enable delivery of energy from the Facility (which is excluded from Shared Facilities) to the point of interconnection, including the Interconnection Agreement itself, that are used in common with third parties.

"<u>Site</u>" means the real property on which the Facility is or will be located, as further described in Exhibit A.

"<u>Site Control</u>" means that Seller (or, prior to the Delivery Term, its Affiliate): (a) owns or has the option to purchase the Site; (b) is the lessee or has the option to lease the Site; (c) is

the holder of a serialized, first-in-line SF-299 application for a right-of-way grant with the United States Bureau of Land Management (BLM); or (d) is the holder of an easement or an option for an easement, right-of-way grant, or similar instrument with respect to the Site.

#### "Station Use" means:

- (a) The Energy produced by the Facility that is used within the Facility to power the lights, motors, control systems and other electrical loads that are necessary for operation of the Facility; and
- (b) The Energy produced by the Facility that is consumed within the Facility's electric energy distribution system as losses.
- "System Emergency" means any condition that requires, as determined and declared by CAISO or the PTO, automatic or immediate action to (i) prevent or limit harm to or loss of life or property, (ii) prevent loss of transmission facilities or generation supply in the immediate vicinity of the Facility, or (iii) to preserve Transmission System reliability.
- "<u>Tax</u>" or "<u>Taxes</u>" means all U.S. federal, state and local and any foreign taxes, levies, assessments, surcharges, duties and other fees and charges of any nature imposed by a Governmental Authority, whether currently in effect or adopted during the Contract Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any and all items of withholding, deficiency, penalty, additions, interest or assessment related thereto.
- "<u>Tax Credits</u>" means the PTC, ITC and any other state, local or federal production tax credit, depreciation benefit, tax deduction or investment tax credit specific to the production of renewable energy or investments in renewable energy facilities.
  - "<u>Terminated Transaction</u>" has the meaning set forth in Section 11.2(a).
  - "Termination Payment" has the meaning set forth in Section 11.3.
- "<u>Test Energy</u>" means Facility Energy delivered (a) commencing on the later of (i) the first date that the CAISO informs Seller in writing that Seller may deliver Facility Energy to the CAISO and (ii) the first date that the PTO informs Seller in writing that Seller has conditional or temporary permission to parallel and (b) ending upon the occurrence of the Commercial Operation Date.
- "<u>Transmission Provider</u>" means any entity or entities transmitting or transporting the Facility Energy on behalf of Seller or Buyer to or from the Delivery Point.
- "<u>Transmission System</u>" means the transmission facilities operated by the CAISO, now or hereafter in existence, which provide energy transmission service within the CAISO Grid from the Delivery Point.
  - "Variable Energy Resource" or "VER" has the meaning set forth in the CAISO Tariff.

"<u>WREGIS</u>" means the Western Renewable Energy Generation Information System or any successor renewable energy tracking program.

"WREGIS Certificate Deficit" has the meaning set forth in Section 4.6(e).

"<u>WREGIS Certificates</u>" has the same meaning as "Certificate" as defined by WREGIS in the WREGIS Operating Rules and are designated as eligible for complying with the California Renewables Portfolio Standard.

"<u>WREGIS Operating Rules</u>" means those operating rules and requirements adopted by WREGIS as of May 1, 2018, as subsequently amended, supplemented or replaced (in whole or in part) from time to time.

- 1.2 **<u>Rules of Interpretation</u>**. In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:
- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement means such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
- (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the term "including" means "including without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;

- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;
- (k) the expression "and/or" when used as a conjunction shall connote "any or all of";
- (l) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning in Prudent Operating Practice shall have such meaning in this Agreement or (ii) do not have well known and generally accepted meaning in Prudent Operating Practice but that have well known and generally accepted technical or trade meanings, shall have such recognized meanings; and
- (m) each Party acknowledges that it was represented by counsel in connection with this Agreement and that it or its counsel reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

## ARTICLE 2 TERM; CONDITIONS PRECEDENT

#### 2.1 **Contract Term**.

(a) The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the conclusion of the Delivery Term, subject to any early termination provisions and any contract term extension provisions set forth herein ("Contract Term"); provided, however, that subject to Buyer's obligations in Section 3.6, Buyer's obligations to pay for or accept any Product are subject to Seller's completion of the conditions precedent pursuant to Section 2.2.



- (c) Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. The confidentiality obligations of the Parties under Article 18 and all indemnity and audit rights shall remain in full force and effect for two (2) years following the termination of this Agreement.
- 2.2 <u>Conditions Precedent</u>. The Delivery Term shall not commence until Seller completes each of the following conditions:
- (a) Seller has delivered to Buyer (i) a completion certificate from a Licensed Professional Engineer substantially in the form of <u>Exhibit H</u> and (ii) a certificate from a Licensed Professional Engineer substantially in the form of <u>Exhibit I</u> setting forth the Installed Capacity on the Commercial Operation Date;
- (b) A Participating Generator Agreement and a Meter Service Agreement between Seller and CAISO shall have been executed and delivered and be in full force and effect, and a copy of each such agreement delivered to Buyer;
- (c) An Interconnection Agreement between Seller and the PTO shall have been executed and delivered and be in full force and effect and a copy of the Interconnection Agreement delivered to Buyer;
- (d) All applicable regulatory authorizations, approvals and permits required for the operation of the Facility have been obtained (or if not obtained, applied for and reasonably expected to be received as and when necessary) and all required conditions thereof that are capable of being satisfied on the Commercial Operation Date have been satisfied in all material respects and shall be in full force and effect;
- (e) Seller has received CEC Precertification of the Facility (and reasonably expects to receive final CEC Certification and Verification for the Facility in no more than one hundred eighty (180) days from the Commercial Operation Date);
- (f) Seller (with the reasonable participation of Buyer) shall have completed all applicable WREGIS registration requirements that are reasonably capable of being completed prior to the Commercial Operation Date under WREGIS rules, including (as applicable) the completion and submittal of all applicable registration forms and supporting documentation, which may include applicable interconnection agreements, informational surveys related to the Facility, Qualified Reporting Entity (QRE) service agreements, and other appropriate documentation required to effect Facility registration with WREGIS and to enable Renewable Energy Credit transfers related to the Facility within the WREGIS system;
- (g) Seller has delivered the Performance Security to Buyer in accordance with Section 8.8; and

- (h) Seller has paid Buyer for all amounts owing under this Agreement as of the Commercial Operation Date, if any, including Daily Delay Damages and Commercial Operation Delay Damages.
- 2.3 <u>Development; Construction; Progress Reports.</u> Within fifteen (15) days after the close of (i) each calendar quarter from the first calendar quarter following the Effective Date until the Construction Start Date, and (ii) each calendar month from the first calendar month following the Construction Start Date until the Commercial Operation Date, Seller shall provide to Buyer a Progress Report and shall hold regularly scheduled meetings between representatives of Buyer and Seller to review such monthly reports and discuss Seller's construction progress. The form of the Progress Report is set forth in <u>Exhibit E</u>, and shall include such additional information as may be reasonably requested by Buyer from time to time. Seller shall also provide Buyer with any reasonable requested documentation (subject to confidentiality restrictions) directly related to the achievement of Milestones within ten (10) Business Days of receipt of such request by Seller. For the avoidance of doubt, as between Seller and Buyer, Seller is solely responsible for the design and construction of the Facility, including the location of the Site, obtaining all permits and approvals to build the Facility, the Facility layout, and the selection and procurement of the equipment comprising the Facility.
- Remedial Action Plan. If Seller (a) misses the Guaranteed Construction Start Date, (b) misses three (3) or more Milestones (other than the Guaranteed Construction Start Date), or (c) misses any one (1) Milestone (other than the Guaranteed Construction Start Date) by more than ninety (90) days, except as the result of Force Majeure Event or Buyer Default, Seller shall submit to Buyer, within ten (10) Business Days after the occurrence of (a), (b) or (c), a remedial action plan ("Remedial Action Plan"), which will describe in detail any delays (actual or anticipated) beyond the scheduled Milestone dates, including the cause of the delay, if known (e.g., governmental approvals, financing, property acquisition, design activities, equipment procurement, project construction, interconnection, or any other factor), Seller's detailed description of its proposed course of action to achieve the missed Milestones and all subsequent Milestones by the Guaranteed Commercial Operation Date; provided, that delivery of any Remedial Action Plan shall not relieve Seller of its obligation to provide Remedial Action Plans with respect to any subsequent Milestones and to achieve the Guaranteed Commercial Operation Date in accordance with the terms of this Agreement. Subject to the provisions of Exhibit B, so long as Seller complies with its obligations under this Section 2.4, Seller shall not be considered in default of its obligations under this Agreement solely as a result of missing any Milestone.

# ARTICLE 3 PURCHASE AND SALE

3.1 <u>Purchase and Sale of Product</u>. Subject to the terms and conditions of this Agreement, during the Delivery Term, Buyer will purchase and receive all of the Product produced by or associated with the Facility at the Contract Price and in accordance with <u>Exhibit C</u>, and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility (net of applicable losses). Subject to Buyer's obligation to purchase Product in accordance with this Section 3.1 and <u>Exhibit C</u>, Buyer has no obligation to purchase from Seller any Product for which the associated Facility Energy is not or cannot be delivered to the

Delivery Point as a result of an outage of the Facility, a Force Majeure Event, or a Curtailment Order (such Facility Energy, "Curtailed Energy").

- 3.2 <u>Sale of Green Attributes</u>. During the Delivery Term, Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all Green Attributes attributable to the Facility Energy generated by the Facility. Upon request of Buyer, Seller shall use commercially reasonable efforts to (a) submit, and receive approval from the Center for Resource Solutions (or any successor that administers the Green-e Certification process), for the Green-e tracking attestations and (b) support Buyer's efforts to qualify the Green Attributes transferred by Seller as Green-e Certified. Commercially reasonable efforts do not include any physical changes to the Facility.
- 3.3 <u>Imbalance Energy</u>. Buyer and Seller recognize that in any given Settlement Period the amount of Facility Energy may deviate from the amount of energy scheduled with the CAISO. To the extent there are such deviations, any costs or revenues from such imbalances shall be solely for the account of Seller, as set forth in <u>Exhibit D</u>.
- 3.4 <u>Ownership of Renewable Energy Incentives</u>. Seller shall have all right, title and interest in and to all Renewable Energy Incentives. Buyer acknowledges that any Renewable Energy Incentives belong to Seller. If any Renewable Energy Incentives, or values representing the same, are initially credited or paid to Buyer, Buyer shall cause such Renewable Energy Incentives or values relating to same to be assigned or transferred to Seller without delay. Buyer shall reasonably cooperate with Seller, at Seller's sole expense, in Seller's efforts to meet the requirements for any certification, registration, or reporting program relating to Renewable Energy Incentives.

#### 3.5 Future Environmental Attributes.

- (a) The Parties acknowledge and agree that as of the Effective Date, environmental attributes sold under this Agreement are restricted to Green Attributes; however, Future Environmental Attributes may be created by a Governmental Authority through Laws enacted after the Effective Date. Subject to the final sentence of this Section 3.5(a), and Section 3.5(b), in such event, Buyer shall bear all costs and risks associated with the transfer, qualification, verification, registration and ongoing compliance for such Future Environmental Attributes, but there shall be no increase in the Contract Price. Upon Seller's receipt of Notice from Buyer of Buyer's intent to claim such Future Environmental Attributes, the Parties shall determine the necessary actions and additional costs associated with such Future Environmental Attributes. Notwithstanding the foregoing, Seller shall have no obligation to take any action or incur any cost, losses or liability arising out of this Section 3.5, or alter the Facility or the operation of the Facility, unless the Parties have agreed on all necessary terms and conditions relating to such alteration or change in operation and Buyer has agreed to reimburse Seller for all costs, losses, and liabilities associated with such Future Environmental Attributes or alteration or change in operation.
- (b) If Buyer elects to receive Future Environmental Attributes pursuant to Section 3.5(a), the Parties agree to negotiate in good faith with respect to the development of further agreements and documentation necessary to effectuate the transfer of such Future

Environmental Attributes, including agreement with respect to (i) appropriate transfer, delivery and risk of loss mechanisms, and (ii) appropriate allocation of any additional costs to Buyer, as set forth above (in any event subject to Section 3.12); *provided*, that the Parties acknowledge and agree such terms are not intended to alter the other material terms of this Agreement.

- 3.6 <u>Test Energy</u>. No less than fourteen (14) days prior to the first day on which Test Energy is expected to be available from the Facility, Seller shall notify Buyer of the availability of the Test Energy. If and to the extent the Facility generates Test Energy, Seller shall sell and Buyer shall purchase from Seller all Test Energy and any associated Products on an as-available basis for up to ninety (90) days from the first delivery of Test Energy. Buyer shall compensate Seller for Test Energy and the Renewable Energy Credits associated with such Test Energy in accordance with <u>Exhibit C</u>. For the avoidance of doubt, the conditions precedent in Section 2.2 are not applicable to the Parties' obligations under this Section 3.6.
  - 3.7 **[Reserved]**.
  - 3.8 [Reserved].
- 3.9 <u>CEC Certification and Verification</u>. Subject to Section 3.12 and in accordance with the timing set forth in this Section 3.9, Seller shall take all necessary steps including, but not limited to, making or supporting timely filings with the CEC to obtain and maintain CEC Certification and Verification throughout the Delivery Term, including compliance with all requirements for certified facilities set forth in the current version of the *RPS Eligibility Guidebook* (or its successor) that are applicable to the Facility. Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the Commercial Operation Date, Seller shall apply with the CEC for final CEC Certification and Verification. Within one hundred eighty (180) days after the Commercial Operation Date, Seller shall obtain and (subject to Section 3.12) maintain throughout the remainder of the Delivery Term the final CEC Certification and Verification. Seller must promptly notify Buyer and the CEC of any changes to the information included in Seller's application for CEC Certification and Verification.

#### 3.10 **[Reserved]**.

- 3.11 **RPS Standard Terms and Conditions**. Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in WREGIS will be taken prior to the first delivery under this Agreement.
- (b) Subject to Section 3.12, Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Facility qualifies and is certified by the CEC as an Eligible Renewable Energy Resource as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Facility's electrical energy output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in Law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default (and Buyer's payment obligations hereunder for Product shall not be reduced) if Seller has used commercially reasonable efforts to comply with such change in Law. The term

"commercially reasonable efforts" as used in this Section 3.11 means efforts consistent with and subject to Section 3.12.

(c) Subject to Section 3.12, Seller shall take all other actions necessary to ensure that the Energy produced from the Generating Facility is tracked for purposes of satisfying the requirements of the California Renewables Portfolio Standard, as set forth in California Public Utilities Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation.

#### 3.12 **Compliance Expenditure Cap.**

- (a) If a change in Laws occurring after the Effective Date has increased Seller's known or reasonably expected costs to comply with Seller's obligations under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer's use of (as applicable) any Product then the Parties agree that the maximum aggregate amount of out-of-pocket costs and expenses ("<u>Compliance Costs</u>") Seller shall be required to bear during the Delivery Term to comply with all of such obligations shall be capped at per MW of Guaranteed Capacity ("<u>Compliance Expenditure Cap</u>").
- (b) Any actions required for Seller to comply with its obligations set forth in the first paragraph above, the Compliance Costs of which will be included in the Compliance Expenditure Cap, shall be referred to collectively as the "Compliance Actions."
- If Seller reasonably anticipates the need to incur Compliance Costs in excess of the Compliance Expenditure Cap in order to take any Compliance Action, Seller shall provide Notice to Buyer of such anticipated Compliance Costs. If the Compliance Costs exceed the Compliance Expenditure Cap, then Buyer will have sixty (60) days to evaluate such Notice (during which time period Seller is not obligated to take any Compliance Actions described in the Notice) and shall, within such time: (1) agree to reimburse Seller for all or some portion of the Compliance Costs that exceed the Compliance Expenditure Cap (such Buyer agreed upon costs, the "Accepted Compliance Costs") on terms and conditions to be set forth in a written amendment to this Agreement, or (2) waive Seller's obligation to take such Compliance Actions, or any part thereof for which Buyer has not agreed to reimburse Seller. If Buyer agrees to pay for all or a portion of the Accepted Compliance Costs, then Seller shall take such Compliance Actions covered by the Accepted Compliance Costs as agreed upon by the Parties and Buyer shall reimburse Seller for its share of the Accepted Compliance Costs in accordance with the payment terms agreed upon by the Parties. If Buyer does not respond to a Notice given by Seller under this Section 3.12 within sixty (60) days after Buyer's receipt of the same (or if Buyer affirmatively waives Seller's obligation to take such Compliance Actions), Buyer shall be deemed to have waived its rights to require Seller to take the Compliance Actions that are the subject of such Notice, and (x) Seller shall have no further obligation to take, and no liability for any failure to take, these Compliance Actions for the remainder of the Contract Term and (y) Buyer's payments to Seller under this Agreement for the remainder of the Contract Term shall not decrease as a result of such change in Laws and will be maintained as if all such Compliance Actions were taken.
  - 3.13 **Project Configuration**. In order to optimize the benefits of the Facility, Buyer

and Seller each agree that if requested by the other Party, then Buyer and Seller will discuss in good faith potential reconfiguration of the Facility or Interconnection Facilities; provided that neither Party shall be obligated to agree to any changes under this Agreement, or to incur any expense in connection with such changes, except under terms mutually acceptable to both Parties (and Seller's Lenders) as set forth in a written agreement executed by the Parties.

## ARTICLE 4 OBLIGATIONS AND DELIVERIES

#### 4.1 **Delivery**.

- (a) Energy. Subject to the provisions of this Agreement, commencing on the Commercial Operation Date and through the end of the Contract Term, Seller shall supply and deliver the Product to Buyer at the Delivery Point, and Buyer shall take delivery of the Product at the Delivery Point in accordance with the terms of this Agreement. Seller will be responsible for paying or satisfying when due any costs or charges imposed in connection with the delivery of Facility Energy to the Delivery Point, including without limitation Station Use, Electrical Losses, and any operation and maintenance charges imposed on Seller by the Transmission Provider directly relating to the Facility's operations. Buyer shall be responsible for all costs, charges and penalties, if any, imposed in connection with the delivery of Facility Energy at and after the Delivery Point, including without limitation transmission costs and transmission line losses and imbalance charges.
- (b) <u>Scheduling and Economic Curtailment</u>. The Facility Energy will be scheduled with the CAISO by Seller (or Seller's designated Scheduling Coordinator for the Facility) in accordance with this Section 4.1(b) and <u>Exhibit D</u>. Seller may schedule, bid or offer all Facility Energy in any Settlement Period in Seller's sole discretion, and may curtail the Facility and Facility Energy for any reason, including economic reasons; *provided*, that no failure by Seller to schedule, bid or offer Facility Energy in any Settlement Period solely due to the existence of a Negative LMP and that is not the result of a Curtailment Order during such Settlement Period shall result in Lost Output for such Settlement Period.
- (c) <u>Green Attributes</u>. All Green Attributes associated with Test Energy (if any) and the Facility Energy during the Delivery Term are exclusively dedicated to and will be conveyed to Buyer. Seller represents and warrants that Seller holds the rights to all Green Attributes from the Facility Energy, and Seller agrees to convey and hereby conveys all such Green Attributes to Buyer as included in the delivery of the Product from the Facility.

#### 4.2 <u>Title and Risk of Loss</u>.

- (a) <u>Energy</u>. Title to and risk of loss related to the Facility Energy, shall pass and transfer from Seller to Buyer at the Delivery Point. Seller warrants that all Product delivered to Buyer is free and clear of all liens, security interests, claims and encumbrances of any kind.
- (b) <u>Green Attributes</u>. Title to and risk of loss related to the Green Attributes associated with the Facility Energy shall pass and transfer from Seller to Buyer upon the transfer of such Green Attributes in accordance with WREGIS.

- 4.3 **Forecasting**. Seller shall provide the forecasts described below at its sole expense and in a format reasonably acceptable to Buyer. Seller shall use reasonable efforts to provide forecasts that are accurate and, to the extent not inconsistent with the requirements of this Agreement, shall prepare such forecasts, or cause such forecasts to be prepared, in accordance with Prudent Operating Practices, including CAISO requirements applicable to projects similar to the Facility.
- (a) Annual Forecast of Energy. No less than forty-five (45) days before (i) the first day of the first Contract Year of the Delivery Term and (ii) at the beginning of each calendar year for every subsequent Contract Year during the Delivery Term, Seller shall provide to Buyer and the SC for the Facility (if applicable) a non-binding forecast of each month's average-day Expected Energy, by hour, for the following calendar year in a form substantially similar to the table found in Exhibit F-1, or as reasonably requested by Buyer.
- (b) Monthly Forecast of Energy and Available Generating Capacity. No less than thirty (30) days before the beginning of Commercial Operation, and thereafter ten (10) Business Days before the beginning of each month during the Delivery Term, Seller shall provide to Buyer and the SC for the Facility (if applicable) a non-binding forecast of the daily expected Energy for each day of the following month in a form substantially similar to the table found in Exhibit F-2 ("Monthly Delivery Forecast").
- (c) <u>Forced Facility Outages.</u> Notwithstanding anything to the contrary herein, Seller shall promptly notify Buyer of Forced Facility Outages and Seller shall keep Buyer informed of any developments that will materially affect either the duration of the outage or the availability of the Facility during or after the end of the outage.
- (d) <u>CAISO Tariff Requirements</u>. To the extent such obligations are applicable to the Facility, Seller will comply with all applicable obligations for Variable Energy Resources under the CAISO Tariff and the Eligible Intermittent Resource Protocol, including providing appropriate operational data and meteorological data, and will fully cooperate with CAISO in providing all data, information, and authorizations required thereunder.
- 4.4 **Reduction in Delivery Obligation**. For the avoidance of doubt, and in no way limiting Section 3.1 or Exhibit G:
- (a) <u>Facility Maintenance</u>. For each Contract Year, no later than December 1 of the preceding Contract Year (or, with respect to the first Contract Year, at least sixty (60) days prior to the Commercial Operation Date), Seller shall provide Buyer with a proposed schedule of planned maintenance that is expected to reduce the Energy generation of the Facility by ten percent (10%) or more during such maintenance (each, a "<u>Planned Outage</u>"). The proposed schedule shall include the amount of capacity of the Facility that will not be available during each Planned Outage and a description of the maintenance to be performed during each Planned Outage. Seller shall notify Buyer as soon as reasonably practicable of any change to such schedule of Planned Outages.
- (b) <u>Forced Facility Outage</u>. Seller shall be permitted to reduce deliveries of Product during any Forced Facility Outage. Seller shall provide Buyer with Notice and expected

duration (if known) of any Forced Facility Outage.

- (c) <u>System Emergencies and other Interconnection Events</u>. Seller shall be permitted to reduce deliveries of Product during any period of System Emergency or upon Notice of a Curtailment Order pursuant to the terms of this Agreement, the Interconnection Agreement or applicable tariff.
- (d) <u>Force Majeure Event</u>. Seller shall be permitted to reduce deliveries of Product during any Force Majeure Event.
- (e) <u>Health and Safety</u>. Seller shall be permitted to reduce deliveries of Product as necessary to maintain health and safety pursuant to Section 6.2.
- **Guaranteed Energy Production**. Seller shall be required to deliver to Buyer no less than the Guaranteed Energy Production in each Performance Measurement Period. Seller shall be excused from achieving the Guaranteed Energy Production during any Performance Measurement Period only to the extent of any Force Majeure Events, System Emergency, Buyer's Default or other failure to perform, Curtailment Periods, Forced Facility Outages or Planned Outages. For purposes of determining whether Seller has achieved the Guaranteed Energy Production, Seller shall be deemed to have delivered to Buyer Energy in the amount it could reasonably have delivered to Buyer but was prevented from delivering to Buyer by reason of any Force Majeure Events, System Emergency, Buyer's Default or other failure to perform, Curtailment Periods, Forced Facility Outages and Planned Outages (as calculated in accordance with Exhibit G, "Lost Output"). If Seller fails to achieve the Guaranteed Energy Production amount in any Performance Measurement Period, Seller shall pay Buyer damages calculated in accordance with Exhibit G; provided, that Seller may, in its sole discretion, as an alternative, either (at Seller's option) (i) provide Replacement Green Attributes (as defined in Exhibit G) or (ii) reimburse Buyer for Replacement Green Attributes (as defined in Exhibit G) procured by Buyer, in each case, prior to the later of (x) ninety (90) days after the conclusion of the applicable Performance Measurement Period or (y) thirty (30) days after Seller's receipt of Notice from Buyer in accordance with Exhibit G of the amount of damages owing. Buyer will pay Seller for all such Replacement Green Attributes provided by Seller pursuant to this Section 4.5 at the REC Rate.
- 4.6 <u>WREGIS</u>. Seller shall, at its sole expense, but subject to Section 3.12, 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 Facility Energy are issued and tracked for purposes of satisfying the requirements of the California Renewables Portfolio Standard and transferred in a timely manner to Buyer for Buyer's sole benefit. Seller shall transfer the Renewable Energy Credits to Buyer. Seller shall comply with all Laws, including the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. In addition:
- (a) Prior to the Commercial Operation Date, Seller shall register the Facility with WREGIS and establish an account with WREGIS ("Seller's WREGIS Account"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS

Certificates using "Forward Certificate Transfers" (as described in the WREGIS Operating Rules) from Seller's WREGIS Account to the WREGIS account(s) of Buyer or the account(s) of a designee that Buyer identifies by Notice to Seller ("Buyer's WREGIS Account"). Seller shall be responsible for all expenses associated with registering the Facility with WREGIS, establishing and maintaining Seller's WREGIS Account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS Account to Buyer's WREGIS Account.

- (b) Seller shall cause Forward Certificate Transfers to occur on a monthly basis in accordance with the certification procedure established by the WREGIS Operating Rules. Since WREGIS Certificates will only be created for whole MWh amounts of Facility Energy generated, any fractional MWh amounts (i.e., kWh) will be carried forward until sufficient generation is accumulated for the creation of a WREGIS Certificate.
- (c) Seller shall, at its sole expense, ensure that the WREGIS Certificates for a given calendar month correspond with the Facility Energy for such calendar month as evidenced by the Facility's metered data.
- (d) Due to the ninety (90) day delay in the creation of WREGIS Certificates relative to the timing of invoice payment under Section 8.2, Buyer shall make an invoice payment for a given month in accordance with Section 8.2 before the WREGIS Certificates for such month are formally transferred to Buyer in accordance with the WREGIS Operating Rules and this Section 4.6. Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller in accordance with Section 8.2.
- A "WREGIS Certificate Deficit" means any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Facility Energy for the same calendar month ("Deficient Month") caused by an error or omission of Seller. If any WREGIS Certificate Deficit is caused by, or is the result of any action or inaction by Seller, then the amount of Facility Energy in the Deficient Month shall be reduced by the amount of the WREGIS Certificate Deficit for purposes of calculating Buyer's payment to Seller under Article 8 and the Guaranteed Energy Production for the applicable Contract Year; provided, however, that such adjustment shall not apply to the extent that Seller either (x) resolves the WREGIS Certificate Deficit within ninety (90) days after the Deficient Month or (y) provides or reimburses Buyer for Replacement Green Attributes (as defined in Exhibit G) delivered to SP 15 EZ Gen Hub as Scheduled Energy within ninety (90) days after the Deficient Month (i) upon a schedule that will replace the WREGIS Certificate Deficit within the same compliance period or such other timing reasonably acceptable to Buyer and (ii) provided that such deliveries do not impose additional costs upon Buyer for which Seller refuses to provide reimbursement. Without limiting Seller's obligations under this Section 4.6, if a WREGIS Certificate Deficit is caused solely by an error or omission of WREGIS, the Parties shall cooperate in good faith to cause WREGIS to correct its error or omission.
- (f) If WREGIS changes the WREGIS Operating Rules after the Effective Date or applies the WREGIS Operating Rules in a manner inconsistent with this Section 4.6 after the Effective Date, the Parties promptly shall modify this Section 4.6 as reasonably required 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 Facility Energy in the same calendar month.

### ARTICLE 5 TAXES

- Allocation of Taxes and Charges. Seller shall pay or cause to be paid all Taxes on or with respect to the Facility or on or with respect to the sale and making available the Product to Buyer, that are imposed on Product prior to its delivery to Buyer at the Delivery Point. Buyer shall pay or cause to be paid all Taxes on or with respect to the delivery to and purchase by Buyer of Product that are imposed on Product at and after its delivery to Buyer at the Delivery Point (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees), if any. If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other for such Taxes. In the event any sale of Product hereunder is exempt from or not subject to any particular Tax, Buyer shall provide Seller with all necessary documentation within thirty (30) days after the Effective Date to evidence such exemption or exclusion. If Buyer does not provide such documentation, then Buyer shall indemnify, defend, and hold Seller harmless from any liability with respect to Taxes from which Buyer claims it is exempt.
- 5.2 <u>Cooperation</u>. Each Party shall use reasonable efforts to implement the provisions of and administer this Agreement in accordance with the intent of the Parties to minimize all Taxes, so long as no Party is materially adversely affected by such efforts. The Parties shall cooperate to minimize Tax exposure; *provided*, *however*, that neither Party shall be obligated to incur any financial or operational burden to reduce Taxes for which the other Party is responsible hereunder without receiving due compensation therefor from the other Party. All Product delivered by Seller to Buyer hereunder shall be a sale made at wholesale, with Buyer reselling such Product.

## ARTICLE 6 MAINTENANCE OF THE FACILITY

- 6.1 <u>Maintenance of the Facility</u>. Seller shall comply with Law and Prudent Operating Practice relating to the operation and maintenance of the Facility and the generation and sale of Product.
- 6.2 <u>Maintenance of Health and Safety</u>. Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair and replacement of the Facility. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt, reasonable action to prevent such damage or injury and shall give Notice to Buyer's emergency contact identified on <u>Exhibit M</u> of such condition. Such action may include, to the extent reasonably necessary, disconnecting and removing all or a portion of the Facility, or suspending the supply of Energy to Buyer.

6.3 <u>Shared Facilities</u>. The Parties acknowledge and agree that certain of the Shared Facilities and Interconnection Facilities, and Seller's rights and obligations under the Interconnection Agreement, may be subject to certain shared facilities or co-tenancy agreements to be entered into among Seller, the Participating Transmission Owner, Seller's Affiliates, or third parties pursuant to which certain Interconnection Facilities may be subject to joint ownership and shared maintenance and operation arrangements; *provided* that such agreements (i) shall permit Seller to perform or satisfy, and shall not purport to limit, its obligations hereunder and (ii) provide for separate metering of the Facility.

# ARTICLE 7 METERING

- 7.1 **Metering**. Seller shall measure the amount of Facility Energy using the Facility Meter, which will be subject to adjustment in accordance with applicable CAISO meter requirements and Prudent Operating Practices, including to account for Electrical Losses and Station Use. All meters will be operated pursuant to applicable CAISO-approved calculation methodologies and maintained at Seller's cost. Subject to meeting any applicable CAISO requirements, the meters shall be programmed to adjust for Electrical Losses and Station Use from the Facility to the Delivery Point in a manner subject to Buyer's prior written approval, not to be unreasonably withheld. Metering will be consistent with the Metering Diagram set forth as Exhibit N, a final version of which shall be provided to Buyer at least thirty (30) days before the Commercial Operation Date. Each meter shall be kept under seal, such seals to be broken only when the meters are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable. In addition, Seller hereby agrees to provide all meter data to Buyer in a form reasonably acceptable to Buyer, and consents to Buyer obtaining from CAISO the CAISO meter data directly relating to the Facility and all inspection, testing and calibration data and reports. Seller, Seller's Scheduling Coordinator and Buyer shall cooperate to allow both Parties to retrieve the meter reads from the CAISO Market Results Interface – Settlements (MRI-S) (or its successor) or directly from the CAISO meter(s) at the Facility.
- Meter Verification. Annually, if Seller has reason to believe there may be a meter malfunction, or upon Buyer's reasonable request, Seller shall test the meter. The tests shall be conducted by independent third parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be present during such tests. If a meter is inaccurate it shall be promptly repaired or replaced. If a meter is inaccurate by more than one percent (1%) and it is not known when the meter inaccuracy commenced (if such evidence exists such date will be used to adjust prior invoices), then the invoices covering the period of time since the last meter test shall be adjusted for the amount of the inaccuracy on the assumption that the inaccuracy persisted during one-half of such period; provided, that (a) such period may not exceed twelve (12) months and (b) such adjustments are accepted by CAISO and WREGIS.

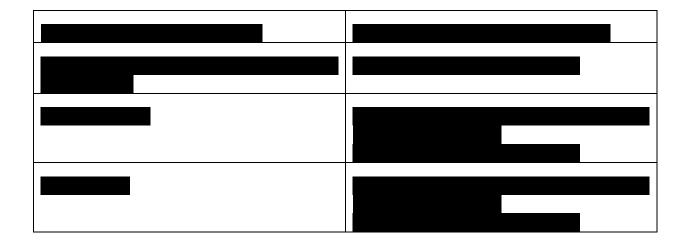
# ARTICLE 8 INVOICING AND PAYMENT; CREDIT

- **Invoicing.** Seller shall make good faith efforts to deliver an invoice to Buyer for Product within fifteen (15) Business Days after the end of the prior monthly billing period. Each invoice shall reflect (a) records of metered data, including CAISO metering and transaction data sufficient to document and verify the amount of Product delivered by the Facility for any Settlement Period during the preceding month, including the amount of PV Energy produced by the Generating Facility as read by the Facility Meter, the amount of Replacement Green Attributes delivered to Buyer (if any), the LMP prices at the Delivery Point for each Settlement Period, and the Contract Price applicable to such Product in accordance with Exhibit C; (b) access to any records, including invoices or settlement data from the CAISO, necessary to verify the accuracy of any amount; and (c) be in a format reasonably specified by Buyer, covering the services provided in the preceding month determined in accordance with the applicable provisions of this Agreement. Seller shall, and shall cause its Scheduling Coordinator to, provide Buyer with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Buyer to verify the accuracy of all invoices.
- 8.2 **Payment**. Buyer shall make payment to Seller for Product by wire transfer or ACH payment to the bank account provided on each monthly invoice, provided, however, that Seller will give Buyer no less than ten (10) days notice of any account change with respect to the place of payment. Buyer shall pay undisputed invoice amounts within thirty (30) days after receipt of the invoice or the end of the prior monthly billing period, whichever is later. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments made after the due date will be considered late and will bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on the prime rate published on the date of the invoice in The Wall Street Journal, or, if The Wall Street Journal is not published on that day, the next succeeding date of publication, plus two percent (2%) (the "Interest Rate"). If the due date occurs on a day that is not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.
- 8.3 <u>Books and Records</u>. To facilitate payment and verification, each Party shall maintain all books and records necessary for billing and payments, including copies of all invoices under this Agreement, for a period of at least two (2) years or as otherwise required by Law. Upon fifteen (15) Business Days' Notice to the other Party, either Party shall be granted reasonable access to the accounting books and records within the possession or control of the other Party pertaining to all invoices generated pursuant to this Agreement. Seller acknowledges that in accordance with California Government Code Section 8546.7, Seller may be subject to audit by the California State Auditor with regard to Seller's performance of this Agreement because the compensation under this Agreement exceeds \$10,000.

- 8.4 Payment Adjustments; Billing Errors. Payment adjustments shall be made if Buyer or Seller discovers there have been good faith inaccuracies in invoicing that are not otherwise disputed under Section 8.5 or an adjustment to an amount previously invoiced or paid is required due to a correction of data by the CAISO or there is determined to have been a meter inaccuracy sufficient to require a payment adjustment. If the required adjustment is in favor of Buyer, Buyer's next monthly payment shall be credited in an amount equal to the adjustment. If the required adjustment is in favor of Seller, Seller shall add the adjustment amount to Buyer's next monthly invoice. Adjustments in favor of either Buyer or Seller shall bear interest, until settled in full, in accordance with Section 8.2, accruing from the date on which the adjusted amount should have been due.
- 8.5 **Billing Disputes.** 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 twenty-four (24) 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. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the original due date to but excluding the date paid. Inadvertent overpayments shall be returned via adjustments in accordance with Section 8.4. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 8.5 within twenty-four (24) months after the invoice is rendered or subsequently adjusted, except in the event of intentional fraud or misrepresentation by the Seller or to the extent any misinformation was from a third party not affiliated with any Party and such third party corrects its information after the twenty-four-month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.
- 8.6 Netting of Payments. The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement or otherwise arising out of this Agreement, including any related damages calculated pursuant to Exhibit B, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

#### 8.7 **Seller's Development Security**.

To secure its obligations under this Agreement, Seller shall deliver Development Security in the Seller Development Security Amount set forth in the schedule below to Buyer



(b) Seller shall maintain the Development Security in full force and effect; provided, that Seller shall not be obligated to replenish the Development Security in the event Buyer collects or draws down any portion of the Development Security for any reason permitted under this Agreement. Upon the earlier of (i) Seller's delivery of the Performance Security, or (ii) sixty (60) days after termination of this Agreement, Buyer shall return the Development Security to Seller, less the amounts drawn in accordance with this Agreement. If the Development Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating specified in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Date, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit in the amount of the Development Security and that otherwise meets the requirements set forth in the definition of Development Security.

Seller's Performance Security. To secure its obligations under this Agreement, 8.8 Seller shall deliver Performance Security to Buyer on or before the Commercial Operation Date. If the Performance Security is not in the form of cash or Letter of Credit, it shall be substantially in the form of Guaranty set forth in Exhibit L. Seller shall maintain the Performance Security in full force and effect, subject to any draws made by Buyer in accordance with this Agreement, until the following have occurred (the "Performance Security Expiration Date"): (A) the Delivery Term has expired or terminated early; and (B) all payment obligations of the Seller then due and payable under this Agreement, including compensation for penalties, Termination Payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security. Performance Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating set forth in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Performance Security Expiration Date, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Performance Security. Seller may at its option exchange one permitted form of Development Security or Performance Security for another permitted form of Development Security or Performance Security, as applicable.

8.9 First Priority Security Interest in Cash or Cash Equivalent Collateral. To secure its obligations under this Agreement, and until released as provided herein, Seller hereby grants to Buyer a present and continuing first-priority security interest ("Security Interest") in, and lien on (and right to net against), and assignment of any cash held as Development Security or Performance Security or any other cash collateral and cash equivalent collateral posted pursuant to Sections 8.7 and 8.8 and any and all interest thereon or proceeds resulting therefrom or from the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer, and Seller agrees to take all action as Buyer reasonably requires in order to perfect Buyer's Security Interest in, and lien on (and right to net against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.

Upon or any time after the occurrence and continuation of an Event of Default caused by Seller, an Early Termination Date resulting from an Event of Default caused by Seller, or an occasion provided for in this Agreement where Buyer is authorized to retain all or a portion of the Development Security or Performance Security, Buyer may do any one or more of the following (in each case subject to the final sentence of this Section 8.9):

- (a) Exercise any of its rights and remedies with respect to the Development Security and Performance Security, including any such rights and remedies under Law then in effect;
- (b) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Security or Performance Security; and
- (c) Liquidate all Development Security or Performance Security (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 this Agreement (Seller remains liable for any amounts owing to Buyer after such application), subject to Buyer's obligation to return any surplus proceeds remaining after these obligations are satisfied in full.

8.10 <u>Financial Statements</u>. In the event a Guaranty is provided as Performance Security in lieu of cash or a Letter of Credit, Seller shall provide to Buyer, or cause the Guarantor to provide to Buyer, unaudited quarterly and annual audited financial statements of the Guarantor (including a balance sheet and statements of income and cash flows), all prepared in accordance with generally accepted accounting principles in the United States, consistently applied.

### 8.11 **Buyer Credit Requirements**.

(a) <u>Buyer's Reporting of Financial and Credit Information</u>. Beginning on the first full calendar quarter of the Contract Term and continuing until the expiration of the Contract Term, Buyer shall provide to Seller the following reports and information:

- (i) within sixty (60) days after the end of each fiscal quarter: (1) the number of customers of Buyer as of the end of such fiscal quarter, (2) Buyer's load served for the most recent two (2) consecutive quarters for which meter data is available and (3) unaudited quarterly financial statements of Buyer; and
- (ii) within one hundred twenty (120) days after the end of each fiscal year, annual audited financial statements of Buyer (including a balance sheet and statements of income and cash flows), all prepared in accordance with generally accepted accounting principles in the United States, consistently applied.

### ARTICLE 9 NOTICES

- 9.1 <u>Addresses for the Delivery of Notices</u>. Except as provided in <u>Exhibit D</u>, any Notice required, permitted, or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the address set forth on <u>Exhibit M</u> or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.
- Acceptable Means of Delivering Notice. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; or (b) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery or express courier, at the time indicated by the time stamp upon delivery; or (c) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

## ARTICLE 10 FORCE MAJEURE

### 10.1 **Definition**.

- (a) "Force Majeure Event" means (i) any act or event that delays or prevents a Party from timely performing all or a portion of its obligations under this Agreement or from complying with all or a portion of the conditions under this Agreement if such act or event, despite the exercise of reasonable efforts, cannot be avoided by and is beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance or (ii) any event caused by or arising from COVID-19 or any mutations thereof or related disruptions and events, notwithstanding the existence or foreseeability of the occurrence thereof or delays attributable thereto as of the Effective Date ("COVID-19 Delay").
- (b) Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the

reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic or pandemic; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; or strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth below.

- Notwithstanding the foregoing, the term "Force Majeure Event" does not include any of the following (except to the extent constituting or arising from a COVID Delay): (i) economic conditions that render a Party's performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs, Buyer's ability to buy electric energy at a lower price, or Seller's ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller's inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; (iv) a Curtailment Order except to the extent such Curtailment Order arises from a Force Majeure Event; (v) Seller's inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility except to the extent such inability is caused by a Force Majeure Event; (vi) any equipment failure except if such equipment failure is caused by a Force Majeure Event; or (vii) Seller's inability to achieve Construction Start of the Facility following the Guaranteed Construction Start Date or achieve Commercial Operation following the Guaranteed Commercial Operation Date unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; it being understood and agreed, for the avoidance of doubt, that the occurrence of a Force Majeure Event may give rise to a Development Cure Period.
- 10.2 No Liability If a Force Majeure Event Occurs. Neither Seller nor Buyer shall be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to a Force Majeure Event. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party's performance of one or more of its obligations hereunder is caused by a Force Majeure Event. Notwithstanding the foregoing, the occurrence and continuation of a Force Majeure Event shall not (a) suspend or excuse the obligation of a Party to make any payments due hereunder, (b) suspend or excuse the obligation of Seller to achieve the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date beyond the extensions provided in Exhibit B, or (c) limit Buyer's right to declare an Event of Default pursuant to Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer's rights pursuant to Section 11.2.
- 10.3 <u>Notice</u>. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party suffering the Force Majeure Event shall (a) as soon as practicable, notify the other Party in writing of the nature, cause, estimated date of commencement thereof,

and the anticipated extent of any delay or interruption in performance, and (b) notify the other Party in writing of the cessation or termination of such Force Majeure Event, all as known or estimated in good faith by the affected Party; *provided*, *however*, that a Party's failure to give timely Notice shall not affect such Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving Notice materially prejudices the other Party. Upon reasonable request from Buyer, Seller shall provide documentation demonstrating to Buyer's reasonable satisfaction that the delays described above did not result from Seller's actions or failure to take reasonable actions.

10.4 <u>Termination Following Force Majeure Event</u>. If a Force Majeure Event has occurred after the Commercial Operation Date that has caused either Party to be substantially or partially unable to perform its obligations hereunder in any material respect, and the impacted Party has claimed and received relief from performance of its obligations for a consecutive twelve (12) month period, then the non-claiming Party may terminate this Agreement upon written Notice to the other Party with respect to the Facility experiencing the Force Majeure Event. Upon any such termination, neither Party shall have any liability to the other Party, save and except for those obligations specified in Section 2.1(b), and Buyer shall promptly return to Seller any Performance Security then held by Buyer, less any amounts drawn in accordance with this Agreement.

# ARTICLE 11 DEFAULTS; REMEDIES; TERMINATION

## 11.1 **Events of Default**. An "**Event of Default**" shall mean,

- (a) with respect to a Party (the "<u>Defaulting Party</u>") that is subject to the Event of Default the occurrence of any of the following:
- (i) the failure by such Party to make, when due, any payment required pursuant to this Agreement and such failure is not remedied within ten (10) Business Days after Notice thereof;
- (ii) 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 such default is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional sixty (60) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts);
- (iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default set forth in this Section 11.1; and except for failures to achieve the Guaranteed Energy Production that do not trigger the provisions of Section 11.1(b)(iii), the exclusive remedies for which are set forth in Section 4.5) and such failure is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional ninety (90) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts);

- (iv) such Party becomes Bankrupt;
- (v) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 14.1, 14.2 or 14.3, if applicable; or
- (vi) 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) with respect to Seller as the Defaulting Party, the occurrence of any of the following:
- (i) if at any time, Seller delivers or attempts to deliver electric energy to the Delivery Point for sale under this Agreement that was not generated or discharged by the Facility, except for Replacement Green Attributes;
- (ii) the failure by Seller to achieve Commercial Operation within one hundred twenty (120) days after the Guaranteed Commercial Operation Date;
- (iii) if, in any two (2) consecutive Contract Year period during the Delivery Term, the Adjusted Energy Production amount is not at least seventy percent (70%) of the Expected Energy amount;
- (iv) failure by Seller to satisfy the collateral requirements pursuant to Sections 8.7 or 8.8 after Notice and expiration of the cure periods set forth therein;
- (v) with respect to any Guaranty provided for the benefit of Buyer, the failure by Seller to 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, in each case, in the amount required hereunder within ten (10) Business Days after Seller receives Notice of the occurrence of any of the following events:
  - (A) if any representation or warranty made by the Guarantor in connection with this Agreement is false or misleading in any material respect when made or when deemed made or repeated, and such default is not remedied within thirty (30) days after Notice thereof;
  - (B) the failure of the Guarantor to make any payment required or to perform any other material covenant or obligation in any Guaranty;
    - (C) the Guarantor becomes Bankrupt;
  - (D) the Guarantor shall fail to meet the criteria for an acceptable Guarantor as set forth in the definition of Guarantor;

- (E) the failure of the Guaranty to be in full force and effect (other than in accordance with its terms) prior to the indefeasible satisfaction of all obligations of Seller hereunder; or
- (F) the Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of any Guaranty;
- (vi) with respect to any outstanding Letter of Credit provided for the benefit of Buyer that is not then required under this Agreement to be canceled or returned, the failure by Seller to provide for the benefit of Buyer either (1) cash, or (2) a substitute Letter of Credit from a different issuer meeting the criteria set forth in the definition of Letter of Credit, in each case, in the amount required hereunder within ten (10) Business Days after Seller receives Notice of the occurrence of any of the following events:
  - (A) the issuer of the outstanding Letter of Credit shall fail to maintain an Investment Grade Credit Rating;
    - (B) the issuer of such Letter of Credit becomes Bankrupt;
  - (C) the issuer of the outstanding Letter of Credit shall fail to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit;
  - (D) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
  - (E) the issuer of the outstanding Letter of Credit shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such Letter of Credit;
  - (F) such Letter of Credit fails or ceases to be in full force and effect at any time; or
  - (G) Seller shall fail to renew or cause the renewal of each outstanding Letter of Credit on a timely basis as provided in the relevant Letter of Credit and as provided in accordance with this Agreement, and in no event less than sixty (60) days prior to the expiration of the outstanding Letter of Credit.
- 11.2 **Remedies; Declaration of Early Termination Date**. If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party ("**Non-Defaulting Party**") shall have the following rights:
- (a) to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement ("Early Termination Date") that

terminates this Agreement (the "<u>Terminated Transaction</u>") and ends the Delivery Term effective as of the Early Termination Date;

- (b) to accelerate all amounts owing between the Parties, and to collect as liquidated damages (i) the Damage Payment (in the case of an Event of Default by Seller occurring before the Commercial Operation Date, including an Event of Default under Section 11.1(b)(ii)) subject to the limitations in Section 11.7, or (ii) the Termination Payment calculated in accordance with Section 11.3 below (in the case of any other Event of Default by either Party);
- (c) to withhold any payments due to the Defaulting Party under this Agreement;
  - (d) to suspend performance; or
- (e) to exercise any other right or remedy available at law or in equity, including specific performance or injunctive relief, except to the extent such remedies are expressly limited under this Agreement;

<u>provided</u>, that payment by the Defaulting Party of the Damage Payment or Termination Payment, as applicable, shall constitute liquidated damages and the Non-Defaulting Party's sole and exclusive remedy for the Terminated Transaction and the Event of Default related thereto.

**Termination Payment**. The Termination Payment ("**Termination Payment**") 11.3 for a Terminated Transaction shall be the aggregate of all Settlement Amounts plus any or all other amounts due to or from the Non-Defaulting Party (as of the Early Termination Date) netted into a single amount. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the net Settlement Amount shall be zero. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for the Terminated Transaction as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. The Settlement Amount shall not include consequential, incidental, punitive, exemplary, indirect or business interruption damages. Without prejudice to the Non-Defaulting Party's duty to mitigate, the Non-Defaulting Party shall not have to enter into replacement transactions to establish a Settlement Amount. Each Party agrees and acknowledges that (a) the actual damages that the Non-Defaulting Party would incur in connection with the Terminated Transaction would be difficult or impossible to predict with certainty, (b) the Damage Payment or Termination Payment described in Section 11.2 or this Section 11.3 (as applicable) is a reasonable and appropriate approximation of such damages, and (c) the Damage Payment or Termination Payment described in Section 11.2 or this Section 11.3 (as applicable) is the exclusive remedy of the Non-Defaulting Party in connection with the Terminated Transaction but shall not otherwise act to limit any of the Non-Defaulting Party's rights or remedies if the Non-Defaulting Party does not elect a Terminated Transaction as its remedy for an Event of Default by the Defaulting Party.

- 11.4 <u>Notice of Payment of Termination Payment or Damage Payment</u>. As soon as practicable after a Terminated Transaction, Notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Damage Payment or Termination Payment, as applicable, and whether the Termination Payment or Damage Payment, as applicable, is due to or from the Non-Defaulting Party. 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 or Damage Payment, as applicable, shall be made to or from the Non-Defaulting Party, as applicable, within ten (10) Business Days after such Notice is effective.
- 11.5 <u>Disputes With Respect to Termination Payment or Damage Payment</u>. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment or Damage Payment, as applicable, in whole or in part, the Defaulting Party shall, within five (5) Business Days of receipt of the Non-Defaulting Party's calculation of the Termination Payment or Damage Payment, as applicable, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute. Disputes regarding the Termination Payment or Damage Payment, as applicable, shall be determined in accordance with Article 15.
- 11.6 <u>Rights And Remedies Are Cumulative</u>. Except where an express and exclusive remedy or measure of liquidated damages is provided, the rights and remedies of a Party pursuant to this Article 11 shall be cumulative and in addition to the rights of the Parties otherwise provided in this Agreement. Any Non-Defaulting Party shall be obligated to use commercially reasonable efforts to mitigate its Costs, Losses and damages resulting from or arising out of any Event of Default of the other Party under this Agreement.
- 11.7 <u>Seller Pre-COD Liability Limitations</u>. Notwithstanding any other provision of this Agreement, Seller's aggregate liability under or arising out of this Agreement prior to the Commercial Operation Date shall be limited to an amount equal to the Damage Payment.
- <u>Facility after Early Termination Date</u>. If the Agreement is terminated by Buyer in accordance with this Agreement prior to the Commercial Operation Date due to Seller's Event of Default, neither Seller nor Seller's Affiliates may sell or deliver any Product associated with or attributable to the Facility to a party other than Buyer for a period of one (1) year following the Early Termination Date due to Seller's Event of Default, unless prior to selling or delivering such Product, or entering into the agreement to sell or deliver such Product to a party other than Buyer, Seller or Seller's Affiliates provide Buyer with a written offer to sell the Product which provides Buyer the right to accept terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) or the terms and conditions to which the third party agreed, and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof.

### ARTICLE 12 LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES

12.1 <u>No Consequential Damages</u>. EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, OR INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR ARISING FROM GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR

ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT, BY STATUTE, IN TORT OR CONTRACT.

12.2 <u>Waiver and Exclusion of Other Damages</u>. EXCEPT AS EXPRESSLY SET FORTH HEREIN, THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. ALL LIMITATIONS OF LIABILITY CONTAINED IN THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, THOSE PERTAINING TO SELLER'S LIMITATION OF LIABILITY AND THE PARTIES' WAIVER OF CONSEQUENTIAL DAMAGES, SHALL APPLY EVEN IF THE REMEDIES FOR BREACH OF WARRANTY PROVIDED IN THIS AGREEMENT ARE DEEMED TO "FAIL OF THEIR ESSENTIAL PURPOSE" OR ARE OTHERWISE HELD TO BE INVALID OR UNENFORCEABLE.

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS AND EXCLUSIVE REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT DAMAGES ONLY.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, INCLUDING UNDER SECTIONS 2.1(b), 4.6, 11.2 AND 11.3, AND AS PROVIDED IN EXHIBIT B AND EXHIBIT G, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT, AND THAT THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE ANTICIPATED HARM OR LOSS. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

THE PARTIES ACKNOWLEDGE AND AGREE THAT MONEY DAMAGES AND THE EXPRESS REMEDIES PROVIDED FOR HEREIN ARE AN ADEQUATE REMEDY FOR THE BREACH BY THE OTHER OF THE TERMS OF THIS AGREEMENT, AND EACH PARTY WAIVES ANY RIGHT IT MAY HAVE TO SPECIFIC PERFORMANCE WITH RESPECT TO ANY OBLIGATION OF THE OTHER PARTY UNDER THIS AGREEMENT.

# ARTICLE 13 REPRESENTATIONS AND WARRANTIES; AUTHORITY

- 13.1 <u>Seller's Representations and Warranties</u>. As of the Effective Date, Seller represents and warrants as follows:
- (a) Seller is a limited liability company, duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation, and is qualified to conduct business in the state of California and each jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller.
- (b) Seller has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement, except where such failure does not have a material adverse effect on Seller's performance under this Agreement. The execution, delivery and performance of this Agreement by Seller has been duly authorized by all necessary limited liability company action on the part of Seller and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Seller or any other party to any other agreement with Seller.
- (c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Seller with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Seller, subject to any permits that have not yet been obtained by Seller, the documents of formation of Seller or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Seller is a party or by which any of its property is bound.
- (d) This Agreement has been duly executed and delivered by Seller. This Agreement is a legal, valid and binding obligation of Seller enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditors' rights or by the exercise of judicial discretion in accordance with general principles of equity.
  - (e) The Facility is located in the State of California.
- (f) Seller will be responsible for obtaining all permits necessary to construct and operate the Facility.
- 13.2 <u>Buyer's Representations and Warranties</u>. As of the Effective Date, Buyer represents and warrants as follows:
- (a) Buyer is a joint powers authority and a validly existing community choice aggregator, duly organized, validly existing and in good standing under the laws of the State of California and the rules, regulations and orders of the California Public Utilities Commission, and is qualified to conduct business in each jurisdiction of the Joint Powers Agreement members. All Persons making up the governing body of Buyer are the elected or appointed incumbents in their positions and hold their positions in good standing in accordance with the Joint Powers Agreement and other Law.

- (b) Buyer has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement, except where such failure does not have a material adverse effect on Buyer's performance under this Agreement. The execution, delivery and performance of this Agreement by Buyer has been duly authorized by all necessary action on the part of Buyer and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Buyer or any other party to any other agreement with Buyer.
- (c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Buyer with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Buyer, the documents of formation of Buyer or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Buyer is a party or by which any of its property is bound.
- (d) This Agreement has been duly executed and delivered by Buyer. This Agreement is a legal, valid and binding obligation of Buyer enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditors' rights or by the exercise of judicial discretion in accordance with general principles of equity.
- (e) Buyer warrants and covenants that with respect to its contractual obligations under this Agreement, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (1) suit, (2) jurisdiction of court, (3) relief by way of injunction, order for specific performance or recovery of property, (4) attachment of assets, or (5) execution or enforcement of any judgment.
- (f) Buyer is a "local public entity" as defined in Section 900.4 of the Government Code of the State of California.
- (g) Buyer cannot assert sovereign immunity as a defense to the enforcement of its obligations under this Agreement.
- 13.3 <u>General Covenants</u>. Each Party covenants that commencing on the Effective Date and continuing throughout the Contract Term:
- (a) It shall continue to be duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and to be qualified to conduct business in California and each jurisdiction where the failure to so qualify would have a material adverse effect on its business or financial condition;
- (b) It shall maintain (or obtain from time to time as required) all regulatory authorizations, approvals and permits necessary for the operation of the Facility and for Seller to legally perform its obligations under this Agreement; and
- (c) It shall perform its obligations under this Agreement in compliance with all terms and conditions in its governing documents and in material compliance with any Law.

13.4 <u>Prevailing Wage</u>. Seller shall comply with all applicable federal, state and local laws, statutes, ordinances, rules and regulations, and orders and decrees of any courts or administrative bodies or tribunals, including without limitation employment discrimination laws and prevailing wage laws. Seller shall use reasonable efforts to ensure that all employees hired by Seller, and its contractors and subcontractors, that will perform construction work or provide services at the Site related to construction of the Facility are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California law, if any ("<u>Prevailing Wage Requirement</u>"). Buyer agrees that Seller's obligations under this Section 13.4 with respect to the Prevailing Wage Requirement will be satisfied upon the execution of a project labor agreement related to construction of the Facility.

### ARTICLE 14 ASSIGNMENT

- 14.1 <u>General Prohibition on Assignments</u>. Except as provided below, neither Party may voluntarily assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. Any assignment made without required written consent, or in violation of the conditions to assignment set out below, shall be null and void. Seller shall be responsible for Buyer's reasonable costs associated with the preparation, review, execution and delivery of documents in connection with any assignment of this Agreement by Seller, including without limitation reasonable attorneys' fees.
- Collateral Assignment. Subject to the provisions of this Section 14.2 and Section 14.3, Seller has the right to assign this Agreement to a Lender as collateral for any financing or refinancing of the Facility. In connection with any debt or equity (including tax equity) financing or refinancing of the Facility by Seller, Buyer shall in good faith work with Seller and Lender to agree upon a consent to collateral assignment of this Agreement ("Collateral Assignment Agreement") or, if applicable, an estoppel certificate or similar instrument with substantially similar provisions requested by Seller or a Lender. The Collateral Assignment Agreement must be in form and substance agreed to by Buyer, Seller and Lender, with such agreement not to be unreasonably withheld, and must include, among others, the following provisions (with such changes as may be reasonably requested by Lender that do not materially alter the obligations of Buyer):
- (a) Buyer shall give Notice of an Event of Default by Seller to the Person(s) to be specified by Lender in the Collateral Assignment Agreement, before exercising its right to terminate this Agreement as a result of such Event of Default; provided that such notice shall be provided to Lender at the time such notice is provided to Seller and any additional cure period of Lender agreed to in the Collateral Assignment Agreement shall not commence until Lender has received notice of such Event of Default;
- (b) Following an Event of Default by Seller under this Agreement, Buyer may require Seller or Lender (if Lender has provided the notice set forth in subsection (c) below) to provide to Buyer a report concerning:

- (i) The status of efforts by Seller or Lender to develop a plan to cure the Event of Default;
  - (ii) Impediments to the cure plan or its development;
- (iii) If a cure plan has been adopted, the status of the cure plan's implementation (including any modifications to the plan as well as the expected timeframe within which any cure is expected to be implemented); and
- (iv) Any other information which Buyer may reasonably require related to the development, implementation and timetable of the cure plan.

Seller or Lender must provide the report to Buyer within ten (10) Business Days after Notice from Buyer requesting the report. Buyer will have no further right to require the report with respect to a particular Event of Default after that Event of Default has been cured;

- (c) Lender will have the right to cure an Event of Default on behalf of Seller, only if Lender sends a written notice to Buyer before the later of (i) the expiration of any cure period, and (ii) five (5) Business Days after Lender's receipt of notice of such Event of Default from Buyer, indicating Lender's intention to cure. Lender must remedy or cure the Event of Default within the cure period under this Agreement and any additional cure periods agreed in the Collateral Assignment Agreement up to a maximum of ninety (90) days (or one hundred eighty (180) days in the event of a bankruptcy of Seller or any foreclosure or similar proceeding if required by Lender to cure any Event of Default). Buyer shall not terminate this Agreement during the period of any prohibition of any Lender curing any Event of Default by Seller pursuant to any process, stay or injunction issued pursuant to any bankruptcy or insolvency or similar proceeding of or with respect to Seller;
- (d) Lender will have the right to consent before any termination of this Agreement which does not arise out of an Event of Default;
- (e) Lender will receive prior Notice of and the right to approve material amendments to this Agreement, which approval will not be unreasonably withheld, delayed or conditioned;
- (f) 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 assume all of Seller's obligations arising under this Agreement and all related agreements arising from and after such assignment (subject to such limits on liability as are mutually agreed to by Seller, Buyer and Lender as set forth in the Collateral Assignment Agreement); *provided*, before such assumption, if Buyer advises Lender that Buyer will require that Lender cure (or cause to be cured) any Event of Default existing as of the possession date and not personal to Seller and reasonably capable of cure in order to avoid the exercise by Buyer (in its sole discretion) of Buyer's right to terminate this Agreement with respect to such Event of Default, then Lender at its option, and in its sole discretion, may elect to either:
  - (i) Cause such Event of Default to be cured, or

- (ii) Not assume this Agreement;
- (g) If Lender elects to sell or transfer the Facility (after Lender directly or indirectly, takes possession of, or title to the Facility), or sale of the Facility occurs through the actions of Lender (for example, a foreclosure sale where a third party is the buyer, or otherwise), then Lender must cause the transferee or buyer to assume all of Seller's obligations arising under this Agreement arising from and after such assignment and all related agreements as a condition of the sale or transfer. Such sale or transfer may be made only to an entity that (i) meets the definition of Permitted Transferee and (ii) is an entity that Buyer is permitted to contract with under applicable Law; and
- (h) Subject to Lender's cure of any Events of Defaults under the Agreement in accordance with Section 14.2(f), if this Agreement is rejected in Seller's Bankruptcy or otherwise terminated in connection therewith Lender shall have the right to elect within forty-five (45) days after such rejection or termination, to enter into a replacement agreement with Buyer having substantially the same terms as this Agreement for the remaining term thereof, and, promptly after Lender's written request, Buyer must enter into such replacement agreement with Lender or Lender's designee.
- 14.3 **<u>Permitted Assignment By Seller.</u>** Notwithstanding anything in this Agreement to the contrary, Seller may, without the prior written consent of Buyer:
- (a) Transfer, sell, pledge, encumber or assign this Agreement and/or the accounts, revenues or proceeds hereof to a Lender consistent with the terms of a Collateral Assignment Agreement;
- (b) Transfer or assign this Agreement to (x) an Affiliate of Seller, or (y) any Person succeeding to all or substantially all of the assets of Seller (whether voluntary or by operation of law); or
- (c) In the case of a sale/leaseback arrangement, assign this Agreement to a lessor party;

in each case provided that such assignee of Seller (other than any Lender holding a security interest only or any lessor holding a lessor interest only) is (together with its Affiliates) a Permitted Transferee or engages a Permitted Transferee to operate and manage the Facility.

## ARTICLE 15 DISPUTE RESOLUTION

- 15.1 <u>Governing Law</u>. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of laws. To the extent enforceable, at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement.
- 15.2 <u>Venue</u>. The Parties agree that any suit, action or other legal proceeding by or against any party (or its affiliates or designees) with respect to or arising out of this Agreement

shall be brought in the federal courts of the United States or the courts of the State of California sitting in San Diego County, California.

15.3 <u>Dispute Resolution</u>. In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a written Notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively.

### ARTICLE 16 INDEMNIFICATION

### 16.1 **Mutual Indemnity**.

- (a) Each Party (the "<u>Indemnifying Party</u>") agrees to defend, indemnify and hold harmless the other Party, its directors, officers, agents, attorneys, employees and representatives (each an "<u>Indemnified Party</u>" and collectively, the "<u>Indemnified Group</u>") from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys' and expert witness fees, for personal injury or death to Persons and damage to the property of any third party to the extent arising out of, resulting from, or caused by the negligent or willful misconduct of the Indemnifying Party, its Affiliates, its directors, officers, employees or agents (collectively, "<u>Indemnifiable Losses</u>").
- (b) Nothing in this Section shall enlarge or relieve Seller or Buyer of any liability to the other for any breach of this Agreement. Neither Party shall be indemnified for its damages resulting from its sole negligence, intentional acts, or willful misconduct. These indemnity provisions shall not be construed to relieve any insurer of its obligations to pay claims consistent with the provisions of a valid insurance policy.
- 16.2 <u>Notice of Claim</u>. Subject to the terms of this Agreement and upon obtaining knowledge of an Indemnifiable Loss for which it is entitled to indemnity under this Article 16, the Indemnified Party will promptly Notify the Indemnifying Party in writing of any damage, claim, loss, liability or expense which Indemnified Party has determined has given or could give rise to an Indemnifiable Loss under Section 16.1 ("<u>Claim</u>"). The Notice is referred to as a "<u>Notice of Claim</u>". A Notice of Claim will specify, in reasonable detail, the facts known to Indemnified Party regarding the Indemnifiable Loss.
- 16.3 Failure to Provide Notice. A failure to give timely Notice or to include any specified information in any Notice as provided in this Section 16.3 will not affect the rights or obligations of any Party hereunder except and only to the extent that, as a result of such failure, any Party which was entitled to receive such Notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise materially damaged as a direct result of such failure and, provided further, Indemnifying Party is not obligated to indemnify any member of the Indemnified Group for the increased amount of any Indemnifiable Loss which would otherwise have been payable to the extent that the increase resulted from the failure to deliver timely a Notice of Claim.
- 16.4 <u>Defense of Claims</u>. If, within ten (10) Business Days after giving a Notice of Claim regarding a Claim to Indemnifying Party pursuant to Section 16.2, Indemnified Party

receives Notice from Indemnifying Party that Indemnifying Party has elected to assume the defense of such Claim, Indemnifying Party will not be liable for any legal expenses subsequently incurred by Indemnified Party in connection with the defense thereof; provided, however, that if Indemnifying Party fails to take reasonable steps necessary to defend diligently such Claim within ten (10) Business Days after receiving Notice from Indemnifying Party that Indemnifying Party believes Indemnifying Party has failed to take such steps, or if Indemnifying Party has not undertaken fully to indemnify Indemnified Party in respect of all Indemnifiable Losses relating to the matter, Indemnified Party may assume its own defense, and Indemnifying Party will be liable for all reasonable costs or expenses, including attorneys' fees, paid or incurred in connection therewith. Without the prior written consent of Indemnified Party, Indemnifying Party will not enter into any settlement of any Claim which would lead to liability or create any financial or other obligation on the part of Indemnified Party for which Indemnified Party is not entitled to indemnification hereunder; provided, however, that Indemnifying Party may accept any settlement without the consent of Indemnified Party if such settlement provides a full release to Indemnified Party and no requirement that Indemnified Party acknowledge fault or culpability. If a firm offer is made to settle a Claim without leading to liability or the creation of a financial or other obligation on the part of Indemnified Party for which Indemnified Party is not entitled to indemnification hereunder and Indemnifying Party desires to accept and agrees to such offer, Indemnifying Party will give Notice to Indemnified Party to that effect. Indemnified Party fails to consent to such firm offer within ten (10) Business Days after its receipt of such Notice, Indemnified Party may continue to contest or defend such Claim and, in such event, the maximum liability of Indemnifying Party to such Claim will be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by Indemnified Party up to the date of such Notice.

- Party will, to the extent of such indemnity payment, be subrogated to all rights of Indemnified Party against any third party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that until Indemnified Party recovers full payment of its Indemnifiable Loss, any and all claims of Indemnifying Party against any such third party on account of said indemnity payment are hereby made expressly subordinated and subjected in right of payment to Indemnified Party's rights against such third party. Without limiting the generality or effect of any other provision hereof, Buyer and Seller shall execute upon request all instruments reasonably necessary to evidence and perfect the above-described subrogation and subordination rights.
- 16.6 <u>Rights and Remedies are Cumulative</u>. Except for express remedies already provided in this Agreement, the rights and remedies of a Party pursuant to this Article 16 are cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

# ARTICLE 17 INSURANCE

### 17.1 **Insurance**.

(a) <u>General Liability</u>. Seller shall maintain, or cause to be maintained at its sole expense, (i) commercial general liability insurance with a minimum of liability limits in the

amount of Two Million Dollars (\$2,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate. Coverage shall include products and completed operations, release of hazardous materials, personal & advertising injury insurance, contractual liability, specifically covering Seller's obligations under this Agreement. The policy shall include Buyer as an additional insured but only to the extent of the liabilities assumed hereunder by Seller. Defense costs shall be provided as an additional benefit and not included with the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.

- (b) <u>Umbrella or Excess Liability Insurance</u>. Seller shall maintain, or cause to be maintained at its sole expense, an Umbrella or Excess Liability Insurance policy in a minimum amount of liability of Ten Million Dollars (\$10,000,000) per occurrence and in the aggregate.
- (c) <u>Workers Compensation Insurance</u>. Seller, if it has employees, shall also maintain at all times during the Contract Term Workers' Compensation and Employers' Liability insurance coverage in accordance with applicable requirements of California Law. Employer's Liability insurance shall be One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.
- (d) <u>Business Auto Liability Insurance</u>. Seller shall maintain at all times during the Contract Term Business Auto Liability insurance for bodily injury and property damage with limits of One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of Seller's use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of the Agreement.
- (e) <u>Construction All-Risk Insurance</u>. Seller shall maintain or cause to be maintained during the construction of the Facility, but only after major electrical generating equipment as arrived at the Facility, prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming the Lender (if any) as the loss payee where its interest may appear.
- (f) <u>Subcontractor Insurance</u>. Seller shall require all of its subcontractors to carry the same levels of insurance as Seller where exposure exists. All subcontractors shall include Seller as an additional insured to (i) Commercial General Liability insurance; (ii) Employers' Liability coverage; and (iii) Business Auto Liability insurance for bodily injury and property damage. All subcontractors shall provide a primary and non-contributory endorsement and a waiver of subrogation to Seller for the required coverage pursuant to this Section 17.1(f).
- (g) Evidence of Insurance. Within ten (10) days after execution of the Agreement and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing such coverage. These certificates shall specify that Buyer shall be given at least thirty (30) days prior Notice by Seller in the event of termination of coverage except ten (10) days for non-payment of premium. Such insurance shall be primary coverage without right of contribution from any insurance of Buyer. Any other insurance maintained by Seller is for the exclusive benefit of Seller and shall not in any manner inure to the benefit of Buyer.

## ARTICLE 18 CONFIDENTIAL INFORMATION

- "Confidential Information," whether oral or written which is delivered by Seller to Buyer or by Buyer to Seller including: (a) the terms and conditions of, and proposals and negotiations related to, this Agreement, (b) information that either Seller or Buyer stamps or otherwise identifies as "confidential" or "proprietary" before disclosing it to the other, and (c) information that would, under the circumstances, appear to a reasonable person to be confidential or proprietary. Confidential Information does not include (i) information that was publicly available at the time of the disclosure, other than as a result of a disclosure in breach of this Agreement; (ii) information that becomes publicly available through no fault of the recipient after the time of the delivery; (iii) information that was rightfully in the possession of the recipient (without confidential or proprietary restriction) at the time of delivery or that becomes available to the recipient; and (iv) information that the recipient independently developed without a violation of this Agreement.
- 18.2 **Duty to Maintain Confidentiality**. Confidential Information will retain its character as Confidential Information but may be disclosed by the recipient (the "Receiving Party") if and to the extent such disclosure is required (a) to be made by any requirements of Law, (b) pursuant to an order of a court or (c) in order to enforce this Agreement. If the Receiving Party becomes legally compelled (by interrogatories, requests for information or documents, subpoenas, summons, civil investigative demands, or similar processes or otherwise in connection with any litigation or to comply with any applicable law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator request or rule) to disclose any Confidential Information of the disclosing Party (the "Disclosing Party"), Receiving Party shall provide Disclosing Party with prompt notice so that Disclosing Party, at its sole expense, may seek an appropriate protective order or other appropriate remedy. In the event that the Disclosing Party is unable to obtain a protective order or other appropriate remedy, or if it so directs the Receiving Party, the Receiving Party or its representatives shall furnish only that portion of the Confidential Information that the Receiving Party is advised by its counsel is required by Law to be furnished by it.
- 18.3 <u>Irreparable Injury; Remedies</u>. Receiving Party acknowledges that its obligations hereunder are necessary and reasonable in order to protect Disclosing Party and the business of Disclosing Party, and expressly acknowledges that monetary damages would be inadequate to compensate Disclosing Party for any breach or threatened breach by Receiving Party of any covenants and agreements set forth in this Article 18. Accordingly, Receiving Party acknowledges that any such breach or threatened breach will cause irreparable injury to Disclosing Party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, Disclosing Party will be entitled to obtain injunctive relief against the threatened breach of this Article 18 or the continuation of any such breach, without the necessity of proving actual damages.

- 18.4 <u>Disclosure to Lenders, Etc.</u>. Notwithstanding anything to the contrary in this Article 18, Confidential Information may be disclosed by Seller to its Affiliates, and its and their respective actual or potential Lender or investor or any of their Affiliates, and its and their actual or potential agents, consultants, advisors, contractors, directors, officers, employees or trustees, so long as the Person to whom Confidential Information is disclosed agrees in writing to be bound by a confidentiality agreement with terms no less restrictive than provisions of this Article 18 or who are subject to professional codes of ethics mandating preservation of client confidences.
- 18.5 Public Records Act. Seller and Buyer acknowledge and agree that this Agreement and any documents, notices or confirmations executed in connection therewith are subject to the requirements of the California Public Records Act (Cal. Government Code § 6250 et seq.). Buyer acknowledges that Seller may submit information to Buyer that Seller considers confidential, proprietary, or trade secret information pursuant to the Uniform Trade Secrets Act (Cal. Civ. Code § 3426 et seq.), or otherwise protected from disclosure pursuant to an exemption to the California Public Records Act (Cal. Government Code §§ 6254 and 6255). acknowledges that Buyer may submit to Seller information that Buyer considers confidential or proprietary or protected from disclosure pursuant to exemptions to the California Public Records Act (Government Code sections 6254 and 6255). Upon request or demand of any third person or entity not a party to this Agreement ("Requestor") for production, inspection and/or copying of information designated by a Party as confidential information (such designated information, the "Confidential Information" and the disclosing Party, the "Disclosing Party"), the Party receiving such request (the "Receiver") as soon as practical, shall notify the Disclosing Party that such request has been made. The Disclosing Party shall be solely responsible for taking whatever legal steps are necessary to protect information deemed by it to be Confidential Information and to prevent release of information to the Requestor by the Receiver. If the Disclosing Party takes no such action within five (5) days after receiving the foregoing notice from the Receiver, the Receiver shall be permitted to comply with the Requestor's demand and is not required to defend against it.
- 18.6 <u>Press Releases</u>. Neither Party shall issue (or cause its Affiliates to issue) a press release regarding the transactions contemplated by this Agreement unless both Parties have agreed upon the contents of any such public statement.

## ARTICLE 19 MISCELLANEOUS

19.1 Entire Agreement; Integration; Exhibits. This Agreement, together with the Cover Sheet and Exhibits attached hereto constitutes the entire agreement and understanding between Seller and Buyer with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. The headings used herein are for convenience and reference purposes only. In the event of a conflict between the provisions of this Agreement and those of the Cover Sheet or any Exhibit, the provisions of first the Cover Sheet, and then this Agreement shall prevail, and such Exhibit shall be corrected accordingly. 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 Party as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.

- 19.2 <u>Amendments</u>. This Agreement may only be amended, modified or supplemented by an instrument in writing executed by duly authorized representatives of Seller and Buyer; *provided*, that, for the avoidance of doubt, this Agreement may not be amended by electronic mail communications.
- 19.3 **No Waiver**. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.
- 19.4 <u>No Agency, Partnership, Joint Venture or Lease</u>. Seller and the agents and employees of Seller shall, in the performance of this Agreement, act in an independent capacity and not as officers or employees or agents of Buyer. Under this Agreement, Seller and Buyer intend to act as energy seller and energy purchaser, respectively, and do not intend to be treated as, and shall not act as, partners in, co-venturers in or lessor/lessee with respect to the Facility or any business related to the Facility. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement or, to the extent set forth herein, any Lender) or Indemnified Party.
- 19.5 <u>Severability</u>. In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. The Parties shall, however, use their best endeavors to agree on the replacement of the void, illegal or unenforceable provision(s) with legally acceptable clauses which correspond as closely as possible to the sense and purpose of the affected provision and this Agreement as a whole.
- Party shall seek, nor shall they support any third party seeking, to prospectively or retroactively revise the rates, terms or conditions of service of this Agreement through application or complaint to FERC pursuant to the provisions of Section 205, 206 or 306 of the Federal Power Act, or any other provisions of the Federal Power Act, absent prior written agreement of the Parties. Further, absent the prior written agreement in writing by both Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party, a non-Party or the FERC acting *sua sponte*, shall be the "public interest" application of the "just and reasonable" 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) and clarified by *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish*, 554 U.S. 527, 128 S. Ct. 2733 (2008) and *NRG Power Mktg., LLC v. Maine Pub. Util. Comm'n*, 130 S. Ct. 503 (2010). Changes proposed by a non-Party or FERC acting *sua sponte* shall be subject to the most stringent standard permissible under applicable law.
- 19.7 <u>Counterparts; Electronic Signatures</u>. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original. The Parties may rely on electronic, facsimile or scanned signatures as originals.

- 19.8 <u>Electronic Delivery</u>. Delivery of an executed signature page of this Agreement by electronic format (including portable document format (.pdf)) shall be the same as delivery of an original executed signature page.
- 19.9 <u>Binding Effect</u>. This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.
- 19.10 No Recourse to Members of Buyer. Buyer is organized as a Joint Powers Authority in accordance with the Joint Exercise of Powers Act of the State of California (Government Code Section 6500, et seq.) pursuant to its Joint Powers Agreement and is a public entity separate from its constituent members. Each Party shall solely be responsible for all its respective debts, obligations and liabilities accruing and arising out of this Agreement. Each Party shall have no rights and shall not make any claims, take any actions or assert any remedies against any of the other Party's constituent members, or the employees, directors, officers, consultants or advisors or its constituent members, in connection with this Agreement.
- 19.11 **Forward Contract**. The Parties acknowledge and agree that this Agreement constitutes a "forward contract" within the meaning of the U.S. Bankruptcy Code, and Buyer and Seller are "forward contract merchants" within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. § 366 or another provision of 11 U.S.C. § 101-1532.
- 19.12 <u>Further Assurances</u>. Each of the Parties hereto agree to provide information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.

[Signatures on following page]

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

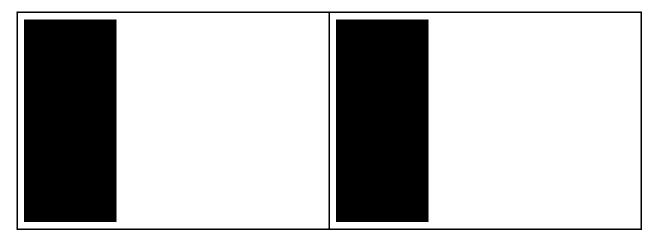
IP OBERON, LLC,	SAN DIEGO COMMUNITY POWER,
a Delaware limited liability company	a California joint powers authority
By:	By:
Name:	Name:
Title:	Title:

### **EXHIBIT A**

## **FACILITY DESCRIPTION**

Site Name: IP Oberon

Site includes all or some of the following APNs:



County: Riverside County, California

CEQA Lead Agency: Colorado River Basin Regional Water Quality Control Board

**Type of Generating Facility**: Solar Photovoltaic (PV)

**Guaranteed Capacity**: See definition in Section 1.1

**Delivery Point**: Facility PNode

**Facility Meter**: See Exhibit N

Facility Interconnection Point: Red Bluff 500kV Substation

Participating Transmission Owner: Southern California Edison

#### **EXHIBIT B**

# MAJOR PROJECT DEVELOPMENT MILESTONES AND COMMERCIAL OPERATION

### 1. <u>Major Project Development Milestones</u>.

- (a) "<u>Construction Start</u>" will occur upon Seller's execution of an engineering, procurement, and construction contract (or similar agreement) and issuance thereunder of a notice to proceed that authorizes the contractor to mobilize to Site and begin physical construction at the Site. The date of Construction Start will be evidenced by and subject to Seller's delivery to Buyer of a certificate substantially in the form attached as <u>Exhibit J</u> hereto, and the date certified therein by Seller shall be the "<u>Construction Start Date</u>." The Seller shall cause Construction Start to occur no later than the Guaranteed Construction Start Date.
- If Construction Start is not achieved by the Guaranteed Construction Start Date, (b) Seller shall pay Daily Delay Damages to Buyer on account of such delay. Daily Delay Damages shall be payable for each day for which Construction Start has not begun after the Guaranteed Construction Start Date. Daily Delay Damages shall be payable to Buyer by Seller until Seller reaches Construction Start of the Facility. On or before the tenth (10th) day of each month, Buyer shall invoice Seller for Daily Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller's receipt of such invoice, Seller shall pay Buyer the amount of the Daily Delay Damages set forth in such invoice. Daily Delay Damages shall be refundable to Seller pursuant to Section 2(b) of this Exhibit B. The Parties agree that Buyer's receipt of Daily Delay Damages shall be Buyer's sole and exclusive remedy for Seller's unexcused delay in achieving the Construction Start Date on or before the Guaranteed Construction Start Date, but shall (x) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer's right to declare an Event of Default pursuant to Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer's default right pursuant to Section 11.2.
- 2. <u>Commercial Operation of the Facility</u>. "<u>Commercial Operation</u>" means the condition existing when (i) Seller has provided Notice to Buyer substantially in the form of <u>Exhibit H</u> (the "<u>COD Certificate</u>"), and (ii) Seller has notified Buyer in writing that it has provided the required documentation to Buyer and met the conditions for achieving Commercial Operation. The "<u>Commercial Operation Date</u>" shall be the later of (x) the Expected Commercial Operation Date or (y) the date on which Commercial Operation is achieved as specified in the COD Certificate.
- (a) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date. Seller shall notify Buyer at least sixty (60) days before the anticipated Commercial Operation Date.
- (b) If Seller achieves Commercial Operation on or before the Guaranteed Commercial Operation Date (not including any extensions to such date resulting from Seller's payment of Commercial Operation Delay Damages, but as may be extended pursuant to a Development Cure Period), then all Daily Delay Damages paid by Seller shall be refunded to

Seller. If Seller achieves Commercial Operation after the Guaranteed Commercial Operation Date, Buyer shall refund to Seller the positive difference (if any) between (x) all Daily Delay Damages previously paid by Seller minus (y) Commercial Operation Delay Damages for the number of days after the Guaranteed Commercial Operation Date that Seller achieved Commercial Operation. Seller shall include the request for refund of the Daily Delay Damages with the first invoice to Buyer after Commercial Operation.

- If Seller does not achieve Commercial Operation by the Guaranteed Commercial (c) Operation Date, Seller shall pay Commercial Operation Delay Damages to Buyer for each day after the Guaranteed Commercial Operation Date until the Commercial Operation Date. Commercial Operation Delay Damages shall be payable to Buyer by Seller until the Commercial Operation Date. On or before the tenth (10<sup>th</sup>) day of each month, Buyer shall invoice Seller for Commercial Operation Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller's receipt of such invoice, Seller shall pay Buyer the amount of the Commercial Operation Delay Damages set forth in such invoice. The Parties agree that Buyer's receipt of Commercial Operation Delay Damages shall be Buyer's sole and exclusive remedy for Seller's unexcused delay in achieving the Commercial Operation Date on or before the Guaranteed Commercial Operation Date, but shall (x) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer's right to declare an Event of Default under Section 11.2(b)(ii) and receive a Damage Payment upon exercise of Buyer's rights pursuant to Section 11.2. For avoidance of doubt, Seller's aggregate payment of Daily Delay Damages (less any Daily Delay Damages amounts refunded to Seller pursuant to Section 2(b) above) and Commercial Operation Delay Damages is subject to Section 11.7 and shall in no event exceed the Development Security amount required hereunder.
- 3. <u>Termination for Failure to Achieve Commercial Operation</u>. If the Facility has not achieved Commercial Operation within one hundred twenty (120) days after the Guaranteed Commercial Operation Date, Buyer may elect to terminate this Agreement in accordance with Sections 11.1(b)(ii) and 11.2.
- 4. <u>Extension of the Guaranteed Dates</u>. The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date both shall, subject to notice and documentation requirements set forth below, be automatically extended on a day-for-day basis (the "<u>Development Cure Period</u>") for the duration of any and all delays arising out of the following circumstances:
  - (a) a Force Majeure Event occurs; or
- (b) the Interconnection Facilities or Network Upgrades are not complete and ready for the Facility to connect and sell Product at the Delivery Point by the Guaranteed Commercial Operation Date, despite the exercise of commercially reasonable efforts by Seller; or
- (c) Buyer has not made all necessary arrangements to receive the Facility Energy at the Delivery Point by the Guaranteed Commercial Operation Date.

Notwithstanding anything in this Agreement to the contrary, the cumulative extensions granted

under Section 4(a) and 4(b) above under the Development Cure Period shall not exceed , for any reason, including a Force Majeure Event; provided, however, that only with respect to a Force Majeure Event related to COVID-19, the day-for-day extensions shall not exceed . Notwithstanding anything to the contrary, no extension under the Development Cure Period shall be given if (i) the delay was the result of Seller's failure to take all commercially reasonable actions to meet its requirements and deadlines, (ii) Seller failed to provide requested documentation as provided below, or (iii) Seller failed to provide written notice to Buyer as required in the next sentence. Seller shall provide prompt written notice to Buyer of a delay, but in no case more than thirty (30) days after Seller became aware of such delay, except that in the case of a delay occurring within sixty (60) days of the Expected Commercial Operation Date, or after such date, Seller must provide written notice within five (5) Business Days of Seller becoming aware of such delay. Upon request from Buyer, Seller shall provide documentation demonstrating to Buyer's reasonable satisfaction that the delays described above did not result from Seller's actions or failure to take reasonable actions.

### 5. <u>Failure to Reach Guaranteed Capacity</u>.

(a) Guaranteed Capacity. If, at Commercial Operation, the Installed PV Capacity is less than one hundred percent (100%) of the Guaranteed Capacity, Seller shall have one hundred twenty (120) days after the Commercial Operation Date to install additional capacity or Network Upgrades such that the Installed PV Capacity is equal to (but not greater than) the Guaranteed Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as <a href="Exhibit I">Exhibit I</a> hereto specifying the new Installed PV Capacity. If Seller fails to construct the Guaranteed Capacity by such date, Seller shall pay "Capacity Damages" to Buyer, in an amount equal to the product of (i) and (ii) each MW (or portion thereof) that the Guaranteed Capacity exceeds the Installed PV Capacity, and the Guaranteed Capacity and other applicable portions of the Agreement shall be adjusted accordingly.

#### **EXHIBIT C**

### **COMPENSATION**

Throughout the Delivery Term, Buyer shall compensate Seller for the Product in accordance with this Exhibit C.

- (a) <u>Energy Payment</u>. For each MWh of Facility Energy in each Settlement Period on or after the Commercial Operation Date, and each MWh of Test Energy in each Settlement Period prior to the Commercial Operation Date, Buyer shall pay Seller in accordance with Section 8.1:
  - i. For any month or any portion of a month after the Commercial Operation Date, for each MWh of Facility Energy delivered by Seller and received by Buyer during such month in accordance with the terms herein and all other Products associated with such Facility Energy, an amount equal to the sum of, for each Settlement Period in such month, the product of (x) the Facility Energy delivered during such Settlement Period, and (y) the Contract Price; and
  - ii. For any month or any portion of a month prior to the Commercial Operation Date, for each MWh of Test Energy delivered by Seller and received by Buyer during such month in accordance with the terms herein and all other Products associated with such Test Energy, an amount equal to the sum of, for each Settlement Period in such month, the product of (x) the Facility Energy delivered during such Settlement Period, and (y) the Contract Price (clause (i) and (ii) collectively, the "Energy Payment").
- (b) Netting. Seller, through its Scheduling Coordinator, shall receive (and is entitled to retain) payment for Facility Energy from CAISO for such delivery based on the applicable Energy Price, as published by CAISO. Consequently, Buyer and Seller hereby agree to net the payment for Facility Energy Seller receives from CAISO against the Energy Payment payable by Buyer hereunder, such that the net payment Seller shall receive from Buyer for Facility Energy shall net to zero (\$0.00) during each month on which Facility Energy is delivered pursuant to this Agreement, and the net payment Seller shall receive from Buyer for the Products shall net to the sum of the REC Rate for all Renewable Energy Credits delivered in such month. For avoidance of doubt, Buyer is purchasing a bundled product and Seller's receipt of payment directly via CAISO settlements is for the Parties' mutual convenience.
- (e) <u>Curtailment Payments</u>. Seller shall receive no compensation from Buyer for Facility Energy provided in violation of a Curtailment Order.
- (f) <u>Tax Credits</u>. The Parties agree that the neither the REC Rate nor the Test Energy Rate are subject to adjustment or amendment if Seller fails to receive any Tax Credits, or if any Tax Credits expire, are repealed or otherwise cease to apply to Seller or the Facility in whole or in part, or Seller or its investors are unable to benefit from any Tax Credits. Seller shall bear all risks, financial and otherwise, throughout the Contract Term, associated with Seller's or the Facility's eligibility to receive Tax Credits or to qualify for accelerated depreciation for Seller's

accounting, reporting or Tax purposes. The obligations of the Parties hereunder, including those obligations set forth herein regarding the purchase and price for and Seller's obligation to deliver Facility Energy and Product, shall be effective regardless of whether the sale of Facility Energy is eligible for, or receives Tax Credits during the Contract Term.

#### **EXHIBIT D**

### SCHEDULING COORDINATOR RESPONSIBILITIES

### **Scheduling Coordinator Responsibilities.**

- Seller as Scheduling Coordinator for the Facility. Upon Initial Synchronization of (a) the Facility to the CAISO Grid and through the end of the Delivery Term, Seller shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for the delivery and the receipt of Test Energy and the Product at the Delivery Point. At least thirty (30) days prior to the Initial Synchronization of the Facility to the CAISO Grid, (i) Seller shall take all actions and execute and deliver to the CAISO all documents necessary to authorize or designate Seller (or Seller's designee) as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization of the Facility to the CAISO Grid, and (ii) Buyer shall, and shall cause its designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Seller or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization of the Facility to the CAISO Grid. Seller (as the Facility's SC) shall submit Schedules to the CAISO in accordance with this Agreement and the applicable CAISO Tariff, protocols and Scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute market or real time basis, as determined by Seller.
- (b) <u>Notices</u>. Seller (as the Facility's SC) shall submit to the CAISO all notices and updates required under the CAISO Tariff regarding the Facility's status, including, but not limited to, all outage requests, forced outages, forced outage reports, clearance requests, or must offer waiver forms.
- CAISO Costs and Revenues. Except as otherwise set forth below, Seller (as Scheduling Coordinator for the Facility) shall be responsible for CAISO costs (including penalties, Imbalance Energy costs, and other charges) and shall be entitled to all CAISO revenues (including credits, Imbalance Energy revenues, and other payments), including revenues associated with CAISO dispatches, bid cost recovery, Inter-SC Trade credits, or other credits in respect of the Product Scheduled or delivered from the Facility. Seller shall be responsible for all CAISO penalties resulting from any failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement. The Parties agree that any Availability Incentive Payments (as defined in the CAISO Tariff) are for the benefit of the Seller and for Seller's account and that any Non-Availability Charges (as defined in the CAISO Tariff) are the responsibility of the Seller and for Seller's account. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Seller as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be the Seller's responsibility.
- (d) <u>CAISO Settlements</u>. Seller (as the Facility's SC) shall be responsible for all settlement functions with the CAISO related to the Facility. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination

of this Agreement.

(e) <u>Master File and Resource Data Template</u>. Seller shall provide the data to the CAISO that is required for the CAISO's Master File and Resource Data Template (or successor data systems) for the Facility consistent with this Agreement. Neither Party shall change such data without the other Party's prior written consent, such consent not to be unreasonably withheld.

#### **EXHIBIT E**

### PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive Summary.
- 2. Facility description.
- 3. Site plan of the Facility.
- 4. Gantt chart schedule showing progress on achieving each of the Milestones.
- 5. Description of any material planned changes to the Facility or the Site.
- 6. Summary of activities during the previous calendar quarter or month, as applicable.
- 7. Forecast of activities scheduled for the current calendar quarter.
- 8. Written description about the progress relative to Seller's Milestones, including whether Seller has met or is on target to meet the Milestones.
- 9. List of issues that are likely to potentially affect Seller's Milestones.
- 10. A status report of start-up activities including a forecast of activities ongoing and after start-up, a report on Facility performance including performance projections for the next twelve (12) months.
- 11. If applicable, prevailing wage reports as required by Law.
- 12. Progress and schedule of all major agreements, contracts, permits, approvals, technical studies, financing agreements and major equipment purchase orders showing the start dates, completion dates, and completion percentages.
- 13. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and startup progress of the Facility, the interconnection into the Transmission System and all other interconnection utility services.
- 14. Supplier Diversity Reporting (if applicable). Format to be provided by Buyer.
- 15. Any other documentation reasonably requested by Buyer.

EXHIBIT F-1
FORM OF AVERAGE EXPECTED ENERGY REPORT

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### **EXHIBIT F-2**

### FORM OF MONTHLY AVAILABLE GENERATING CAPACITY REPORT

The following tables are provided for informational purposes only, and shall not constitute, or be deemed to constitute, an obligation of any of the Parties to this Agreement.

## Available Generating Capacity, MW Per Hour - January

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#### **EXHIBIT G**

## GUARANTEED ENERGY PRODUCTION DAMAGES CALCULATION

In accordance with Section 4.5, if Seller fails to achieve the Guaranteed Energy Production during any Performance Measurement Period, and Seller elects not to provide Replacement Green Attributes to cure such failure, then a liquidated damages payment shall be due from Seller to Buyer, calculated as follows:

$$(A - B) * (C - D)$$

where:

 $\underline{A}$  = the Guaranteed Energy Production amount for the Performance Measurement Period, in MWh

 $\underline{\mathbf{B}}$  = the Adjusted Energy Production amount for the Performance Measurement Period, in MWh

 $\underline{C}$  = the average replacement price for Replacement Green Attributes for the Performance Measurement Period, in \$/MWh, which, with respect to any Replacement Green Attribute, is the lesser of (a) the market value for such Replacement Green Attribute and (b) \$50. Buyer is not required to enter into a replacement transaction in order to determine this amount.

D = the REC Rate for the Contract Year, in \$/MWh

"<u>Adjusted Energy Production</u>" shall mean the sum of the following: Facility Energy + Lost Output + Replacement Green Attributes.

"Lost Output" has the meaning given in Section 4.5 of the Agreement. Lost Output shall be calculated, in any given period, as the sum of (a) the Real-Time Production Capability of the Generating Facility during such period *minus* (b) the sum of (i) Facility Energy delivered during such period *plus* (ii) the amount of any curtailment of Facility Energy resulting from a failure by Seller to schedule, bid or offer Facility Energy during such period solely due to the existence of a Negative LMP and that is not the result of a Curtailment Order during such period.

"Real-Time Production Capability" means the amount of Energy production capability of the Facility taking into account (a) the actual 10-minute (or more frequent) solar data (interpolated over time intervals, if necessary) measured by weather monitoring equipment located at the Facility that was available for operation for the duration of the period in question or prorated accordingly, or, if such monitoring equipment is unavailable during a relevant period, then using other available data or interpolated data determined using industry standard practices, as reasonably acceptable to Seller and Buyer, and (b) the generation determined by the power curve provided by the manufacturer of the solar photovoltaic panels and inverters installed at the Facility reflecting the Energy that would be produced by such solar photovoltaic panels and inverters (adjusted based on the results of the latest power curve test, if any), as applied to the solar data referred to in clause (a), as adjusted for line and step-up transformer losses to the

Delivery Point, using historical data compiled by Seller and reasonably agreed or confirmed by Buyer.

"Replacement Green Attributes" means Renewable Energy Credits of the same Portfolio Content Category (i.e., PCC1) as the Green Attributes portion of the Product and of the same timeframe for retirement as the Renewable Energy Credits that would have been generated by the Facility during the Performance Measurement Period for which the Replacement Green Attributes are being provided. Replacement Green Attributes will further satisfy long term renewable portfolio standard requirements.

No payment shall be due if the calculation of (A - B) or (C - D) yields a negative number.

Within sixty (60) days after each Contract Year, Buyer will send Seller Notice of the amount of damages owing, if any, which shall be payable to Buyer before the later of (a) thirty (30) days of such Notice and (b) ninety (90) days after each Performance Measurement Period, provided that the amount of damages owing shall be adjusted to account for Replacement Green Attributes, if any, delivered after each applicable Performance Measurement Period.

## **EXHIBIT H**

## FORM OF COMMERCIAL OPERATION DATE CERTIFICATE

This certification (" <u>Certification</u> ") of Commercial Operation is delivered by[licensed professional engineer] (" <u>Engineer</u> ") to San Diego Community Power, a California joint powers authority (" <u>Buyer</u> ") in accordance with the terms of that certain Renewable Power Purchase Agreement dated (" <u>Agreement</u> ") by and between IP Oberon, LLC, a Delaware limited liability company (" <u>Seller</u> ") and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.
As of _[DATE]_, Engineer hereby certifies and represents to Buyer the following:
1. The Generating Facility is fully operational, reliable and interconnected, fully integrated and synchronized with the Transmission System.
2. Seller has installed equipment for the Generating Facility with a nameplate capacity of no less than ninety-five percent (95%) of the Guaranteed Capacity.
3. The Generating Facility's testing included a performance test demonstrating peak electrical output of no less than ninety-five percent (95%) of the Guaranteed Capacity for the Generating Facility at the Delivery Point, adjusted for ambient conditions on the date of the Facility testing, and such peak electrical output, as adjusted, was [peak output in MW].
4. Authorization to parallel the Facility was obtained by the Participating Transmission Provider, [Name of Participating Transmission Owner as appropriate] on _[DATE]
5. The Transmission Provider has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Participating Transmission Owner as appropriate] on _[DATE]
6. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO Tariff on _[DATE]
EXECUTED by [LICENSED PROFESSIONAL ENGINEER]
this day of, 20

[LICENSED PROFESSIONAL ENGINEER]

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Its:			
Date:			

## **EXHIBIT I**

## FORM OF INSTALLED CAPACITY CERTIFICATE

	Capacity is delivered by [licensed professional
·	unity Power, a California joint powers authority t certain Renewable Power Purchase Agreement
dated ("Agreement") by and between	n IP Oberon, LLC, a Delaware limited liability terms used in this Certification but not otherwise
I hereby certify the following:	
-	denerating Facility demonstrated peak electrical adjusted for ambient conditions on the date of the and shall be the " <u>Installed Capacity</u> ".
EXECUTED by [LICENSED PROFESSIONAL	LENGINEER]
this, 20	
	[LICENSED PROFESSIONAL ENGINEER]
	By:
	Its:
	Date:

## **EXHIBIT J**

## FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date (" <u>Certification</u> ") is delivered by IP Oberon, LLC, a Delaware limited liability company (" <u>Seller</u> ") to San Diego Community Power, a California joint powers authority (" <u>Buyer</u> ") in accordance with the terms of that certain Renewable Power Purchase Agreement dated (" <u>Agreement</u> ") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.
Seller hereby certifies and represents to Buyer the following:
1. Construction Start (as defined in <u>Exhibit B</u> of the Agreement) has occurred, and a copy of the notice to proceed that Seller issued to its contractor as part of Construction Start is attached hereto;
2. the Construction Start Date occurred on (the "Construction Start Date"); and
3. the precise Site on which the Facility is located is, which must be within the boundaries of the previously identified Site:
IN WITNESS WHEREOF, the undersigned has executed this Certification on behalf of Seller as of the day of
[SELLER ENTITY]
By:
Its:
Date:

#### **EXHIBIT K**

## FORM OF LETTER OF CREDIT

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:
Bank Ref.:
Amount: US\$[XXXXXXXX]
Expiry Date:

Beneficiary:

San Diego Community Power, a California joint powers authority

Ladies and Gentlemen:

By the order of \_\_\_\_\_\_ ("Applicant"), we, [insert bank name and address] ("Issuer") hereby issue our Irrevocable Standby Letter of Credit No. [XXXXXXX] ("Letter of Credit") in favor of San Diego Community Power, a California joint powers authority] ("Beneficiary"), for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Renewable Power Purchase Agreement dated as of \_\_\_\_\_ and as amended ("Agreement") between Applicant and Beneficiary. This Letter of Credit shall

Funds under this Letter of Credit are available to Beneficiary by presentation on or before the Expiration Date of a dated statement purportedly signed by your duly authorized representative, in the form attached hereto as Exhibit A, containing one of the two alternative paragraphs set forth in paragraph 2 therein, referencing our Letter of Credit No. [XXXXXXX] ("Drawing Certificate").

become effective immediately and shall expire on [Insert Date ] which is one year after the issue date of this Letter of Credit, or any expiration date extended in accordance with the terms hereof

The Drawing Certificate may be presented by (a) physical delivery, (b) as a PDF attachment to an e-mail to [bank email address] or (c) facsimile to [bank fax number [XXX-XXXX]] confirmed by [e-mail to [bank email address]]. Transmittal by facsimile or email shall be deemed delivered when received.

The original of this Letter of Credit (and all amendments, if any) is not required to be presented in connection with any presentment of a Drawing Certificate by Beneficiary hereunder in order to receive payment.

("Expiration Date").

We hereby agree with the Beneficiary that all documents presented under and in compliance with the terms of this Letter of Credit, that such drafts will be duly honored upon presentation to the Issuer on or before the Expiration Date. All payments made under this Letter of Credit shall be made with Issuer's own immediately available funds by means of wire transfer in immediately available United States dollars to Beneficiary's account as indicated by Beneficiary in its Drawing Certificate or in a communication accompanying its Drawing Certificate.

Partial draws are permitted under this Letter of Credit, and this Letter of Credit shall remain in full force and effect with respect to any continuing balance.

It is a condition of this Letter of Credit that the Expiration Date shall be deemed automatically extended without an amendment for a one year period beginning on the present Expiration Date hereof and upon each anniversary for such date, unless at least one hundred twenty (120) days prior to any such Expiration Date we have sent to you written notice by overnight courier service that we elect not to extend this Letter of Credit, in which case it will expire on the date specified in such notice. No presentation made under this Letter of Credit after such Expiration Date will be honored.

Notwithstanding any reference in this Letter of Credit to any other documents, instruments or agreements, this Letter of Credit contains the entire agreement between Beneficiary and Issuer relating to the obligations of Issuer hereunder.

This Letter of Credit shall be subject to the provisions (to the extent that such provisions are not inconsistent with this Letter of Credit) of the International Chamber of Commerce International Standby Practices (ICC publication no. 590, 1998) (the "ISP98") with regard to all matters not provided for herein, and, to the extent not inconsistent with the ISP98, this Letter of Credit shall be governed by and interpreted in accordance with the laws of the State of New York, without giving effect to any choice of law rules that would require the application of laws of another jurisdiction.

Please address all correspondence regarding this Letter of Credit to the attention of the Letter of Credit Department at [insert bank address information], referring specifically to Issuer's Letter of Credit No. [XXXXXXX]. For telephone assistance, please contact Issuer's Standby Letter of Credit Department at [XXX-XXX-XXXX] and have this Letter of Credit available.

[Bank Name]	
[Insert officer name] [Insert officer title]	

## **EXHIBIT A**

# (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD)

Draw	awing Certificate	
[Inser	sert Bank Name and Address]	
power (the '	e undersigned, a duly authorized representative of wers authority, as beneficiary (the "Beneficiary") of the "Letter of Credit") issued by [insert bank name pplicant"), hereby certifies to the Bank as follows:	he Irrevocable Letter of Credit No. [XXXXXXX]
1.	Applicant and Beneficiary are party to that cert as of, 20 (the "Agreement").	tain Renewable Power Purchase Agreement dated
2.	Beneficiary is making a drawing under this Letter of Credit in the amount of U.S. \$ because a Seller Event of Default (as such term is defined in the Agreement) has occurred other occasion provided for in the Agreement where Beneficiary is authorized to dra Letter of Credit has occurred.	
	OR	
	which equals the full available amount under the to maintain the Letter of Credit in force and experience of the control of th	her of Credit in the amount of U.S. \$, he Letter of Credit, because Applicant is required affect beyond the expiration date of the Letter of with a replacement Letter of Credit or other for to such expiration date.
3.	• •	tive of San Diego Community Power, a California ute and deliver this Drawing Certificate on behalf
	u are hereby directed to make payment of the requestifornia joint powers authority, by wire transfer in count:	
	[Specify account information]	
		San Diego Community Power a California joint powers authority
		By: Name: Title: Date:

#### **EXHIBIT L**

## FORM OF GUARANTY

This Guaranty (this " <u>Guaranty</u> ") is entered into as of [] (the " <u>Effective Date</u> ") by and between [], a [] (" <u>Guarantor</u> "), and San Diego Community Power, a California joint powers authority (together with its successors and permitted assigns, " <u>Buyer</u> ").
Recitals
A. Buyer and IP Oberon, LLC, a Delaware limited liability company (" <u>Seller</u> "), entered into that certain Renewable Power Purchase Agreement (as amended, restated or otherwise modified from time to time, the " <u>PPA</u> ") dated as of [], 20
B. Guarantor is entering into this Guaranty as Performance Security to secure Seller's obligations under the PPA, as required by Section 8.8 of the PPA.
C. It is in the best interest of Guarantor to execute this Guaranty inasmuch as Guarantor will derive substantial direct and indirect benefits from the execution and delivery of the PPA.
D. Initially capitalized terms used but not defined herein have the meaning set forth in the PPA.
<u>Agreement</u>
1. <u>Guaranty</u> . For value received, Guarantor does hereby unconditionally, absolutely and irrevocably guarantee, as primary obligor and not as a surety, to Buyer the prompt payment by Seller of any and all amounts and payment obligations now or hereafter owing from Seller to Buyer under the PPA, including, without limitation, compensation for penalties, the Termination Payment, indemnification payments or other damages, as and when required pursuant to the terms of the PPA (the " <u>Guaranteed Amount</u> "), <u>provided</u> , that Guarantor's aggregate liability under or arising out of this Guaranty shall not exceed Dollars (\$). The Parties understand and agree that any payment by Guarantor or Seller of any portion of the Guaranteed Amount shall thereafter reduce Guarantor's maximum aggregate liability hereunder on a dollar-for-dollar basis. This Guaranty is an irrevocable, absolute, unconditional and continuing guarantee of the full and punctual payment, and not of collection, of the Guaranteed Amount and, except as otherwise expressly addressed herein, is in no way conditioned upon any requirement that Buyer first attempt to collect the payment of the Guaranteed Amount from Seller, any other guarantor of the Guaranteed Amount or any other Person or entity or resort to any other means of obtaining payment of the Guaranteed Amount. In the event Seller shall fail to duly, completely or punctually pay any Guaranteed Amount as required pursuant to the PPA, Guarantor shall promptly pay such amount as required herein.

Guaranty only when and if a payment is due and payable by Seller to Buyer under the terms and conditions of the Agreement. If Seller fails to pay any Guaranteed Amount as required pursuant to the PPA for five (5) Business Days following Seller's receipt of Buyer's written notice of such

and may make a demand upon Guarantor (a "Payment Demand") for such unpaid Guaranteed Amount. A Payment Demand shall be in writing and shall reasonably specify in what manner and what amount Seller has failed to pay and an explanation of why such payment is due and owing, with a specific statement that Buyer is requesting that Guarantor pay under this Guaranty. Guarantor shall, within five (5) Business Days following its receipt of the Payment Demand, pay the Guaranteed Amount to Buyer.

- 3. Scope and Duration of Guaranty. This Guaranty applies only to the Guaranteed Amount. This Guaranty shall continue in full force and effect from the Effective Date until the earlier of the following: (x) all Guaranteed Amounts have been paid in full (whether directly or indirectly through set-off or netting of amounts owed by Buyer to Seller), or (y) replacement Performance Security is provided in an amount and form required by the terms of the PPA. Further, this Guaranty (a) shall remain in full force and effect without regard to, and shall not be affected or impaired by any invalidity, irregularity or unenforceability in whole or in part of this Guaranty, and (b) subject to the preceding sentence, shall be discharged only by complete performance of the undertakings herein. Without limiting the generality of the foregoing, the obligations of the Guarantor hereunder shall not be released, discharged, or otherwise affected and this Guaranty shall not be invalidated or impaired or otherwise affected for the following reasons:
  - (i) the extension of time for the payment of any Guaranteed Amount, or
  - (ii) any amendment, modification or other alteration of the PPA, or
  - (iii) any indemnity agreement Seller may have from any party, or
- (iv) any insurance that may be available to cover any loss, except to the extent insurance proceeds are used to satisfy the Guaranteed Amount, or
- (v) any voluntary or involuntary liquidation, dissolution, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar proceeding affecting, Seller or any of its assets, including but not limited to any rejection or other discharge of Seller's obligations under the PPA imposed by any court, trustee or custodian or any similar official or imposed by any law, statue or regulation, in each such event in any such proceeding, or
- (vi) the release, modification, waiver or failure to pursue or seek relief with respect to any other guaranty, pledge or security device whatsoever, or
- (vii) any payment to Buyer by Seller that Buyer subsequently returns to Seller pursuant to court order in any bankruptcy or other debtor-relief proceeding, or
- (viii) those defenses based upon (A) the legal incapacity or lack of power or authority of any Person, including Seller and any representative of Seller to enter into the PPA or perform its obligations thereunder, (B) lack of due execution, delivery, validity or enforceability, including of the PPA, or (C) Seller's inability to pay any Guaranteed Amount or perform its obligations under the PPA, or

(ix) any other event or circumstance that may now or hereafter constitute a defense to payment of the Guaranteed Amount, including, without limitation, statute of frauds and accord and satisfaction:

<u>provided</u> that Guarantor reserves the right to assert for itself any defenses, setoffs or counterclaims that Seller is or may be entitled to assert against Buyer.

- 4. <u>Waivers by Guarantor</u>. Guarantor hereby unconditionally waives as a condition precedent to the performance of its obligations hereunder, with the exception of the requirements in Paragraph 2, (a) notice of acceptance, presentment or protest with respect to the Guaranteed Amounts and this Guaranty, (b) notice of any action taken or omitted to be taken by Buyer in reliance hereon, (c) any requirement that Buyer exhaust any right, power or remedy or proceed against Seller under the PPA, and (d) any event, occurrence or other circumstance which might otherwise constitute a legal or equitable discharge of a surety. Without limiting the generality of the foregoing waiver of surety defenses, it is agreed that the occurrence of any one or more of the following shall not affect the liability of Guarantor hereunder:
- (i) at any time or from time to time, without notice to Guarantor, the time for payment of any Guaranteed Amount shall be extended, or such performance or compliance shall be waived;
- (ii) the obligation to pay any Guaranteed Amount shall be modified, supplemented or amended in any respect in accordance with the terms of the PPA;
- (iii) subject to Section 10, any (a) sale, transfer or consolidation of Seller into or with any other entity, (b) sale of substantial assets by, or restructuring of the corporate existence of, Seller or (c) change in ownership of any membership interests of, or other ownership interests in, Seller; or
- (iv) the failure by Buyer or any other Person to create, preserve, validate, perfect or protect any security interest granted to, or in favor of, Buyer or any Person.
- 5. <u>Subrogation</u>. Notwithstanding any payments that may be made hereunder by the Guarantor, Guarantor hereby agrees that until the earlier of payment in full of all Guaranteed Amounts or expiration of the Guaranty in accordance with Section 3, it shall not be entitled to, nor shall it seek to, exercise any right or remedy arising by reason of its payment of any Guaranteed Amount under this Guaranty, whether by subrogation or otherwise, against Seller or seek contribution or reimbursement of such payments from Seller.
- 6. Representations and Warranties. Guarantor hereby represents and warrants that (a) it has all necessary and appropriate [limited liability company][corporate] powers and authority and the legal right to execute and deliver, and perform its obligations under, this Guaranty, (b) this Guaranty constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights or general principles of equity, (c) the execution, delivery and performance of this Guaranty does not and will not contravene Guarantor's organizational documents, any applicable Law or any contractual provisions binding on or affecting Guarantor, (d) there are no actions, suits or proceedings pending before any court,

governmental agency or arbitrator, or, to the knowledge of the Guarantor, threatened, against or affecting Guarantor or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Guarantor to enter into or perform its obligations under this Guaranty, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Guarantor), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this Guaranty by Guarantor.

7. <u>Notices</u>. Notices under this Guaranty shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, and (ii) four Business Days after mailing if sent by certified, first class mail, return receipt requested. If transmitted by facsimile, such notice shall be deemed received when the confirmation of transmission thereof is received by the party giving the notice. Any party may change its address or facsimile to which notice is given hereunder by providing notice of the same in accordance with this Paragraph 8.

If delivered to Buyer, to it at	[] Attn: [] Fax: []
If delivered to Guarantor, to it at	[] Attn: [] Fax: []

- 8. <u>Governing Law and Forum Selection</u>. This Guaranty shall be governed by, and interpreted and construed in accordance with, the laws of the United States and the State of California, excluding choice of law rules. The Parties agree that any suit, action or other legal proceeding by or against any party (or its affiliates or designees) with respect to or arising out of this Guaranty shall be brought in the federal courts of the United States or the courts of the State of California sitting in San Diego County, California.
- 9. <u>Miscellaneous</u>. This Guaranty shall be binding upon Guarantor and its successors and assigns and shall inure to the benefit of Buyer and its successors and permitted assigns pursuant to the PPA. No provision of this Guaranty may be amended or waived except by a written instrument executed by Guarantor and Buyer. This Guaranty is not assignable by Guarantor without the prior written consent of Buyer. No provision of this Guaranty confers, nor is any provision intended to confer, upon any third party (other than Buyer's successors and permitted assigns) any benefit or right enforceable at the option of that third party. This Guaranty embodies the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior or contemporaneous agreements and understandings of the parties hereto, verbal or written, relating to the subject matter hereof. If any provision of this Guaranty is determined to be illegal or unenforceable (i) such provision shall be deemed restated in accordance with applicable Laws to reflect, as nearly as possible, the original intention of the parties hereto and (ii) such

determination shall not affect any other provision of this Guaranty and all other provisions shall remain in full force and effect. This Guaranty may be executed in any number of separate counterparts, each of which when so executed shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. This Guaranty may be executed and delivered by electronic means with the same force and effect as if the same was a fully executed and delivered original manual counterpart.

#### 10. WAIVER OF JURY TRIAL; JUDICIAL REFERENCE.

- (a) JURY WAIVER. EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS GUARANTY OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTY HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.
- (b) <u>JUDICIAL REFERENCE</u>. IN THE EVENT ANY LEGAL PROCEEDING IS FILED IN A COURT OF THE STATE OF CALIFORNIA (THE "<u>COURT</u>") BY OR AGAINST ANY PARTY HERETO IN CONNECTION WITH ANY CONTROVERSY, DISPUTE OR CLAIM DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS GUARANTY OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY) (EACH, A "CLAIM") AND THE WAIVER SET FORTH IN THE PRECEDING PARAGRAPH IS NOT ENFORCEABLE IN SUCH ACTION OR PROCEEDING, THE PARTIES HERETO AGREE AS FOLLOWS:
- (i) ANY CLAIM (INCLUDING BUT NOT LIMITED TO ALL DISCOVERY AND LAW AND MOTION MATTERS, PRETRIAL MOTIONS, TRIAL MATTERS AND POST-TRIAL MOTIONS) WILL BE DETERMINED BY A GENERAL REFERENCE PROCEEDING IN ACCORDANCE WITH THE PROVISIONS OF CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 638 THROUGH 645.1. THE PARTIES INTEND THIS GENERAL REFERENCE AGREEMENT TO BE SPECIFICALLY ENFORCEABLE IN ACCORDANCE WITH CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 638.
- (ii) UPON THE WRITTEN REQUEST OF ANY PARTY, THE PARTIES SHALL SELECT A SINGLE REFEREE, WHO SHALL BE A RETIRED JUDGE OR JUSTICE. IF THE PARTIES DO NOT AGREE UPON A REFEREE WITHIN TEN (10) DAYS OF SUCH WRITTEN REQUEST, THEN, ANY PARTY MAY REQUEST THE COURT TO APPOINT A REFEREE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 640(B).

(iii) THE PARTIES RECOGNIZE AND AGREE THAT ALL CLAIMS RESOLVED IN A GENERAL REFERENCE PROCEEDING PURSUANT HERETO WILL BE DECIDED BY A REFEREE AND NOT BY A JURY.

[Signature on next page]

IN WITNESS WHEREOF, the undersigned has caused this Guaranty to be duly executed and delivered by its duly authorized representative on the date first above written.

GUARANTOR:
[]
By:
Printed Name:
Title:
BUYER:
[]
By:
Printed Name:
Title:
By:
Printed Name:
Title:

## **EXHIBIT M**

## **NOTICES**

IP Oberon, LLC ("Seller")	San Diego Community Power, a California joint powers authority ("Buyer")
All Notices:	All Notices:
	San Diego Community Power Attn: Chief Executive Officer San Diego Community Power 815 E Street, Suite 12716 San Diego, CA 92112 Phone: (619) 236-6563 E-mail: bcarnahan@sdcommunitypower.org
With a copy to: n/a	
Reference Numbers:	Reference Numbers:
Invoices:	Invoices: Attn: Michael Maher Phone: (415) 526-3020 Email: mmaher@mahercpa.com
Scheduling: [To be updated prior to COD] Attn: Phone: Facsimile: E-mail:	Scheduling: Tenaska Power Services CO. Attn: Kara Whillock, Tenaska Power Services Co. Phone: 972-333-6122 Email: kwhillock@tnsk.com Day Ahead: (817) 303-1115 Real Time: (817) 303-1852 Facsimile: (817) 303-1104
Confirmations: [To be updated prior to COD] Attn: Phone: Facsimile: E-mail:	Confirmations: Attn: Chief Executive Officer San Diego Community Power 815 E Street, Suite 12716 San Diego, CA 92112 Phone: (619) 236-6563 E-mail: bcarnahan@sdcommunitypower.org

IP Oberon, LLC ("Seller")	San Diego Community Power, a California joint powers authority ("Buyer")
Payments:	Payments: Attn: Michael Maher Phone: (415) 526-3020 Email: mmaher@mahercpa.com
Wire Transfer:	Wire Transfer:
With additional Notices of an Event of Default to:	With additional Notices of an Event of Default to:
	Ryan Baron, Best Best & Krieger LLP 18101 Von Karman Ave., Suite 1000 Irvine CA 92612 Phone: (949) 263-6568 Email: ryan.baron@bbklaw.com
Emergency Contact: [To be updated prior to COD] Attn: Phone: Facsimile: E-mail:	Emergency Contact: Attn: Chief Executive Officer San Diego Community Power 815 E Street, Suite 12716 San Diego, CA 92112 Phone: (619) 236-6563 E-mail: bcarnahan@sdcommunitypower.org

## **EXHIBIT N**

## **METERING DIAGRAM**

[See attached]



# SAN DIEGO COMMUNITY POWER Staff Report – Item 16

To: San Diego Community Power Board of Directors

From: Byron Vosburg, Director of Power Services

Via: Bill Carnahan, Interim Chief Executive Officer

Subject: Renewable Power Purchase Agreement with JVR Energy Park, LLC.

Date: May 27, 2021

# RECOMMENDATION

Approve the Long-term Renewable Power Purchase Agreement with JVR Energy Park, LLC and authorize the Interim CEO to execute the agreement.

#### **BACKGROUND**

As SDCP strives to meet its environmental, financial, and regulatory compliance goals and requirements, long-term power purchase agreements (PPAs) of at least 10 years in duration will become integral components of its energy supply portfolio. Long-term PPAs provide renewable generation facility developers with the certain revenue stream against which they can finance up-front capital requirements, so each long-term PPA that SDCP signs with a developing facility will underpin a new, incremental renewable energy project. In addition, long-term PPAs lock in renewable energy supply around which SDCP can build its power supply portfolio while also providing power supply cost certainty around which SDCP can develop its pro forma financial model.

In response to last year's Long-term Renewable Energy Request for Offers (RFO), SDCP staff received offers from thirty-two suppliers or developers to purchase renewable energy from eighty-four unique project configurations. Staff reviewed these responses with the Ad Hoc Contracts Committee on August 4, 2020 and narrowed them down on August 18, 2020 to a "short-list" of potential projects with which to enter PPA negotiations. Staff reviewed three of these PPAs with the Finance and Risk Management Committee on April 15, 2021. The Vikings Energy Farm PPA was approved by the SDCP Board and executed last month; this month, we present for your review the remaining two PPAs with IP Oberon and JVR Energy Park. Together, these three PPAs represent a combined 340 MW of solar and 220 MW of storage capacity to be developed in Southern California. Generation from these three projects is expected to total 990,000 MWh per year, which is enough to serve approximately 200,000 SDCP customer households.

#### **ANALYSIS AND DISCUSSION**

Staff negotiated the attached PPA for the purchase of renewable energy from JVR Energy Park, which is a solar project to be developed near Jacumba Hot Springs, CA in San Diego County by BayWa r.e. ("BayWa").

The project has a guaranteed capacity of 90 MW of solar production and 70 MW of battery storage capacity. As previously reviewed with the Ad Hoc Contracts Committee, the contract offers competitive energy and capacity prices. The capacity from this project is especially valuable given the project's proximity to SDCP communities and eligibility for San Diego-Imperial Valley (SD-IV) Local Resource Adequacy ("RA").

Renewable energy produced by the facility will be an important ~260 GWh/year foundational block of long-term renewable energy deliveries within SDCP's power supply portfolio (~6,000 GWh/year once fully enrolled).

Below is additional information regarding BayWa and the draft PPA.

Background – BayWa r.e. ("Baywa")

- Jointly owned by BayWa AG (51%) and Energy Infrastructure Partners (49%).
  - BayWa AG founded in Munich, Germany in 1923
- Located in 30 countries; 4 GW installed worldwide; 10 GW under management;
   1.5 GW operating/constructing in North America.
- US headquarters in Irvine, CA
- Previously completed 28 MW Jacumba Solar facility in 2017

## Contract Overview – JVR Energy Park, LLC

- Project:
  - o 90 MW Solar
  - 70 MW/280 MWh Battery Energy Storage System (BESS)
- Project location: Jacumba Hot Springs, San Diego County, CA
- Guaranteed commercial operation date: March 31, 2023
- Contract term: 20 years
- Expected annual energy production: approximately 260,000 MWh (equivalent power for approximately 52,000 homes)
- Guaranteed energy production: 85% of projected annual deliveries
- Energy price:
  - Solar Fixed energy price applicable to the full term of the agreement
  - Battery Energy Storage System Fixed capacity price adjusted for efficiency, availability and verified capacity
- No credit or collateral obligations for SDCP
- SDCP would receive financial compensation in the event of seller's failure to successfully achieve certain development milestones

#### **COMMITTEE REVIEW**

This item was recommended for Board approval by the Finance and Risk Management Committee on April 15, 2021.

## FISCAL IMPACT

The competitive energy and capacity pricing of the PPA are confidential, but the long-term purchase of renewable energy and capacity will provide SDCP with significant value and cost certainty over the term of this PPA

## **ATTACHMENTS**

Attachment A: Renewable Power Purchase Agreement with JVR Energy Park, LLC

## RENEWABLE POWER PURCHASE AGREEMENT

## **COVER SHEET**

Seller: JVR Energy Park, LLC, a California limited liability company

**Buyer**: San Diego Community Power, a California joint powers authority

<u>Description of Facility</u>: A 90 MW $_{AC}$  solar photovoltaic Generation Facility combined with a 70 MW $_{AC}$  / 280 MW $_{AC}$  DC-coupled battery energy storage facility, limited to 90 MW $_{AC}$  deliveries at the Delivery Point, as further described herein.

## **Milestones**:

Milestone	Expected Date for Completion
<b>Evidence of Site Control</b>	Complete
<b>Executed Interconnection Agreement</b>	Complete
CEC Pre-Certification Obtained	Complete
Major Use Permit	
Network Upgrades Completed	
<b>Expected Construction Start Date</b>	
Full Capacity Deliverability Status Obtained	
Initial Synchronization	
<b>Expected Commercial Operation Date</b>	
<b>Guaranteed Commercial Operation Date</b>	

**<u>Delivery Term</u>**: The period for Product delivery will be for Twenty (20) Contract Years.

## **Expected Energy**:

Contract Year	Expected Energy (MWh <sub>AC</sub> )
1	
2	
3	
4	

5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	

**Guaranteed PV Capacity**: 90 MW<sub>AC</sub>

**Storage Contract Capacity**: 70 MW<sub>AC</sub>

Storage Contract Output: 280 MWh<sub>AC</sub>

**Minimum Storage Facility Discharging Loss Factor**:

**Guaranteed Storage Availability**:

Maximum storage facility Cycles per year:

Maximum storage facility Cycles per day:

**Capacity Attributes**: Local RA within the SD-IV Area

**<u>Delivery Point</u>**: Facility PNode, as further described in Exhibit A

# **Contract Price**

The Renewable Rate shall be:

Contract Year	Renewable Rate
1 – 20	\$ MWh <sub>AC</sub> (flat) with no escalation

The Storage Rate shall be:

Contract Year	Storage Rate
1 – 20	\$\textstyle \kappa \kap

# **Product**:

	PV Energy Wind Energy Discharging Energy* Green Attributes (Portfolio Content Category 1) Storage Capacity* Capacity Attributes (select options below as applicable) ☐ Energy Only Status ☐ Full Capacity Deliverability Status (completed)			
$\bowtie$	Ancillary Services, if applicable			
<u>Scheduling Coordinator</u> : A party to be designated by Buyer, for the avoidance of doubt, other than Seller				
	<b>ment Security</b> : The sum of $W_{AC}$ of Guaranteed PV Capacity and $W_{AC}$ ge Contract Capacity			
	pance Security: The sum of $W_{AC}$ of Guaranteed PV Capacity and $W_{AC}$ ge Contract Capacity.			

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#### RENEWABLE POWER PURCHASE AGREEMENT

This Renewable Power Purchase Agreement ("<u>Agreement</u>") is entered into as of \_\_\_\_\_\_, 2021 (the "<u>Effective Date</u>"), between San Diego Community Power, a California joint powers authority ("<u>Buyer</u>") and JVR Energy Park, LLC, a California limited liability company ("<u>Seller</u>"). Buyer and Seller are sometimes referred to herein individually as a "<u>Party</u>" and jointly as the "<u>Parties</u>." All capitalized terms used in this Agreement are used with the meanings ascribed to them in Article 1 to this Agreement.

#### RECITALS

WHEREAS, Seller intends to develop, design, permit, construct, own or otherwise control, and operate the Facility; and

WHEREAS, Seller desires to sell, and Buyer desires to purchase, on the terms and conditions set forth in this Agreement, the Product;

NOW THEREFORE, in consideration of the mutual covenants and agreements herein contained, and for other good and valuable consideration, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

## ARTICLE 1 DEFINITIONS

- 1.1 <u>Contract Definitions</u>. The following terms, when used herein with initial capitalization, shall have the meanings set forth below:
  - "AC" means alternating current.
  - "Accepted Compliance Costs" has the meaning set forth in Section 3.11(d).
- "<u>Adjusted Charging Energy</u>" means, for the applicable period, multiplying (i) the total Charging Energy by (ii) the Storage Facility Charging Loss Factor and then dividing the result by the (iii) the Storage Facility Discharging Loss Factor. For avoidance of doubt, this is intended to represent the energy at the Facility meter equivalent to the energy charged by the Storage Facility from the Generating Facility, as if it had been delivered directly to the Facility Meter.
- "<u>Adjusted Discharging Energy</u>" means, for the applicable period, the result of multiplying (i) the total Discharging Energy for such period by (ii) the Storage Facility Discharging Loss Factor. For avoidance of doubt, this is intended to represent the energy discharged from the Storage Facility at the Facility meter.
  - "Adjusted Energy Production" has the meaning set forth in Exhibit G.
- "Adjusted Facility Energy" means, for the applicable period, the sum of (a) the total Facility Energy for such period, plus (b) Adjusted Charging Energy, minus (c) Adjusted Discharging Energy for such period. For illustrative purposes, Adjusted Facility Energy = (a) + (b) (c).

- "Affiliate" means, with respect to any Person, each Person that directly or indirectly controls, is controlled by, or is under common control with such designated Person. For purposes of this definition and the definition of "Permitted Transferee", "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any Person, shall mean (a) the direct or indirect right to cast at least fifty percent (50%) of the votes exercisable at an annual general meeting (or its equivalent) of such Person or, if there are no such rights, ownership of at least fifty percent (50%) of the equity or other ownership interest in such Person, or (b) the right to direct the policies or operations of such Person.
- "Agreement" has the meaning set forth in the Preamble and includes any Exhibits, schedules and any written supplements and amendments hereto, the Cover Sheet, and any designated collateral, credit support or similar arrangement between the Parties.
  - "<u>Alternative Dispatches</u>" has the meaning set forth in Section 4.5(f).
- "Ancillary Services" means those Ancillary Services, as defined in the CAISO Tariff, that can be produced from the Storage Facility at any relevant time consistent with the terms and conditions of this Agreement, the Operating Restrictions and Prudent Operating Practice. For clarity, "Ancillary Services" as used herein does not include, at any relevant time, any ancillary services that the Facility is not actually physically capable of providing consistent with the terms and conditions of this Agreement, the Operating Restrictions, the Interconnection Agreement, the Facility's CAISO Certification, and Prudent Operating Practice.
  - "Annual Storage Availability" has the meaning set forth in Exhibit P.
- "<u>Approved Forecast Vendor</u>" means (a) any of Clean Power Research SolarAnywhere, SolarGIS, CAISO, AWS Truepower/UL, DNV GL, or Tenaska Power Services Co., or (b) any other vendor reasonably acceptable to both Buyer and Seller for the purposes of providing or verifying the forecasts under Section 4.3(d).
- "<u>Automated Dispatch System</u>" or "<u>ADS</u>" has the meaning set forth in the CAISO Tariff.
  - "Automated Dispatches" has the meaning set forth in Section 4.5(f).
- "Availability Adjusted Storage Contract Capacity" has the meaning set forth in Exhibit P.
- "<u>Available Generating Capacity</u>" means the capacity of the Generating Facility, expressed in whole MWs<sub>AC</sub> deliverable at the Delivery Point, that is mechanically available to generate Energy assuming no Charging Energy or Discharging Energy during such period.
  - "Available Storage Energy Capacity" has the meaning set forth in Exhibit P(a).
  - "Available Storage Power Capacity" has the meaning set forth in Exhibit P(a).

"Bankrupt" means with respect to any entity, such entity that (a) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar Law, (b) has any such petition filed or commenced against it which remains unstayed or undismissed for a period of ninety (90) days, (c) makes an assignment or any general arrangement for the benefit of creditors, (d) otherwise becomes bankrupt or insolvent (however evidenced), (e) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (f) is generally unable to pay its debts as they fall due.

<u>"Battery Augmentation"</u> means any change to the Storage Facility equipment related to increasing or replenishing its ability to store Energy.

"Business Day" means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday in California. A Business Day begins at 8:00 a.m. and ends at 5:00 p.m. local time for the Party sending a Notice, or payment, or performing a specified action.

"Buyer" means San Diego Community Power, a California joint powers authority.

#### "Buyer Bid Curtailment" means occurrence of both of the following:

- (a) the CAISO provides notice to a Party or the Scheduling Coordinator for the Generating Facility, requiring the Party to curtail any Facility Energy which would have been produced from the Facility for a period of time based on the full amount of Facility Energy forecasted for the Facility for such period in accordance with the most recent forecast available under Section 4.3 for the period specified in the CAISO notice and such curtailment notice results from actions of the Buyer or the SC; and
- (b) the Facility either (i) did not submit a Self-Schedule for the MWhs subject to the reduction; or (ii) did submit a Self-Schedule in the Day-Ahead Market for the MWhs subject to the reduction, but thereafter submitted an Energy Supply Bid (as defined in the CAISO Tariff) in the Real-Time Market for such MWhs subject to the reduction.

Notwithstanding the occurrence of a curtailment as described in pargraph (a) and (b) above, if the Facility is subject to a Planned Outage, Forced Facility Outage, Force Majeure Event or a Curtailment Period for all or any portion of the period covered in the curtailment notice from the CAISO described in paragraph (a), then the calculation of Deemed Delivered Energy during such period shall not include any PV Energy that was not generated or Charging Energy not stored due to such Planned Outage, Forced Facility Outage, Force Majeure Event or Curtailment Period.

"Buyer Curtailment Order" means the instruction from Buyer to Seller to reduce Facility Energy from the Facility by the amount, and for the period of time set forth in such instruction, for reasons unrelated to a Planned Outage, Forced Facility Outage, Force Majeure Event and/or Curtailment Order.

"Buyer Curtailment Period" means the period of time, as measured using current Settlement Intervals, during which Seller reduces Facility Energy from the Facility pursuant to or

as a result of (a) a Buyer Bid Curtailment, (b) a Buyer Curtailment Order, or (c) a Buyer Default which directly causes Seller to be unable to deliver Facility Energy to the Delivery Point; provided, that the duration of any Buyer Curtailment Period shall be inclusive of the time required for the Generating Facility to ramp down and ramp up.

"<u>Buyer Default</u>" means a failure by Buyer (or its agents) to perform Buyer's obligations hereunder, and includes an Event of Default of Buyer.

"Buyer's WREGIS Account" has the meaning set forth in Section 4.10(a).

"<u>CAISO</u>" means the California Independent System Operator Corporation or any successor entity performing similar functions.

"CAISO Approved Meter" means a CAISO approved revenue quality meter or meters, CAISO approved data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, all Facility Energy delivered to the Delivery Point.

"<u>CAISO Certification</u>" means the certification and testing requirements for a storage unit set forth in the CAISO Tariff that are applicable to the Facility, including certification and testing for all Ancillary Services that are applicable to the Facility.

"CAISO Dispatch" means any Charging Notice or Discharging Notice given by the CAISO to the Facility, whether through ADS, AGC, Alternative Dispatches or any successor communication protocol, communicating an Ancillary Service Award (as defined in the CAISO Tariff) or directing the Storage Facility to charge or discharge at a specific MW<sub>AC</sub> rate for a specified period of time or amount of MWh<sub>AC</sub>.

"CAISO Grid" has the same meaning as "CAISO Controlled Grid" as defined in the CAISO Tariff.

"<u>CAISO Operating Order</u>" means the "operating order" defined in Section 37.2.1.1 of the CAISO Tariff.

"<u>CAISO Tariff</u>" means the California Independent System Operator Corporation Agreement and Tariff, Business Practice Manuals (BPMs), and Operating Procedures, including the rules, protocols, procedures and standards attached thereto, as the same may be amended or modified from time-to-time and approved by FERC.

"California Renewables Portfolio Standard" or "RPS" means the renewable energy program and policies established by California State Senate Bills 1038 (2002), 1078 (2002), 107 (2008), X-1 2 (2011), 350 (2015), and 100 (2018) as codified in, *inter alia*, California Public Utilities Code Sections 399.11 through 399.31 and California Public Resources Code Sections 25740 through 25751, as such provisions are amended or supplemented from time to time.

"Capacity Attribute" means any current or future defined characteristic, certificate, tag, credit, or accounting construct associated with the amount of power that the Facility can generate and deliver to the Delivery Point at a particular moment and that can be purchased and sold under CAISO market rules, including Resource Adequacy Benefits.

"Capacity Availability Factor" has the meaning set forth in Exhibit C.

"Capacity Damages" has the meaning set forth in Exhibit B.

"<u>Capacity Test</u>" or "CT" means the Commercial Operation Storage Capacity Test, Storage Capacity Test, or any other test conducted pursuant to Exhibit O.

"<u>CEC</u>" means the California Energy Commission, or any successor agency performing similar statutory functions.

"CEC Certification and Verification" means that the CEC has certified (or, with respect to periods before the date that is one hundred eighty (180) days following the Commercial Operation Date, that the CEC has pre-certified, as such date may be extended pursuant to Section 3.9) that the Facility or Generating Facility (as applicable) is an Eligible Renewable Energy Resource for purposes of the California Renewables Portfolio Standard and that all Facility Energy or PV Energy (as applicable) delivered to the Delivery Point qualifies as generation from an Eligible Renewable Energy Resource.

"CEC Precertification" means that the CEC has issued a precertification for the Facility or the Generating Facility (as applicable) indicating that the planned operations of the Facility or the Generating Facility (as applicable) would comply with applicable CEC requirements for CEC Certification and Verification.

"CEQA" means the California Environmental Quality Act.

"Change of Control" means, except in connection with public market transactions of equity interests or capital stock of Seller's Ultimate Parent, any circumstance in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, more than fifty percent (50%) of the outstanding equity interests in Seller; provided that in calculating ownership percentages for all purposes of the foregoing:

- (a) any ownership interest in Seller held by Ultimate Parent indirectly through one or more intermediate entities shall not be counted towards Ultimate Parent's ownership interest in Seller unless Ultimate Parent directly or indirectly owns more than fifty percent (50%) of the outstanding equity interests in each such intermediate entity; and
- (b) ownership interests in Seller owned directly or indirectly by any Lender (including any cash equity or tax equity provider) or assignee or transferee thereof shall be excluded from the total outstanding equity interests in Seller.

"<u>Charging Energy</u>" means all Energy produced by the Generating Facility that is delivered to the Storage Facility pursuant to a Charging Notice. All Charging Energy shall be used solely to charge the Storage Facility, and all Charging Energy shall be generated solely by the Generating Facility. For avoidance of doubt, Charging Energy shall be measured at the Storage Facility Meter.

"Charging Notice" means the operating instruction, and any subsequent updates, given by Buyer's SC or the CAISO to the Facility, directing the Storage Facility to charge Charging Energy at a specific MW<sub>DC</sub> rate for a specified period of time or to an amount of MWh<sub>DC</sub>, provided (a) any such operating instruction shall be in accordance with the Operating Restrictions and the CAISO Tariff and (b) subject to Section 7.1(b), if, during a period when the Storage Facility is so instructed to be charging, the actual power output level of the Generating Facility is less than the power level set forth in an applicable "Charging Notice", such "Charging Notice" shall be deemed to be automatically adjusted to be equal to the actual power level of the Generating Facility (as adjusted to reflect Electrical Losses). For the avoidance of doubt, (i) any Buyer request to initiate a Storage Capacity Test consistent with Section 4.9 shall not be considered a Charging Notice, and (ii) any Charging Notice shall not constitute a Buyer Bid Curtailment, Buyer Curtailment Order or Curtailment Order.

"Claim" has the meaning set forth in Section 16.2(a).

"Clipped PV Energy" means the amount of energy as would be measured at the Storage Facility Meter produced at the Generating Facility in excess of what can be delivered as  $90MW_{AC}$  at the Delivery Point.

"COD Certificate" has the meaning set forth in Exhibit B.

"Commercial Operation" has the meaning set forth in Exhibit B.

"Commercial Operation Date" has the meaning set forth in Exhibit B.

"Commercial Operation Delay Damages" means an amount equal to (a) the Development Security amount required hereunder, *divided by* (b) one hundred and twenty (120).

"Commercial Operation Storage Capacity Test" means the Storage Capacity Test conducted in connection with Commercial Operation of the Storage Facility, including any additional Storage Capacity Test for additional Storage Facility capacity installed after the Commercial Operation Date pursuant to Section 5 of Exhibit B.

"Compliance Actions" has the meaning set forth in Section 3.12.

"Compliance Expenditure Cap" has the meaning set forth in Section 3.12.

"Confidential Information" has the meaning set forth in Section 18.1.

"Construction Start" has the meaning set forth in Exhibit B.

- "Construction Start Date" has the meaning set forth in Exhibit B.
- "Contract Price" has the meaning set forth on the Cover Sheet. For the avoidance of doubt, the Contract Price is each of the Renewable Rate and the Storage Rate.
  - "Contract Term" has the meaning set forth in Section 2.1.
- "Contract Year" means a period of twelve (12) consecutive months. The first Contract Year shall commence on the Commercial Operation Date and each subsequent Contract Year shall commence on the anniversary of the Commercial Operation Date.
- "Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the Agreement; and all reasonable attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with terminating the Agreement.
- "Cover Sheet" means the cover sheet to this Agreement, which is incorporated into this Agreement.
- "COVID-19" means the epidemic disease designated COVID-19 and the related virus designated SARS-CoV-2 and any mutations thereof, and the efforts of a Governmental Authority to combat such disease.
- "<u>CPUC</u>" means the California Public Utilities Commission or any successor agency performing similar statutory functions.
- "Credit Rating" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by S&P or Moody's. If ratings by S&P and Moody's are not equivalent, the lower rating shall apply.

### "Curtailment Order" means any of the following:

(a) CAISO orders, directs, alerts, or provides notice to a Party, including a CAISO Operating Order, that such Party is required to curtail deliveries of Facility Energy for the following reasons: (i) any System Emergency, or (ii) any warning of an anticipated System Emergency, or warning of an imminent condition or situation, which jeopardizes CAISO's electric system integrity or the integrity of other systems to which CAISO is connected; provided, however, that if the CAISO directs the Generating Facility to curtail production as a sole result of Buyer or the SC submitting a Self-Schedule that results in an Energy oversupply or potential Energy oversupply and Buyer or the SC are unable to resolve the issue with the CAISO, then such curtailment will be treated as Buyer Bid Curtailment.

- (b) a curtailment ordered by the Participating Transmission Owner for reasons including, but not limited to, (i) any situation that affects normal function of the electric system including, but not limited to, any abnormal condition that requires action to prevent circumstances such as equipment damage, loss of load, or abnormal voltage conditions, or (ii) any warning, forecast or anticipation of conditions or situations that jeopardize the Participating Transmission Owner's electric system integrity or the integrity of other systems to which the Participating Transmission Owner is connected;
- (c) a curtailment ordered by CAISO or the Participating Transmission Owner due to scheduled or unscheduled maintenance on the Participating Transmission Owner's transmission facilities that prevents (i) Buyer from receiving or (ii) Seller from delivering Facility Energy to the Delivery Point; or
- (d) a curtailment in accordance with Seller's obligations or limitations under its Interconnection Agreement with the CAISO, Participating Transmission Owner or distribution operator, including curtailments arising from Seller not possessing Full Capacity Deliverability Status as to one-hundred percent (100%) of the Installed Capacity, or other limitations on transfer capability under the Interconnection Agreement; or
- (e) a curtailment resulting from the operation of any Storage Facility capacity in excess of the Storage Contract Capacity installed pursuant to Section 4.5(f).

*provided, however*, that a Curtailment Order will not include any curtailment that is a Buyer Bid Curtailment.

"<u>Curtailment Period</u>" means the period of time, as measured using current Settlement Intervals, during which Facility Energy from the Facility is reduced pursuant to a Curtailment Order; <u>provided</u> that the Curtailment Period shall be inclusive of the time required for the Generating Facility to ramp down and ramp up.

"Cycles" means, at any point in time during any Contract Year, the number of full equivalent charge/discharge cycles of the Storage Facility, calculated as: (a) the total cumulative amount of Discharging Energy from the Storage Facility at such point in time during such Contract Year (expressed in MWh<sub>AC</sub>) *divided by* (b) the weighted average Storage Contract Capacity for such Contract Year to date *multiplied by* four (4).

"<u>Daily Delay Damages</u>" means an amount equal to (a) the Development Security amount required hereunder, divided by (b) one hundred twenty (120).

"<u>Damage Payment</u>" means a dollar amount not to exceed the amount of the Development Security, as measured in the aggregate pursuant to Section 11.7.

"<u>Day-Ahead Forecast</u>" has the meaning set forth in Section 4.3(c).

"Day-Ahead Market" has the meaning set forth in the CAISO Tariff.

"Day-Ahead Schedule" has the meaning set forth in the CAISO Tariff.

"Deemed Delivered Energy" means the amount of Energy expressed in MWh<sub>AC</sub> that the Generating Facility would have produced and delivered to the Storage Facility or the Delivery Point, but that is not produced by the Generating Facility during a Buyer Curtailment Period, which amount shall be equal to the Real-Time Forecast (of the hourly expected PV Energy produced by the Generating Facility) provided pursuant to Section 4.3(d) for the period of time during the Buyer Curtailment Period (or other relevant period), less the amount of (i) PV Energy delivered to the Delivery Point directly from the Generating Facility and (ii) Adjusted Charging Energy, during the Buyer Curtailment Period (or other relevant period); provided that, if the applicable difference is negative, the Deemed Delivered Energy shall be zero (0). If the LMP for the Facility's PNode during any Settlement Interval was less than zero, Deemed Delivered Energy shall be reduced in such Settlement Interval by the amount of any Charging Energy that was not able to be delivered to the Storage Facility during such Settlement Interval due to the unavailability of the Storage Facility due to a Forced Facility Outage.

"<u>Defaulting Party</u>" has the meaning set forth in Section 11.1(a).

"<u>Deficient Month</u>" has the meaning set forth in Section 4.10(e).

"Delivery Point" means the Facility PNode.

"<u>Delivery Term</u>" shall mean the period of Contract Years set forth on the Cover Sheet beginning on the Commercial Operation Date, unless terminated earlier in accordance with the terms and conditions of this Agreement.

"<u>Development Cure Period</u>" has the meaning set forth in <u>Exhibit B</u>.

"<u>Development Security</u>" means (i) cash; or (ii) a Letter of Credit in the amount set forth on the Cover Sheet; or (iii) in the sole discretion of Buyer, a Guaranty.

"<u>Discharging Energy</u>" means all Energy delivered to the Delivery Point from the Storage Facility, net of the Electrical Losses and Station Use, as measured at the Storage Facility Metering Point by the Storage Facility Meter. For the avoidance of doubt, all Discharging Energy will have originally been delivered to the Storage Facility as Charging Energy.

"Discharging Notice" means the operating instruction, and any subsequent updates, given by Buyer or Buyer's SC or CAISO to the Facility, directing the Storage Facility to discharge Discharging Energy at a specific MW<sub>AC</sub> rate for a specified period of time or amount of MWh<sub>AC</sub>, provided that any such operating instruction or updates shall be in accordance with the Operating Restrictions and the CAISO Tariff, and (b) subject to Section 7.1(b), if, during a period when the Storage Facility is so instructed to be discharging, the sum of PV Energy and Discharging Energy would exceed the Interconnection Capacity Limit, such "Discharging Notice" shall be deemed to be automatically adjusted to reduce the amount of Discharging Energy so that the sum of Discharging Energy and PV Energy does not exceed the Interconnection Capacity Limit, until such time as Buyer's SC or CAISO issues a further modified Discharging Notice. For the avoidance of doubt, any Discharging Notice shall not constitute a Buyer Bid Curtailment, Buyer Curtailment Order or Curtailment Order.

- "Early Termination Date" has the meaning set forth in Section 11.2(a).
- "Effective Date" has the meaning set forth on the Preamble.
- "<u>Effective FCDS Date</u>" means the date identified in Seller's Notice to Buyer (along with a Full Capacity Deliverability Status Finding from CAISO) as the date that the Facility has attained Full Capacity Deliverability Status.
- "Electrical Losses" means subject to meeting any applicable CAISO requirements and in accordance with Section 7.1, all transmission or transformation losses (a) within the Generating Facility before the Delivery Point associated with delivery of PV Energy, (b) between the Storage Facility Metering Point and the Delivery Point associated with delivery of Discharging Energy, and (c) from within the Generating Facility to the Storage Facility Metering Point associated with delivery of Charging Energy. If any amounts included within the definitions of "Electrical Losses" and "Station Use" hereunder are duplicative, then for all relevant calculations hereunder it is intended that such amounts not be double counted or otherwise duplicated.
- "Eligible Renewable Energy Resource" has the meaning set forth in California Public Utilities Code Section 399.12(e) and California Public Resources Code Section 25741(a), as either code provision is amended or supplemented from time to time.
- "Energy" means the amount of electricity either used or generated, charged, or discharged over a period of time, expressed in terms of kilowatt-hours ("kWh") or megawatt-hours ("MWh"), as context dictates.
- "Energy Management System" or "EMS" means the Storage Facility's energy management system.
  - "Energy Supply Bid" has the meaning set forth in the CAISO Tariff.
  - "Event of Default" has the meaning set forth in Section 11.1.
  - "Excess MWh" has the meaning set forth in Exhibit C.
  - "Excused Event" has the meaning set forth in Exhibit P.
- "<u>Executed Interconnection Agreement Milestone</u>" means the date for completion of execution of the Interconnection Agreement by Seller and the PTO as set forth on the Cover Sheet.
- "Expected Commercial Operation Date" is the date set forth on the Cover Sheet by which Seller reasonably expects to achieve Commercial Operation.
- "Expected Construction Start Date" is the date set forth on the Cover Sheet by which Seller reasonably expects to achieve Construction Start.
- "Expected Energy" means the quantity of PV Energy that Seller expects to be able to deliver to Buyer from the Generating Facility during each Contract Year or other time period

(assuming no Charging Energy or Discharging Energy during such Contract Year or time period) in the quantity specified on the Cover Sheet, which amount shall be adjusted proportionately to the reduction from Guaranteed PV Capacity to Installed PV Capacity pursuant to Section 5(a) of Exhibit B, if applicable.

"Facility" means the combined Generating Facility and the Storage Facility.

"<u>Facility Energy</u>" means PV Energy and/or Discharging Energy, as applicable, at the Delivery Point, during any Settlement Interval or Settlement Period, net of Electrical Losses and Station Use, as measured by the Facility Meter, will be adjusted in accordance with CAISO meter requirements and Prudent Operating Practices to account for Electrical Losses and Station Use.

"Facility Meter" means the CAISO Approved Meter that will measure all Facility Energy.

"<u>FERC</u>" means the Federal Energy Regulatory Commission or any successor government agency.

"Force Majeure Event" has the meaning set forth in Section 10.1.

"<u>Forced Facility Outage</u>" means an unexpected failure of one or more components of the Facility that prevents Seller from generating Energy or making Facility Energy available at the Delivery Point and that is not the result of a Force Majeure Event.

"Forecasting Penalty" means for each hour in which Seller does not provide the forecast required in Section 4.3(d) and Buyer incurs a loss or penalty resulting from Seller's failure and Buyer's scheduling activities in such hour with respect to Facility Energy, the product of (A) the absolute difference (if any) between (i) the expected PV Energy for such hour (which, for the avoidance of doubt, assumes no Charging Energy or Discharging Energy in such hour) set forth in the Monthly Forecast and (ii) the actual PV Energy produced by the Generating Facility (absent any Charging Energy and Discharging Energy), *multiplied by* (B) the absolute value of the Real-Time Price in such hour.

"Forward Certificate Transfers" has the meaning set forth in Section 4.10(a).

"Full Capacity Deliverability Status" has the meaning set forth in the CAISO Tariff.

"<u>Full Capacity Deliverability Status Finding</u>" means a written confirmation from the CAISO that the Facility is eligible for Full Capacity Deliverability Status.

"Future Environmental Attributes" shall mean any and all generation attributes (other than Green Attributes or Renewable Energy Incentives) under the RPS regulations or under any and all other international, federal, regional, state or other law, rule, regulation, bylaw, treaty or other intergovernmental compact, decision, administrative decision, program (including any voluntary compliance or membership program), competitive market or business method (including all credits, certificates, benefits, and emission measurements, reductions, offsets and allowances related thereto) that are attributable in the future, to the generation of electrical energy by the

Facility. Future Environmental Attributes do not include any Energy, Ancillary Services, reliability, or Capacity Attributes, or Tax Credits, associated with the construction or operation of the Facility, or 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.

"Gains" means, 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 this Agreement for the remaining Contract Term, determined in a commercially reasonable manner. Factors used in determining the economic benefit to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., SP-15), all of which should be calculated for the remaining Contract Term, and include the value of Green Attributes, Renewable Energy Incentives, any Future Environmental Attributes (to the extent such are in existence at the time "Gains" are applicable under this Agreement), and Capacity Attributes. A Party shall use commercially reasonable efforts to obtain third-party information in order to determine Gains and shall use information available to it internally for such purpose only if it is unable, after using commercially reasonable efforts, to obtain relevant third-party information.

"Generating Facility" means the solar photovoltaic generating facility described on the Cover Sheet and in Exhibit A, located at the Site and including mechanical equipment and associated facilities and equipment required to deliver (i) PV Energy to the Delivery Point, and (ii) Charging Energy to the Storage Facility; provided, that the "Generating Facility" does not include the Storage Facility or the Shared Facilities.

"Governmental Authority" means any federal, state, provincial, local or municipal government, any political subdivision thereof or any other governmental, congressional or parliamentary, regulatory, or judicial instrumentality, authority, body, agency, department, bureau, or entity with authority to bind a Party at law, including CAISO and CPUC; provided, however, that "Governmental Authority" shall not in any event include any Party.

"Green Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Facility and its displacement of conventional energy generation. Green Attributes include but are not limited to Renewable Energy Credits, as well as: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Facility, (ii) Tax Credits, or (iii) emission reduction credits encumbered

or used by the Facility for compliance with local, state, or federal operating and/or air quality permits. Green Attributes under the preceding definition are limited to Green Attributes that exist under applicable Law as of the Effective Date.

"Green Tag Reporting Rights" means the right of a purchaser of renewable energy to report ownership of accumulated "Green Tags" in compliance with and to the extent permitted by applicable Law and include, without limitation, rights under Section 1605(b) of the Energy Policy Act of 1992, and any present or future federal, state or local certification program or emissions trading program, including pursuant to the WREGIS Operating Rules.

"Green Tags" means a unit accumulated on a MWh<sub>AC</sub> basis where one (1) represents the Green Attributes associated with one (1) MWh<sub>AC</sub> of Facility Energy.

"Guaranteed Commercial Operation Date" means the Expected Commercial Operation Date, as such date may be extended by the Development Cure Period.

"Guaranteed Construction Start Date" means the Expected Construction Start Date, as such date may be extended by the Development Cure Period.

"<u>Guaranteed Energy Production</u>" means an amount of Adjusted Facility Energy, as measured in MWh<sub>AC</sub>, equal to the Guaranteed Energy Production Percentage *multiplied by* the total Expected Energy (as set forth on the Cover Sheet) for the applicable Performance Measurement Period.

### "Guaranteed Energy Production Percentage" means

"Guaranteed PV Capacity" means the amount of generating capacity of the Generating Facility, as measured in  $MW_{AC}$  at the Delivery Point, set forth on the Cover Sheet, as the same may be adjusted pursuant to Section 5(a) of Exhibit B.

"Guaranteed Storage Availability" has the meaning set forth in Section 4.8.

"Guarantor" means, with respect to Seller, (a) a Person that is reasonably acceptable to Buyer, or (b) any Person that (i) Buyer does not already have any material credit exposure to under any other agreements, guarantees, or other arrangements at the time its Guaranty is issued, (ii) has an Investment Grade Credit Rating, (iii) has a tangible net worth of at least One Hundred Fifty Million Dollars (\$150,000,000), (iv) is incorporated or organized in a jurisdiction of the United States and is in good standing in such jurisdiction, and (v) executes and delivers a Guaranty for the benefit of Buyer.

"Guaranty" means a guaranty from a Guarantor provided for the benefit of Buyer substantially in the form attached as Exhibit L, or as reasonably acceptable to Buyer.

"Imbalance Energy" means the amount of Energy in MWh, in any given Settlement Period or Settlement Interval, by which the amount of Facility Energy deviates from the applicable amount of Scheduled Energy.

- "Indemnifiable Loss(es)" has the meaning set forth in Section 16.1.
- "Indemnified Group" has the meaning set forth in Section 16.1.
- "<u>Initial Synchronization</u>" means the initial delivery of Facility Energy to the Delivery Point.
  - "<u>Installed Capacity</u>" has the meaning set forth in <u>Exhibit I</u>.
- "<u>Installed PV Capacity</u>" means the actual PV generating capacity of the Generating Facility, as measured in MW<sub>AC</sub> at the Delivery Point, that achieves Commercial Operation, as demonstrated by a performance test, adjusted for ambient conditions on the date of the performance test, and evidenced by a certificate substantially in the form attached as <u>Exhibit I</u> hereto.
- "Installed Storage Capacity" means the maximum dependable operating capability of the Storage Facility to discharge electric energy, as measured in MW<sub>AC</sub> at the Delivery Point, that achieves Commercial Operation, adjusted for ambient conditions on the date of the performance test, and as evidenced by a certificate substantially in the form attached as Exhibit I hereto. It is acknowledged that Seller shall have the right and option in its sole discretion to install Storage Facility capacity in excess of the Storage Contract Capacity; provided, Buyer shall have no rights to instruct Seller to (i) charge or discharge the Storage Facility at an instantaneous rate (in MW<sub>AC</sub>) in excess of the Storage Contract Capacity; (ii) charge the Storage Facility to a level (in MWh<sub>AC</sub>) in excess of the Storage Contract Capacity times four (4) hours; or iii) otherwise violate the Operating Restrictions.
- "Interconnection Agreement" means the interconnection agreement entered into by Seller pursuant to which the Facility will be interconnected with the Transmission System, and pursuant to which Seller's Interconnection Facilities and any other Interconnection Facilities will be constructed, operated and maintained during the Contract Term.
- "Interconnection Capacity Limit" means the maximum instantaneous amount of power that is permitted to be delivered to the Delivery Point under Seller's Interconnection Agreement, in the amount of  $90~MW_{AC}$ .
- "<u>Interconnection Facilities</u>" means the interconnection facilities, control and protective devices and metering facilities required to connect the Facility with the Transmission System in accordance with the Interconnection Agreement.

<sup>&</sup>quot;Interest Rate" has the meaning set forth in Section 8.2.

<sup>&</sup>quot;Interim Deliverability Status" has the meaning set forth in the CAISO Tariff.

- "Inter-SC Trade" or "IST" has the meaning set forth in the CAISO Tariff.
- "Investment Grade Credit Rating" means a Credit Rating of BBB- or higher by S&P or Fitch or Baa3 or higher by Moody's.
- "<u>ITC</u>" means the investment tax credit established pursuant to Section 48 of the United States Internal Revenue Code of 1986.
- "<u>Joint Powers Act</u>" means the Joint Exercise of Powers Act of the State of California (Government Code Section 6500 et seq.).
- "<u>Joint Powers Agreement</u>" means that certain Joint Powers Agreement dated October 30, 2017, as amended from time to time, under which Buyer is organized as a Joint Powers Authority in accordance with the Joint Powers Act.
- "<u>kWh</u>" means a kilowatt-hour measured in alternating current, unless expressly stated in terms of direct current.
- "<u>Law</u>" means any applicable law, statute, rule, regulation, decision, writ, order, decree or judgment, permit or any interpretation thereof, promulgated or issued by a Governmental Authority.
- "Lender" means, collectively, any Person (i) providing senior or subordinated construction, interim, back leverage or long-term debt, tax equity financing or refinancing for or in connection with the development, construction, purchase, installation or operation of the Facility, whether that financing or refinancing takes the form of private debt (including back-leverage debt), public debt or any other form (including financing or refinancing provided to a member or other direct or indirect owner of Seller), including any Person directly or indirectly providing financing or refinancing for the Facility, and any trustee or agent or similar representative acting on their behalf, (ii) providing interest rate or commodity protection under an agreement hedging or otherwise mitigating the cost of any of the foregoing obligations and/or (iii) participating in a lease financing (including a sale leaseback or leveraged leasing structure) with respect to the Facility.
- "<u>Letter(s) of Credit</u>" means one or more irrevocable, standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank (a) having a Credit Rating of at least A- with an outlook designation of "stable" from S&P or A3 with an outlook designation of "stable" from Moody's or (b) being reasonably acceptable to Buyer, in a form substantially similar to the letter of credit set forth in <u>Exhibit K</u>.
- "<u>Licensed Professional Engineer</u>" means an independent, professional engineer selected by Seller and reasonably acceptable to Buyer, licensed in the State of California.
  - "Local Capacity Area Resources" has the meaning set forth in the CAISO Tariff.
  - "Locational Marginal Price" or "LMP" has the meaning set forth in the CAISO Tariff.

"Losses" means, 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 termination of this Agreement for the remaining Contract Term, determined in a commercially reasonable manner. Factors used in determining economic loss to a Party may include, without limitation, reference to information supplied by one or more third parties, which shall exclude Affiliates of the Non-Defaulting Party, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, volatilities, spreads or other relevant market data in the relevant markets, comparable transactions, forward price curves based on economic analysis of the relevant markets, settlement prices for comparable transactions at liquid trading hubs (e.g., SP-15), all of which should be calculated for the remaining Contract Term and must include the value of Green Attributes, Capacity Attributes, and Renewable Energy Incentives.

"Lost Output" has the meaning set forth in Section 4.7.

"Major Project Development Milestone" has the meaning set forth in in Exhibit B.

"Master File" has the meaning set forth in the CAISO Tariff.

"Maximum Available Clipped PV Energy" means, for the day in question,

"Maximum Charging Capacity" has the meaning set forth in in Exhibit A.

"Maximum Discharging Capacity" has the meaning set forth in in Exhibit A.

"<u>Milestones</u>" means the development activities for significant permitting, interconnection, financing and construction milestones set forth on the Cover Sheet.

"<u>Monthly Capacity Payment</u>" means the payment required to be made by Buyer to Seller each month of the Delivery Term as compensation for the Storage Contract Capacity and Capacity Attributes associated with the Storage Facility, as calculated in accordance with Exhibit C.

"Monthly Delivery Forecast" has the meaning set forth in Section 4.3(b).

"Moody's" means Moody's Investors Service, Inc., or its successors.

"<u>MW</u>" means megawatts in alternating current, unless expressly stated in terms of direct current.

- "<u>MWh</u>" means megawatt-hour measured in alternating current, unless expressly stated in terms of direct current.
- "<u>Negative LMP</u>" means, in any Settlement Interval, the Real-Time Market LMP at the Facility's PNode is less than Zero dollars (\$0).
  - "Negative LMP Costs" has the meaning set forth in Exhibit C.
- "<u>NERC</u>" means the North American Electric Reliability Corporation or any successor entity performing similar functions.
  - "Net Qualifying Capacity" has the meaning set forth in the CAISO Tariff.
  - "Network Upgrades" has the meaning set forth in the CAISO Tariff.
  - "Non-Defaulting Party" has the meaning set forth in Section 11.2.
- "Notice" shall, unless otherwise specified in the Agreement, mean written communications by a Party to be delivered by hand delivery, United States mail, overnight courier service, or electronic messaging (e-mail).
  - "Notice of Claim" has the meaning set forth in Section 16.2.
- "<u>On-Peak Hour</u>" means any hour from hour-ending 0700 to hour-ending 2200 (i.e., 6:00 AM to 9:59 PM) on Monday through Saturday, Pacific Prevailing Time, excluding North American Electric Reliability Council (NERC) holidays.
- "<u>Operating Restrictions</u>" means those rules, requirements, and procedures set forth on Exhibit Q and any other restriction pursuant to Prudent Operating Practice.
- "<u>Participating Transmission Owner</u>" or "<u>PTO</u>" means an entity that owns, operates and maintains transmission or distribution lines and associated facilities or has entitlements to use certain transmission or distribution lines and associated facilities where the Facility is interconnected. For purposes of this Agreement, the Participating Transmission Owner is set forth in <u>Exhibit A</u>.
  - "Party" or "Parties" has the meaning set forth in the Preamble.
- "Performance Measurement Period" means each two (2) consecutive Contract Years commencing with the first Contract Year so that the first Performance Measurement Period shall include Contract Years 1 and 2. For the avoidance of doubt, Performance Measurement Periods shall overlap, so that if the first Performance Measurement Period is comprised of Contract Years 1 and 2, the second Performance Measurement Period shall be comprised of Contract Years 2 and 3, the third Performance Measurement Period shall be comprised of Contract Years 3 and 4, and so on; provided, however, that a new Performance Measurement Period shall begin following any Performance Measurement Period for which Seller pays any liquidated damages or provides any Replacement Product under Section 4.7. Thus, for example, if Seller pays any liquidated damages

or provides any Replacement Product under Section 4.7 for the Performance Measurement Period that is comprised of Contract Years 4 and 5, the next Performance Measurement Period shall be comprised of Contract Years 6 and 7.

"<u>Performance Security</u>" means (i) cash or (ii) a Letter of Credit or (iii) a Guaranty (if permitted by Buyer, in its sole discretion) in the amount set forth on the Cover Sheet.

"<u>Permitted Transferee</u>" means (i) any Affiliate of Seller or (ii) any entity that satisfies, or is controlled by another Person that satisfies, the following requirements:

- (a) either (i) has a tangible net worth of not less than one hundred million dollars (\$100,000,000) or an Investment Grade Credit Rating, or (ii) provides a replacement of the Development Security or Performance Security, as applicable; and
- (b) At least two (2) years of experience in the ownership and operations of power generation facilities and energy storage facilities similar to the Facility, or has retained a third-party with such experience to operate the Facility.

"<u>Person</u>" means any individual, sole proprietorship, corporation, limited liability company, limited or general partnership, joint venture, association, joint-stock company, trust, incorporated organization, institution, public benefit corporation, unincorporated organization, government entity or other entity.

"Planned Outage" means a period during which the Facility is either in whole or in part not capable of providing service due to planned maintenance that has been scheduled in accordance with Section 4.6(a).

"PNode" has the meaning set forth in the CAISO Tariff.

"<u>Portfolio</u>" means the single portfolio of electrical energy generating, energy storage, or other assets and entities, including the Facility (or the interests of Seller or Seller's Affiliates or the interests of their respective direct or indirect parent companies), that is pledged as collateral security in connection with a Portfolio Financing.

"Portfolio Content Category" means PCC1, PCC2 or PCC3, as applicable.

"<u>Portfolio Content Category 1</u>" or "<u>PCC1</u>" means any Renewable Energy Credit associated with the generation of electricity from an Eligible Renewable Energy Resource consisting of the portfolio content set forth in California Public Utilities Code Section 399.16(b)(1), as may be amended from time to time or as further defined or supplemented by Law.

"Portfolio Financing" means any debt incurred by an Affiliate of Seller that is secured only by a Portfolio.

"<u>Portfolio Financing Entity</u>" means any Affiliate of Seller that incurs debt in connection with any Portfolio Financing.

"Product" has the meaning set forth on the Cover Sheet.

"Progress Report" means a progress report including the items set forth in Exhibit E.

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

"<u>PTC</u>" means the production tax credit established pursuant to Section 45 of the United States Internal Revenue Code of 1986.

"<u>PV Energy</u>" means Energy that is generated using photo-voltaic cells at the Generating Facility and delivered directly to the Delivery Point, net of Electrical Losses, and is not Charging Energy or Discharging Energy.

"Qualifying Capacity" has the meaning set forth in the CAISO Tariff.

"RA Deficiency Amount" means the liquidated damages payment that Seller shall pay to Buyer for an applicable RA Shortfall Month as calculated in accordance with Section 3.8(b).

"RA Guarantee Date" means the date set forth in the deliverability Section of the Cover Sheet, which is the date the Facility is expected to achieve Interim or Full Capacity Deliverability Status.

"<u>RA Shortfall Month</u>" means, for purposes of calculating an RA Deficiency Amount under Section 3.8(b), any month, commencing on the RA Guarantee Date, during which the Net Qualifying Capacity of the Facility for such month was less than the Qualifying Capacity of the Facility for such month.

"Real-Time Forecast" means any Notice of any change to the Available Generating Capacity, Available Storage Power Capacity, Available Storage Energy Capacity, or hourly expected Energy delivered by or on behalf of Seller pursuant to Section 4.3(d).

"Real-Time Market" has the meaning set forth in the CAISO Tariff.

"<u>Real-Time Price</u>" means the Resource-Specific Settlement Interval LMP as defined in the CAISO Tariff. If there is more than one applicable Real-Time Price for the same period of time, Real-Time Price shall mean the price associated with the smallest time interval.

"Remedial Action Plan" has the meaning in Section 2.4.

"Renewable Energy Credit" has the meaning set forth in California Public Utilities Code Section 399.12(h), as may be amended from time to time or as further defined or supplemented by Law.

"Renewable Energy Incentives" means: (a) all federal, state, or local Tax credits or other Tax benefits associated with the construction, ownership, or production of electricity from the Facility (including credits under Sections 38, 45, 46 and 48 of the Internal Revenue Code of 1986, as amended); (b) any federal, state, or local grants, subsidies or other like benefits relating in any way to the Facility, including any cash grant or similar or substitute payment in lieu of federal Tax credits available under subsequently enacted federal legislation; and (c) any other form of incentive relating in any way to the Facility that is not a Green Attribute or a Future Environmental Attribute.

"Renewable Rate" has the meaning set forth on the Cover Sheet.

"Replacement Energy" has the meaning set forth in Exhibit G.

"Replacement Green Attributes" has the meaning set forth in Exhibit G.

"Replacement Product" has the meaning set forth in Exhibit G.

"Replacement RA" means Resource Adequacy Benefits, if any, equivalent to those that would have been provided by the Facility with respect to the applicable month in which a RA Deficiency Amount is due to Buyer and, to the extent that the Facility would have qualified as a Local Capacity Area Resource for such month, described as a Local Capacity Area Resource and located within the same Local Capacity Area.

"Resource Adequacy Benefits" means the rights and privileges attached to the Facility that satisfy any entity's resource adequacy obligations, as those obligations are set forth in any Resource Adequacy Rulings and includes any local, zonal or otherwise locational attributes associated with the Facility.

"Resource Adequacy Rulings" means all CPUC rulings and decisions governing resource adequacy that are currently in effect and applicable to the performance of this Agreement and any future ruling or decision, or any other resource adequacy Law, however described, as such

decisions, rulings, Laws, rules or regulations may be amended or modified from time-to-time throughout the Delivery Term.

"<u>S&P</u>" means the Standard & Poor's Financial Services, LLC (a subsidiary of S&P Global Inc.) or its successor.

"<u>SCADA Systems</u>" means the standard supervisory control and data acquisition systems to be installed by Seller as part of the Facility, including those system components that enable Seller to receive ADS and AGC instructions from the CAISO or similar instructions from Buyer's SC.

"<u>Schedule</u>" has the meaning set forth in the CAISO Tariff, and "<u>Scheduled</u>" has a corollary meaning.

"<u>Scheduled Energy</u>" means the Facility Energy that clears under the applicable CAISO market based on the final Day-Ahead Schedule, FMM Schedule (as defined in the CAISO Tariff), or any other financially binding Schedule, market instruction or dispatch for the Facility for a given period of time implemented in accordance with the CAISO Tariff.

"Scheduling Coordinator" or "SC" means an entity certified by the CAISO as qualifying as a Scheduling Coordinator pursuant to the CAISO Tariff for the purposes of undertaking the functions specified in "Responsibilities of a Scheduling Coordinator," of the CAISO Tariff, as amended from time to time.

"Settlement Amount" means the Non-Defaulting Party's (or in the case of Section 3.10(d)(v), Seller's) Costs and Losses, on the one hand, netted against its Gains, on the other. If the Non-Defaulting Party's (or in the case of Section 3.10(d)(v), Seller's) Costs and Losses exceed its Gains, then the Settlement Amount shall be an amount owing to the Non-Defaulting Party (or in the case of Section 3.10(d)(v), Seller's) Gains exceed its Costs and Losses, then the Settlement Amount shall be zero dollars (\$0). The Settlement Amount does not include consequential, incidental, punitive, exemplary or indirect or business interruption damages.

"Settlement Interval" has the meaning set forth in the CAISO Tariff.

<sup>&</sup>quot;Security Interest" has the meaning set forth in Section 8.8.

<sup>&</sup>quot;Self-Schedule" has the meaning set forth in the CAISO Tariff.

<sup>&</sup>quot;Seller" has the meaning set forth on the Cover Sheet.

<sup>&</sup>quot;Seller's WREGIS Account" has the meaning set forth in Section 4.10(a).

"Settlement Period" has the meaning set forth in the CAISO Tariff.

"Shared Facilities" means the gen-tie lines, transformers, substations, or other equipment, permits, contract rights, and other assets and property (real or personal), in each case, as necessary to enable delivery of energy from the Facility (which is excluded from Shared Facilities) to the point of interconnection, including the Interconnection Agreement itself, that are used in common with third parties.

"<u>Site</u>" means the real property on which the Facility is or will be located, as further described in Exhibit A.

"Site Control" means that Seller (or, prior to the Delivery Term, its Affiliate): (a) owns or has the option to purchase the Site; (b) is the lessee or has the option to lease the Site; or (c) is the holder of an easement or an option for an easement, right-of-way grant, or similar instrument with respect to the Site.

"SOC" or "State of Charge" means the (a) Stored Energy Level, as defined at whatever point is measured of the Storage Facility relative to (b) the result of multiplying (i) the Storage Contract Capacity by (ii) four (4) hours; expressed as a percentage.

"<u>Station Use</u>" means the Energy (including Energy produced or discharged by the Facility) that is used within the Facility to power the lights, motors, temperature control systems, control systems, and other electrical loads that are necessary for operation of the Facility.

"<u>Storage Capacity Test</u>" means any test or retest of the capacity of the Storage Facility conducted in accordance with the testing procedures, requirements and protocols set forth in Section 4.9 and Exhibit O.

"Storage Contract Capacity" means the total capacity (in  $MW_{AC}$ ) of the Storage Facility initially equal to the Storage Contract Capacity amount set forth on the Cover Sheet, as the same may be adjusted in accordance with Section 5(b) of Exhibit B and from time to time pursuant to Section 4.9 and Exhibit O to reflect the results of the most recently performed Storage Capacity Test.

"Storage Facility" means the energy storage facility described on the Cover Sheet and in  $\underline{\text{Exhibit A}}$  (including the operational requirements of the energy storage facility) and in  $\underline{\text{Exhibit R}}$ , located at the Site and including mechanical equipment and associated facilities and equipment required to deliver Storage Product (but excluding any Shared Facilities), and as such energy storage facility may be expanded or otherwise modified from time to time in accordance with the terms of this Agreement.

"Storage Facility Charging Loss Factor" is determined by the Storage Capacity Test, and represents the result of subtracting from the number one (1)

"Storage Facility Discharging Loss Factor" is determined by the Storage Capacity Test, and shall not fall below the minimum value set forth on the Cover Sheet and represents the result of subtracting from the number one (1) the percentage of electrical losses associated with Energy physically stored in the Storage facility (as read by the Storage Facility meter in  $MWh_{DC}$ ) being discharged to the Delivery point as Discharging Energy. For example, the difference between the Stored Energy Level in  $MWh_{DC}$  at the Delivery point after losses was 10% less than the physically stored energy level in  $MWh_{DC}$  at the Storage Facility meter, then the Storage Facility Discharging Loss Factor would be (.90).

"Storage Facility Meter" means, as applicable, all or part of the equipment and software, including the EMS, along with a compatible data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, the amount of Charging Energy delivered to the Storage Facility Metering Points and the amount of Discharging Energy discharged from the Storage Facility at the Storage Facility Metering Points to the Delivery Point for the purpose of invoicing in accordance with Section 8.1. For clarity, the Facility may contain multiple measurement devices that will make up the Storage Facility Meter, and, unless otherwise indicated, references to the Storage Facility Meter shall mean all such measurement devices and the aggregated data of all such measurement devices, taken together.

"Storage Facility Metering Point" means the location(s) of the Storage Facility Meter(s) shown on Exhibit R.

"<u>Storage Product</u>" means (a) Discharging Energy, (b) Capacity Attributes, if any, (c) Available Storage Energy Capacity, (d) Available Storage Power Capacity, and (e) Ancillary Services (as defined in the CAISO Tariff), if any, in each case arising from or relating to the Storage Facility.

"Storage Rate" has the meaning set forth on the Cover Sheet.

"Stored Energy Level" means, at a particular time, the amount of Energy in the Storage Facility available to be discharged as Discharging Energy, as defined at whatever point is measured. The Parties acknowledge that, taking into account Electrical Losses to the Delivery Point, the actual amount of Energy (expressed in MWh<sub>DC</sub>) physically stored in the Storage Facility at any moment in time shall be greater than the Stored Energy Level as measured at the Delivery Point (expressed in MWh<sub>AC</sub>) as defined in the preceding sentence, and the Facility's energy management system shall provide a continuous monitoring and read out of the Stored Energy Level as defined in the preceding sentence as measured at the Delivery Point.

"System Emergency" means any condition that requires, as determined and declared by CAISO or the PTO, automatic or immediate action to (i) prevent or limit harm to or loss of life or property, (ii) prevent loss of transmission facilities or generation supply in the immediate vicinity of the Facility, or (iii) to preserve Transmission System reliability.

"<u>Tax</u>" or "<u>Taxes</u>" means all U.S. federal, state and local and any foreign taxes, levies, assessments, surcharges, duties and other fees and charges of any nature imposed by a Governmental Authority, whether currently in effect or adopted during the Contract Term, including ad valorem, excise, franchise, gross receipts, import/export, license, property, sales and use, stamp, transfer, payroll, unemployment, income, and any and all items of withholding, deficiency, penalty, additions, interest or assessment related thereto.

"<u>Tax Credits</u>" means the PTC, ITC and any other state, local and/or federal production tax credit, depreciation benefit, tax deduction and/or investment tax credit specific to the production of renewable energy and/or investments in renewable energy or battery storage facilities.

"<u>Terminated Transaction</u>" has the meaning set forth in Section 11.2(a).

"<u>Termination Payment</u>" has the meaning set forth in Section 11.3.

"<u>Test Energy</u>" means Facility Energy delivered (a) commencing on the later of (i) the first date that the CAISO informs Seller in writing that Seller may deliver Facility Energy to the CAISO and (ii) the first date that the PTO informs Seller in writing that Seller has conditional or temporary permission to operate in parallel with the CAISO grid, and (b) ending upon the occurrence of the Commercial Operation Date.

"<u>Test Energy Rate</u>" has the meaning set forth in Section 3.6.

"<u>Transmission System</u>" means the transmission facilities operated by the CAISO, now or hereafter in existence, which provide energy transmission service within the CAISO grid from the Delivery Point.

"<u>Transmission System Outage</u>" means an outage on the Transmission System, other than a System Emergency, that is not caused by Seller's actions or inactions and that prevents Buyer or the CAISO (as applicable) from receiving Facility Energy onto the Transmission System.

"<u>Ultimate Parent</u>" means BayWa r.e. Solar Projects, LLC, a Delaware limited liability company.

"Variable Energy Resource" or "VER" has the meaning set forth in the CAISO Tariff.

"<u>WREGIS</u>" means the Western Renewable Energy Generation Information System or any successor renewable energy tracking program.

"WREGIS Certificate Deficit" has the meaning set forth in Section 4.10(e).

"<u>WREGIS Certificates</u>" has the same meaning as "Certificate" as defined by WREGIS in the WREGIS Operating Rules and are designated as eligible for complying with the California Renewables Portfolio Standard.

- "<u>WREGIS Operating Rules</u>" means those operating rules and requirements adopted by WREGIS as of May 1, 2018, as subsequently amended, supplemented or replaced (in whole or in part) from time to time.
- 1.2 **Rules of Interpretation**. In this Agreement, except as expressly stated otherwise or unless the context otherwise requires:
- (a) headings and the rendering of text in bold and italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa and the masculine, feminine and neuter genders include all genders;
- (c) the words "hereof", "herein", and "hereunder" and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement;
- (d) a reference to an Article, Section, paragraph, clause, Party, or Exhibit is a reference to that Section, paragraph, clause of, or that Party or Exhibit to, this Agreement unless otherwise specified;
- (e) a reference to a document or agreement, including this Agreement means such document, agreement or this Agreement including any amendment or supplement to, or replacement, novation or modification of this Agreement, but disregarding any amendment, supplement, replacement, novation or modification made in breach of such document, agreement or this Agreement;
- (f) a reference to a Person includes that Person's successors and permitted assigns;
- (g) the term "including" means "including without limitation" and any list of examples following such term shall in no way restrict or limit the generality of the word or provision in respect of which such examples are provided;
- (h) references to any statute, code or statutory provision are to be construed as a reference to the same as it may have been, or may from time to time be, amended, modified or reenacted, and include references to all bylaws, instruments, orders and regulations for the time being made thereunder or deriving validity therefrom unless the context otherwise requires;
- (i) in the event of a conflict, a mathematical formula or other precise description of a concept or a term shall prevail over words providing a more general description of a concept or a term;
- (j) references to any amount of money shall mean a reference to the amount in United States Dollars;
- (k) words, phrases or expressions not otherwise defined herein that (i) have a generally accepted meaning in Prudent Operating Practice shall have such meaning in this

Agreement or (ii) do not have well known and generally accepted meaning in Prudent Operating Practice but that have well known and generally accepted technical or trade meanings, shall have such recognized meanings; and

(l) each Party acknowledges that it was represented by counsel in connection with this Agreement and that it or its counsel reviewed this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

# ARTICLE 2 TERM; CONDITIONS PRECEDENT

#### 2.1 Contract Term.

- (a) The term of this Agreement shall commence on the Effective Date and shall remain in full force and effect until the conclusion of the Delivery Term, subject to any early termination provisions and any contract term extension provisions set forth herein ("<u>Contract Term</u>"); <u>provided, however</u>, that subject to Buyer's obligations in Section 3.6, Buyer's obligations to pay for or accept any Product are subject to Seller's completion of the conditions precedent pursuant to Section 2.2.
- (b) Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. The confidentiality obligations of the Parties under Article 18 and all audit rights shall remain in full force and effect for two (2) years following the termination of this Agreement and all indemnity obligations shall remain in full force and effect for two (2) years following the termination of this Agreement.
- 2.2 <u>Conditions Precedent</u>. The Delivery Term shall not commence until Seller completes each of the following conditions:
- (a) Seller has delivered to Buyer (i) a completion certificate from a Licensed Professional Engineer substantially in the form of Exhibit H and (ii) a certificate from a Licensed Professional Engineer substantially in the form of Exhibit I setting forth the Installed Capacity on the Commercial Operation Date;
- (b) A Participating Generator Agreement and a Meter Service Agreement between Seller and CAISO shall have been executed and delivered and be in full force and effect, and a copy of each such agreement delivered to Buyer;
- (c) An Interconnection Agreement between Seller and the PTO shall have been executed and delivered and be in full force and effect and a copy of the Interconnection Agreement delivered to Buyer;
- (d) All applicable regulatory authorizations, approvals and permits required for the operation of the Facility have been obtained and all required conditions thereof that are capable

of being satisfied on the Commercial Operation Date have been satisfied and shall be in full force and effect:

- (e) Seller has received CEC Precertification of the Facility (and reasonably expects to receive final CEC Certification and Verification for the Facility in no more than one hundred eighty (180) days from the Commercial Operation Date);
- (f) Seller (with the reasonable participation of Buyer) shall have completed all applicable WREGIS registration requirements that are reasonably capable of being completed prior to the Commercial Operation Date under WREGIS rules, including (as applicable) the completion and submittal of all applicable registration forms and supporting documentation, which may include applicable interconnection agreements, informational surveys related to the Facility, QRE service agreements, and other appropriate documentation required to effect Facility registration with WREGIS and to enable Renewable Energy Credit transfers related to the Facility within the WREGIS system;
- (g) Seller has delivered the Performance Security to Buyer in accordance with Section 8.8; and
- (h) Seller has paid Buyer for all amounts owing under this Agreement as of the Commercial Operation Date, if any, including Daily Delay Damages and Commercial Operation Delay Damages.
- **Development; Construction; Progress Reports**. Within fifteen (15) days after 2.3 the close of (i) each calendar quarter from the first calendar quarter following the Effective Date until the Construction Start Date, and (ii) each calendar month from the first calendar month following the Construction Start Date until the Commercial Operation Date, Seller shall provide to Buyer a Progress Report, and when requested by Buyer, shall conduct telephonic meetings (unless office meetings are agreed to by the Parties) between representatives of Buyer and Seller to review such monthly reports and discuss Seller's construction progress. The form of the Progress Report is set forth in Exhibit E, and shall include such additional information as may be reasonably requested by Buyer from time to time. Seller shall also provide Buyer with any reasonably requested documentation (subject to confidentiality restrictions) directly related to the achievement of Milestones within ten (10) Business Days of receipt of such request by Seller. For the avoidance of doubt, as between Seller and Buyer, Seller is solely responsible for the design and construction of the Facility, including the location of the Site, obtaining all permits and approvals to build the Facility, the Facility layout, and the selection and procurement of the equipment comprising the Facility.
- 2.4 <u>Remedial Action Plan</u>. If Seller (a) misses the Guaranteed Construction Start Date, (b) misses three (3) or more Milestones (other than the Guaranteed Construction Start Date), or (c) misses any one (1) Milestone (other than the Guaranteed Construction Start Date) by more than ninety (90) days, except as the result of Force Majeure Event or Buyer Default, Seller shall submit to Buyer, within ten (10) Business Days after the occurrence of (a), (b) or (c), a remedial action plan ("<u>Remedial Action Plan</u>"), which will describe in detail any delays (actual or anticipated) beyond the scheduled Milestone dates, including the cause of the delay, if known (e.g.,

governmental approvals, financing, property acquisition, design activities, equipment procurement, project construction, interconnection, or any other factor), Seller's detailed description of its proposed course of action to achieve the missed Milestones and all subsequent Milestones by the Guaranteed Commercial Operation Date; <u>provided</u>, that delivery of any Remedial Action Plan shall not relieve Seller of its obligation to provide Remedial Action Plans with respect to any subsequent Milestones and to achieve the Guaranteed Commercial Operation Date in accordance with the terms of this Agreement. Subject to the provisions of <u>Exhibit B</u>, so long as Seller complies with its obligations under this Section 2.4, Seller shall not be considered in default of its obligations under this Agreement solely as a result of missing any Milestone.

## ARTICLE 3 PURCHASE AND SALE

- 3.1 **Purchase and Sale of Product**. Subject to the terms and conditions of this Agreement, during the Delivery Term, Buyer will purchase and receive all of the Product produced by or associated with the Facility at the Contract Price and in accordance with Exhibit C, and Seller shall supply and deliver to Buyer all of the Product produced by or associated with the Facility (net of applicable losses). At its sole discretion, Buyer may during the Delivery Term re-sell or use for another purpose all or a portion of the Product, provided that no such re-sale or use shall relieve Buyer of any obligations hereunder. During the Delivery Term, Buyer will have exclusive rights to offer, bid, and/or otherwise submit the Product, or any component thereof, from the Facility after the Delivery Point for resale into the market or to any third party, and retain and receive any and all related revenues. Subject to Buyer's obligation to purchase Product in accordance with this Section 3.1 and Exhibit C, Buyer has no obligation to pay Seller the Renewable Rate for any Product from the Generating Facility for which the associated PV Energy or Discharging Energy is not or cannot be delivered to the Delivery Point as a result of an outage of the Facility, a Force Majeure Event, or a Curtailment Order.
- 3.2 <u>Sale of Green Attributes</u>. During the Delivery Term, Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all Green Attributes attributable to the Facility Energy generated by the Facility. Upon request of Buyer, Seller shall use commercially reasonable efforts to (a) submit, and receive approval from the Center for Resource Solutions (or any successor that administers the Green-e Certification process), for the Green-e tracking attestations and (b) support Buyer's efforts to qualify the Green Attributes transferred by Seller as Green-e Certified.
- 3.3 <u>Imbalance Energy</u>. Buyer and Seller recognize that in any given Settlement Period the amount of Facility Energy may deviate from the amount of energy scheduled with the CAISO. To the extent there are such deviations, any costs or revenues from such imbalances shall be solely for the account of Buyer.
- 3.4 <u>Ownership of Renewable Energy Incentives</u>. Seller shall have all right, title and interest in and to all Renewable Energy Incentives. Buyer acknowledges that any Renewable Energy Incentives belong to Seller. If any Renewable Energy Incentives, or values representing the same, are initially credited or paid to Buyer, Buyer shall cause such Renewable Energy Incentives or values relating to same to be assigned or transferred to Seller without delay. Buyer

shall reasonably cooperate with Seller, at Seller's sole expense, in Seller's efforts to meet the requirements for any certification, registration, or reporting program relating to Renewable Energy Incentives.

### 3.5 <u>Future Environmental Attributes</u>.

- (a) The Parties acknowledge and agree that as of the Effective Date, environmental attributes sold under this Agreement are restricted to Green Attributes; however, Future Environmental Attributes may be created by a Governmental Authority through Laws enacted after the Effective Date. Subject to the final sentence of this Section 3.5(a), and Sections 3.5(b) and 3.12, in such event, Buyer shall bear all costs and risks associated with the transfer, qualification, verification, registration and ongoing compliance for such Future Environmental Attributes, but there shall be no increase in the Contract Price. Upon Seller's receipt of Notice from Buyer of Buyer's intent to claim such Future Environmental Attributes, the Parties shall determine the necessary actions and additional costs associated with such Future Environmental Attributes. Seller shall have no obligation to bear any costs, losses or liability, or alter the Facility or the operation of the Facility, unless the Parties have agreed on all necessary terms and conditions relating to such alteration or change in operation and Buyer has agreed to reimburse Seller for all costs, losses, and liabilities associated with such alteration or change in operation.
- (b) If Buyer elects to receive Future Environmental Attributes pursuant to Section 3.5(a), the Parties agree to negotiate in good faith with respect to the development of further agreements and documentation necessary to effectuate the transfer of such Future Environmental Attributes, including agreement with respect to (i) appropriate transfer, delivery and risk of loss mechanisms, and (ii) appropriate allocation of any additional costs to Buyer, as set forth above (in any event subject to Section 3.12); *provided*, that the Parties acknowledge and agree such terms are not intended to alter the other material terms of this Agreement.
- 3.6 <u>Test Energy</u>. No less than fourteen (14) days prior to the first day on which Test Energy is expected to be available from the Facility, Seller shall notify Buyer of the availability of and expected duration of the Test Energy. If and to the extent the Facility generates Test Energy, Seller shall sell and Buyer shall purchase from Seller all Test Energy and any associated Products on an as-available basis for up to ninety (90) days from the first delivery of Test Energy. As compensation for such Test Energy and associated Product, Buyer shall pay Seller an amount equal to of the Renewable Rate (the "<u>Test Energy Rate</u>"). For the avoidance of doubt, the conditions precedent in Section 2.2 are not applicable to the Parties' obligations under this Section 3.6.
- 3.7 <u>Capacity Attributes</u>. Seller shall request Full Capacity Deliverability Status in the CAISO generator interconnection process. As between Buyer and Seller, Seller shall be responsible for the cost and installation of any Network Upgrades associated with obtaining such Full Capacity Deliverability Status.
- (a) Throughout the Delivery Term, Seller grants, pledges, assigns and otherwise commits to Buyer all the Capacity Attributes from the Facility.

- (b) Throughout the Delivery Term and subject to Section 3.12, Seller shall use commercially reasonable efforts to maintain eligibility for Full Capacity Deliverability Status or Interim Deliverability Status for the Facility from the CAISO and shall perform all commercially reasonable actions necessary to ensure that the Facility qualifies to provide Resource Adequacy Benefits to Buyer. Throughout the Delivery Term, and subject to Section 3.12, Seller hereby covenants and agrees to transfer all Resource Adequacy Benefits from the Facility to Buyer.
- (c) For the duration of the Delivery Term and subject to Section 3.12, Seller shall take all commercially reasonable administrative actions, including complying with all applicable registration and reporting requirements, and execute all documents or instruments necessary to enable Buyer to use all of the Capacity Attributes committed by Seller to Buyer pursuant to this Agreement.

### 3.8 **Resource Adequacy Failure**.

- (a) <u>RA Deficiency Determination</u>. For each RA Shortfall Month, Seller shall pay to Buyer the RA Deficiency Amount as liquidated damages and/or provide Replacement RA, as set forth in Section 3.8(b), as the sole remedy for the Capacity Attributes that Seller failed to convey to Buyer.
- Date, for each RA Shortfall Month, Seller shall pay to Buyer an amount (the "RA Deficiency Amount") equal to the product of the difference, expressed in kW, of (i) the Qualifying Capacity of the Facility (or, if applicable during the period between the RA Guarantee Date and the Effective FCDS date, the amount of Qualifying Capacity the Facility would reasonable be estimated to qualify for based on the CPUC-adopted qualifying capacity methodology(s) then in effect), minus (ii) the Net Qualfying Capacity of the Facility, multiplied by the price for CPM Capacity (in \$/kW) as listed in Section 43A.7.1 of the CAISO Tariff (or its successor) ("CPM Price"); provided that Seller may, as an alternative to paying some or all of the RA Deficiency Amounts, provide Replacement RA in the amount of (X) the Qualifying Capacity of the Facility with respect to such month, minus (Y) the Net Qualifying Capacity of the Facility with respect to such month, provided that any Replacement RA capacity is communicated by Seller to Buyer with Replacement RA product information in a Notice substantially in the form of Exhibit M at least fifty (50) Business Days before the applicable CPUC operating month for the purpose of monthly RA reporting.
- 3.9 <u>CEC Certification and Verification</u>. Subject to Section 3.12 and in accordance with the timing set forth in this Section 3.9, Seller shall take all necessary steps including, but not limited to, making or supporting timely filings with the CEC to obtain and maintain CEC Certification and Verification throughout the Delivery Term, including compliance with all applicable requirements for certified facilities set forth in the current version of the *RPS Eligibility Guidebook* (or its successor) that are applicable to the Facility. Seller shall obtain CEC Precertification by the Commercial Operation Date. Within thirty (30) days after the Commercial Operation Date, Seller shall apply with the CEC for final CEC Certification and Verification. Within one hundred eighty (180) days after the Commercial Operation Date, Seller shall obtain and (subject to Section 3.12) maintain throughout the remainder of the Delivery Term the final CEC Certification

and Verification. Seller must promptly notify Buyer and the CEC of any changes to the information included in Seller's application for CEC Certification and Verification for the Facility.

#### 3.10 **[Reserved]**.

#### 3.11 **RPS Standard Terms and Conditions**.

- (a) Seller warrants that all necessary steps to allow the Renewable Energy Credits transferred to Buyer to be tracked in WREGIS will be taken prior to the first delivery under this Agreement.
- (b) Seller, and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement that: (i) the Facility qualifies and is certified by the CEC as an Eligible Renewable Energy Resource as such term is defined in Public Utilities Code Section 399.12 or Section 399.16; and (ii) the Facility's electrical energy output delivered to Buyer qualifies under the requirements of the California Renewables Portfolio Standard. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law. The term "commercially reasonable efforts" as used in this Section 3.11 means efforts consistent with and subject to Section 3.12.
- (c) Seller and, if applicable, its successors, represents and warrants that throughout the Delivery Term of this Agreement the renewable energy credits transferred to Buyer conform to the definition and attributes required for compliance with the California Renewables Portfolio Standard, as set forth in California Public Utilities Commission Decision 08-08-028, and as may be modified by subsequent decision of the California Public Utilities Commission or by subsequent legislation. To the extent a change in law occurs after execution of this Agreement that causes this representation and warranty to be materially false or misleading, it shall not be an Event of Default if Seller has used commercially reasonable efforts to comply with such change in law.

#### 3.12 <u>Compliance Expenditure Cap.</u>

- (a) If a change in Law occurring after the Effective Date has increased Seller's known or reasonably expected cost to comply with Seller's obligations under this Agreement with respect to obtaining, maintaining, conveying or effectuating Buyer's use of (as applicable) Green Attributes or Capacity Attributes (as applicable), then the Parties agree that the maximum aggregate amount of out-of-pocket costs and expenses ("Compliance Costs") Seller shall be required to bear to comply with all of such obligations shall be capped at per MW of Guaranteed Capacity, in the aggregate, during the Delivery Term ("Compliance Expenditure Cap"). Seller's internal administrative costs association with obtaining, maintaining, conveying or effectuating, Buyer's use of (as applicable) any Product are excluded from the Compliance Expenditure Cap.
  - (b) Any actions required for Seller to comply with its obligations set forth in

the first paragraph above, the Compliance Costs of which will be included in the Compliance Expenditure Cap, shall be referred to collectively as the "Compliance Actions"

- (c) If Seller reasonably anticipates the need to incur Compliance Costs in excess of the Compliance Expenditure Cap in order to take any Compliance Action Seller shall provide Notice to Buyer of such anticipated Compliance Costs.
- (d) If the Compliance Costs exceed the Compliance Expenditure Cap, then Buyer will have sixty (60) days to evaluate such Notice (during which time period Seller is not obligated to take any Compliance Actions described in the Notice) and shall, within such time, either (1) agree to reimburse Seller for all or a portion of the costs that exceed the Compliance Expenditure Cap (such Buyer-agreed upon costs, the "Accepted Compliance Costs") on terms and conditions to be set forth in a written amendment to this Agreement, or (2) waive Seller's obligation to take such Compliance Actions, or any part thereof for which Buyer has not agreed to reimburse Seller. If Buyer does not respond to a Notice given by Seller under this Section 3.12 within sixty (60) days after Buyer's receipt of same, Buyer shall be deemed to have waived its rights to require Seller to take Compliance Actions that are the subject of the Notice, and Seller shall have no further obligation to take, and no liability for any failure to take, these Compliance Actions for the remainder of the Contract Term.
- (e) If Buyer agrees to pay for all or a portion of the Accepted Compliance Costs, then Seller shall take such Compliance Actions covered by the Accepted Compliance Costs as agreed upon by the Parties in a commercially reasonable timeframe and Buyer shall reimburse Seller for it share of the Accepted Compliance Costs within sixty (60) days from receipt of an invoice, or as otherwise agreed upon by the Parties.
- 3.13 **Project Configuration**. In order to optimize the benefits of the Facility, Buyer and Seller each agree that if requested by the other Party, then Buyer and Seller will discuss in good faith potential reconfiguration of the Facility or Interconnection Facilities (including enabling the Storage Facility to be charged from the grid); provided that neither Party shall be obligated to agree to any changes under this Agreement, or to incur any expense in connection with such changes, except under terms mutually acceptable to both Parties in their sole discretion (and Seller's Lenders) as set forth in a written agreement executed by the Parties.

# ARTICLE 4 OBLIGATIONS AND DELIVERIES

#### 4.1 **Delivery**.

(a) <u>Energy</u>. Subject to the provisions of this Agreement, commencing on the Commercial Operation Date and through the end of the Contract Term, Seller shall supply and deliver the Product to Buyer at the Delivery Point (except for Charging Energy), and Buyer shall take delivery of the Product at the Delivery Point (except for Charging Energy) in accordance with

the terms of this Agreement. Seller will be responsible for paying or satisfying when due any costs or charges imposed in connection with the delivery of Facility Energy to the Delivery Point, and including without limitation (but without limiting Buyer's obligation to pay amounts associated with the Storage Facility Discharge Loss Factor as expressly provided herein), Station Use, Electrical Losses, any costs associated with delivering the Charging Energy from the Generating Facility to the Storage Facility, and any operation and maintenance charges imposed on Seller by the PTO directly relating to the Facility's operations. Buyer shall be responsible for all costs, charges and penalties, if any, imposed in connection with the delivery of Facility Energy at and after the Delivery Point, including without limitation transmission costs and transmission line losses and imbalance charges. The PV Energy, Charging Energy, and Discharging Energy will be scheduled with the CAISO by Buyer (or Buyer's designated Scheduling Coordinator for the Facility) in accordance with Exhibit D.

- (b) <u>Green Attributes</u>. All Green Attributes associated with the Facility Energy during the Delivery Term are exclusively dedicated to and will be conveyed to Buyer. Seller represents and warrants that Seller holds the rights to all Green Attributes from the Facility, and Seller agrees to convey and hereby conveys all such Green Attributes to Buyer as included in the delivery of the Product from the Facility.
- (c) Ancillary Services; Environmental Attributes. If, at any time during the Contract Term, Buyer requests Seller to provide any new or different environmental attributes or Ancillary Services that may become recognized from time to time in the CAISO market and that are not expressly listed in Exhibit Q (including, for example, reactive power), and Seller is able to provide any such product from the Facility without material adverse effect (including any obligation to incur more than de minimis costs or liabilities) on Seller or the Facility or Seller's obligations or liabilities under this Agreement, then Seller shall use commercially reasonable efforts to coordinate with Buyer to provide such product. If provision of any such new product would have a material adverse effect (including any obligation to incur more than de minimis costs or liabilities) on Seller or the Facility or Seller's obligations or liabilities under this Agreement, then Seller shall be obligated to provide such product only if the Parties first execute an amendment to this Agreement with respect to such product that is mutually acceptable to both Parties.

#### 4.2 Title and Risk of Loss.

- (a) <u>Energy</u>. Notwithstanding <u>Section 4.1(a)</u>, title to and risk of loss related to the Facility Energy, shall pass and transfer from Seller to Buyer at the Delivery Point. Seller warrants that all Product delivered to Buyer is free and clear of all liens, security interests, claims and encumbrances of any kind.
- (b) <u>Green Attributes</u>. Title to and risk of loss related to the Green Attributes associated with the Facility Energy shall pass and transfer from Seller to Buyer upon the transfer of such Green Attributes in accordance with WREGIS.
- 4.3 **Forecasting**. Seller shall provide the forecasts described below at its sole expense and in a format reasonably acceptable to Buyer (or Buyer's designee). Seller shall use commercially reasonable efforts to provide forecasts that are accurate and, to the extent not

inconsistent with the requirements of this Agreement, shall prepare such forecasts, or cause such forecasts to be prepared, in accordance with Prudent Operating Practices, including CAISO requirements applicable to projects similar to the Facility.

- (a) <u>Annual Forecast of Energy</u>. No less than forty-five (45) days before (i) the first day of the first Contract Year of the Delivery Term and (ii) at the beginning of each calendar year for every subsequent Contract Year during the Delivery Term, Seller shall provide to Buyer and the SC for the Facility (if applicable) a non-binding forecast of each month's average-day expected PV Energy and Clipped PV Energy, by hour, for the following calendar year in a form substantially similar to the table found in <u>Exhibit F-1</u>, or as reasonably requested by Buyer.
- (b) Monthly Forecast of PV Energy and Available Generating Capacity. No less than thirty (30) days before the beginning of Commercial Operation, and thereafter ten (10) Business Days before the beginning of each month during the Delivery Term, Seller shall provide to Buyer and the SC for the Facility (if applicable) a non-binding forecast of the hourly expected PV Energy, Clipped PV Energy, Available Generating Capacity, available Storage Energy Capacity, and Available Storage Power Capacity for each day of the following month in a form substantially similar to the table found in Exhibit F-2 ("Monthly Delivery Forecast").
- Day-Ahead Forecast. By 5:30 AM Pacific Prevailing Time on the Business Day immediately preceding the date of delivery, or as otherwise specified by Buyer consistent with Prudent Operating Practice, Seller shall provide Buyer with a non-binding forecast of (i) Available Generating Capacity and (ii) Available Storage Power Capacity, (iii) Available Storage Energy Capacity, and (iv) hourly expected PV Energy, and (v) Clipped PV Energy, in each case, for each Settlement Interval of each hour of the immediately succeeding day ("Day-**Ahead Forecast**"). A Day-Ahead Forecast provided in a day prior to any non-Business Day(s) shall include non-binding forecasts for the immediate day, each succeeding non-Business Day and the next Business Day. Each Day-Ahead Forecast shall clearly identify, for each Settlement Interval of each hour, Seller's best estimate of (i) the Available Generating Capacity and (ii) the Available Storage Power Capacity and (iii) Available Storage Energy Capacity and (iv) the hourly expected Energy, and (v) Stored Energy Level. These Day-Ahead Forecasts shall be sent to Buyer's on-duty Scheduling Coordinator. If Seller fails to provide Buyer with a Day-Ahead Forecast as required herein for any period, then for such unscheduled delivery period only Buyer shall rely on any Real-Time Forecast provided in accordance with Section 4.3(d) or the Monthly Delivery Forecast or Buyer's best estimate based on information reasonably available to Buyer.
- (d) Real-Time Forecasts. During the Delivery Term, Seller shall notify Buyer of any changes from the Day-Ahead Forecast of one (1) MW<sub>AC</sub> or more in (i) Available Generating Capacity, (ii) Avaible Storage Power Capacity, (iii) Available Storage Energy Capacity, (iv) hourly expected Energy, or (v) Clipped PV Energy in each case, whether due to Forced Facility Outage, Force Majeure or other cause, as soon as reasonably possible, but no later than one (1) hour prior to the deadline for submitting Schedules to the CAISO in accordance with the rules for participation in the Real-Time Market. If the Available Generating Capacity, Available Storage Power Capacity, or hourly expected Energy changes by at least one (1) MW<sub>AC</sub> as of a time that is less than one (1) hour prior to the Real-Time Market deadline, but before such deadline, then Seller

must notify Buyer as soon as reasonably possible. Such Real-Time Forecasts of PV Energy shall be provided by an Approved Forecast Vendor and shall contain information regarding the beginning date and time of the event resulting in the change in Available Generating Capacity, Available Storage Power Capacity, Available Storage Energy Capacity, Clipped PV Energy, or hourly expected Energy, as applicable, the expected end date and time of such event, and any other information required by the CAISO or reasonably requested by Buyer. Seller shall also provide access to routinely updated forecasts for each Settlement Interval of each hour of the expected Energy. Such real-time forecasts of Energy shall be provided by the CAISO, or if the CAISO does not provide such forecasts for the Facility then such forecasts shall be provided by an Approved Forecast Vendor. With respect to any Forced Facility Outage, Seller shall use commercially reasonable efforts to notify Buyer of such outage within ten (10) minutes of the commencement of the Forced Facility Outage. Seller shall inform Buyer of any developments that will affect either the duration of such outage or the availability of the Facility during or after the end of such outage. These Real-Time Forecasts shall be communicated in a method reasonably acceptable to Buyer; provided that Buyer specifies the method no later than sixty (60) Business Days prior to the effective date of such requirement. In the event Buyer fails to provide Notice of an acceptable method for communications under this Section 4.3(d), then Seller shall send such communications by telephone and e-mail to the SC and by email to the Buyer.

- (e) <u>Forced Facility Outages.</u> Notwithstanding anything to the contrary herein, Seller shall promptly notify Buyer's on-duty Scheduling Coordinator of Forced Facility Outages, and Seller shall keep Buyer informed of any developments that will affect either the duration of the outage or the availability of the Facility during or after the end of the outage.
- (f) <u>Forecasting Penalties</u>. Subject to a Force Majeure Event, in the event Seller does not in a given hour provide the forecast required in Section 4.3(d) and Buyer incurs a loss or penalty resulting from Seller's failure and Buyer's scheduling activities with respect to PV Energy during such hour, Seller shall be responsible for a Forecasting Penalty for each such hour. Settlement of Forecasting Penalties shall occur as set forth in Article 8 of this Agreement.
- (g) <u>CAISO Tariff Requirements</u>. To the extent such obligations are applicable to the Facility, Seller will comply with all applicable obligations for Variable Energy Resources under the CAISO Tariff and the Eligible Intermittent Resource Protocol, including providing appropriate operational data and meteorological data, and will fully cooperate with Buyer, Buyer's SC, and CAISO, in providing all data, information, and authorizations required thereunder.

#### 4.4 **Dispatch Down/Curtailment**.

(a) <u>General</u>. Seller agrees to reduce the amount of PV Energy and/or Discharging Energy produced by the Facility, by the amount and for the period set forth in any applicable Curtailment Order, Buyer Curtailment Order, or notice received from CAISO in respect of a Buyer Bid Curtailment, <u>provided</u> that Seller is not required to reduce such amount to the extent such reduction or any such Curtailment Order, Buyer Curtailment Order or notice is inconsistent with the (i) limitations of the Facility set out in the Operating Restrictions and (ii) with a directive from CAISO or the Transmission Provider.

- (b) <u>Buyer Curtailment.</u> Buyer shall have the right to order Seller to curtail deliveries of Facility Energy through Buyer Curtailment Orders, provided that Buyer shall pay Seller for all Deemed Delivered Energy associated with a Buyer Curtailment Period at the Renewable Rate.
- Charging during curtailment. Seller may at its discretion automatically use PV Energy that is subject to an applicable Curtailment Order, Buyer Curtailment Order, or notice received from CAISO in respect of a Buyer Bid Curtailment, as Charging Energy, by the amount and for the period set forth in any applicable Curtailment Order, Buyer Curtailment Order, or notice received from CAISO in respect of a Buyer Bid Curtailment, provided that such charging is consistent with the (i) limitations of the Facility set out in the Operating Restrictions and (ii) with a directive from CAISO or the Transmission Provider.
- (d) Failure to Comply. If Seller fails to comply with a Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order, then, for each MWh<sub>AC</sub> of Facility Energy that is delivered by the Facility to the Delivery Point that is in excess of the Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order, Seller shall pay Buyer for each such MWhAC at an amount equal to the sum of (A) + (B) + (C), where: (A) is the amount, if any, paid to Seller by Buyer for delivery of such excess MWh<sub>AC</sub> (excluding any excess MWhs delivered to reasonably comply with the limitation of the Facility set out in the Operating Restrictions) and, (B) is the sum, for all Settlement Intervals with a Negative LMP during the Buyer Curtailment Period or Curtailment Period, of the absolute value of the product of such excess MWh<sub>AC</sub> in each Settlement Interval and the Negative LMP for such Settlement Interval (excluding any excess MWhs delivered to reasonably comply with the limitation of the Facility set out in the Operating Restrictions), and (C) is any penalties assessed by the CAISO or other charges assessed by the CAISO resulting from Seller's failure to comply with the Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order, in each case that are not related to any excess MWhs delivered to reasonably comply with the limitation of the Facility set out in the Operating Restrictions.
- Seller Equipment Required for Curtailment Instruction Communications. (e) Subject to the last sentence of this Section 4.4(e), Seller shall acquire, install, and maintain such SCADA Systems, communications links and other equipment, and implement such protocols and practices, as necessary to respond and follow instructions, including an electronic signal conveying real time and intra-day instructions, to operate the Facility as reasonably directed by the CAISO or Buyer's SC in accordance with this Agreement and/or a Governmental Authority, including to implement a Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order in accordance with the then-current methodology used to transmit such instructions as it may change from time to time. If at any time during the Delivery Term Seller's facilities, communications links or other equipment, protocols or practices are not in compliance with then-current methodologies applicable to the Facility, Seller shall, subject to the last sentence of this Section 4.4(e), take the steps necessary to become compliant as soon as commercially reasonably possible. Seller shall be liable pursuant to Section 4.4(d) for failure to comply with a Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order, during the time that Seller's facilities, communications links or other equipment, protocols or practices are not in compliance with this Section 4.4(e). For the avoidance of doubt, a Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order

communication via such systems and facilities shall have the same force and effect on Seller as any other form of communication. If Seller is directed by Buyer to install or implement facilities, communications links or other equipment, protocols or practices facilities pursuant to this Section 4.4(e) that are not otherwise required for the Facility pursuant to the CAISO Tariff, then the installation or implementation of such facilities, communications links or other equipment, protocols or practices facilities will be deemed Compliance Actions subject to the Compliance Expenditure Cap as set forth in Section 3.12.

#### 4.5 Charging Energy Management.

- (a) Upon receipt of a valid Charging Notice, Seller shall take all actions that are in accordance with Prudent Operating Practice and are necessary, to deliver the Charging Energy from the Generating Facility to the Storage Facility in order to deliver the Storage Product in accordance with the terms of this Agreement (including the Operating Restrictions), including maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy from the Generating Facility to the Storage Facility. CAISO costs and charges associated with charging of the Storage Facility shall be allocated in accordance with this Agreement.
- (b) Buyer will have the right to charge the Storage Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Charging Notices to Seller electronically, provided, that Buyer's right to issue Charging Notices is subject to Prudent Operating Practice and the requirements and limitations set forth in this Agreement, including the Operating Restrictions, the CAISO Tariff, and the availability of Charging Energy and the provisions of Section 4.5(a). Each Charging Notice issued in accordance with this Agreement will be effective unless and until Buyer modifies such Charging Notice by providing Seller with an updated Charging Notice.
- (c) Seller shall not charge the Storage Facility during the Delivery Term other than pursuant to a valid Charging Notice (it being understood that Seller may adjust a Charging Notice in order to maintain compliance with the Operating Restrictions), or as pursuant to 4.4.(c), or in connection with a Storage Capacity Test, Planned Outage, Forced Facility Outage, or pursuant to a notice from CAISO, the PTO, or any other Governmental Authority, or as otherwise required by applicable law. If, during the Delivery Term, Seller (a) charges the Storage Facility to a Stored Energy Level greater than the Stored Energy Level provided for in the Charging Notice (b) charges the Storage Facility in violation of the first sentence of this Section 4.5(c), or (c) charges the Storage Facility in connection with maintenance of the Storage Facility or to achieve any Operating Restrictions (which charging shall not be a violation of the first sentence of this Section 4.5(c)), then (x) Seller shall be responsible for all energy costs associated with such charging of the Storage Facility, (y) Buyer shall not be required to pay for the charging of such energy (i.e., Charging Energy), and (z) Buyer shall be entitled to discharge such energy and entitled to all of the benefits (including Storage Product) associated with such discharge.
- (d) Buyer will have the right to discharge the Storage Facility seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Discharging Notices to Seller electronically, and subject to the requirements and limitations set forth in this

Agreement, including the Operating Restrictions, the CAISO Tariff, and the existing State of Charge of the Storage Facility. Each Discharging Notice issued in accordance with this Agreement will be effective unless and until Buyer's SC or the CAISO modifies such Discharging Notice by providing Seller with an updated Discharging Notice.

- (e) Seller shall not discharge the Storage Facility during the Delivery Term other than pursuant to a valid Discharging Notice (it being understood that Seller may adjust a Charging Notice in order to maintain compliance with the Operating Restrictions), or in connection with a Storage Capacity Test, Planned Outage, Forced Facility Outage, or pursuant to a notice from CAISO, the PTO, Transmission Provider, or any other Governmental Authority, or as otherwise required by applicable law. If at any time the sum of PV Energy and Discharging Energy would exceed the Interconnection Capacity Limit, then (i) the applicable Discharging Notice shall be deemed to be modified to reduce the amount of Discharging Energy such that the total Facility Energy does not exceed the Interconnection Capacity Limit; (ii) Seller shall provide Notice to Buyer's SC of such condition; and (iii) Buyer shall have the right to issue a modified Discharging Notice and Buyer Curtailment Order.
- (f) During the Delivery Term, Seller shall maintain SCADA Systems, the EMS, communications links and other equipment consistent with Section 4.4, including as may be necessary to receive automated Charging Notices and Discharging Notices consistent with CAISO protocols and practice, if applicable ("Automated Dispatches"). In the event of the failure or inability of the Storage Facility to receive Automated Dispatches, Seller shall use all commercially reasonable efforts to repair or replace the applicable components as soon as reasonably possible, and if there is any material delay in such repair or replacement, Seller shall provide Buyer with a written plan of all actions Seller plans to take to repair or replace such components for Buyer's review and comment. During any period during which the Storage Facility is not capable of receiving or implementing Automated Dispatches, Seller shall implement back-up procedures consistent with the CAISO Tariff and CAISO protocols to enable Seller to receive and implement non-automated Charging Notices or Discharging Notices ("Alternative Dispatches").
- Settlement Interval, Curtailment Orders, Buyer Curtailment Orders, and Buyer Bid Curtailments applicable to such Settlement Interval shall have priority over any Charging Notices and Discharging Notices applicable to such Settlement Interval, and Seller shall have no liability for violation of this Section 4.5 or any Charging Notice or Discharging Notice if and to the extent such violation is caused by Seller's compliance with any Curtailment Order, Buyer Curtailment Order, Buyer Bid Curtailment or other instruction or direction from a Governmental Authority or the PTO. Buyer shall have the right, but not the obligation, to provide Seller with updated Charging Notices and Discharging Notices during any Buyer Curtailment Order, Buyer Bid Curtailment or Curtailment Order consistent with the Operating Restrictions.
- 4.6 **Reduction in Delivery Obligation**. For the avoidance of doubt, and in no way limiting Section 3.1, 3.8 or <u>Exhibit G.</u> or any rights expressly provided hereunder of Seller in relation to operation of the Facility:

- (a) Facility Maintenance. Seller will provide to Buyer written schedules for Planned Outages for each Contract Year no later than thirty (30) days prior to the first day of the applicable Contract Year. Buyer may provide comments no later than ten (10) days after receiving any such schedule, and Seller will in good faith take into account any such comments. Seller will deliver to Buyer the final updated schedule of Planned Outages no later than ten (10) days after receiving Buyer's comments. Seller shall be permitted to change any Planned Outages within the current Contract Year if such changes are required to comply with Prudent Operating Practices, or by providing at least sixty (60) days' notice, in both cases subject to consent by Buyer not to be unreasonably withheld, conditioned or delayed. Seller shall be permitted to reduce deliveries of Product during any period of such Planned Outages. Notwithstanding anything in this Agreement to the contrary, no outages of the Facility shall be scheduled or planned from each June 1 through October 31 during the Delivery Term, unless approved by Buyer in writing in its sole discretion. In the event that Seller has a previously Planned Outage that becomes coincident with a System Emergency, Seller shall make all reasonable efforts to reschedule such Planned Outage.
- (b) <u>Forced Facility Outage</u>. Seller shall be permitted to reduce deliveries of Product during any Forced Facility Outage. Seller shall provide Buyer with Notice and expected duration (if known) of any Forced Facility Outage.
- (c) <u>System Emergencies and other Interconnection Events</u>. Seller shall be permitted to reduce deliveries of Product during any period of System Emergency, Transmission Outage, Buyer Curtailment Period or upon Notice of a Curtailment Order pursuant to the terms of this Agreement, the Interconnection Agreement or applicable tariff.
- (d) <u>Force Majeure Event</u>. Seller shall be permitted to reduce deliveries of Product during any Force Majeure Event.
- (e) <u>Health and Safety</u>. Seller shall be permitted to reduce deliveries of Product as necessary to maintain health and safety pursuant to Section 6.2.
- (f) <u>Payments</u>. Seller shall remain responsible to Buyer for any payment or penalty otherwise due under this Agreement as a result of a reduction in delivery of Product.
- Guaranteed Energy Production. Seller shall be required to deliver to Buyer no less than the Guaranteed Energy Production in each Performance Measurement Period. Seller shall be excused from achieving the Guaranteed Energy Production during any Performance Measurement Period only to the extent of any Force Majeure Events, System Emergency, Transmission System Outage, Storage Capacity Tests, Buyer's Default or other failure to perform, and Curtailment Periods or Buyer Curtailment Periods. For purposes of determining whether Seller has achieved the Guaranteed Energy Production, Seller shall be deemed to have delivered to Buyer (1) any Deemed Delivered Energy, plus (2) PV Energy + Adjusted Discharging Energy in the amount it could reasonably have delivered to Buyer or the Storage Facility but was prevented from delivering to Buyer by reason of any Force Majeure Events, System Emergency, Transmisison System Outage, Storage Capacity Tests, Buyer's Default or other failure to perform, and Curtailment Periods ("Lost Output"). If Seller fails to achieve the Guaranteed Energy Production

amount in any Performance Measurement Period, Seller shall pay Buyer damages calculated in accordance with Exhibit G; provided that Seller may, as an alternative, provide Replacement Product (as defined in Exhibit G) delivered to Buyer at SP-15 Hub under a Day-Ahead Schedule as an IST within ninety (90) days after the conclusion of the applicable Performance Measurement Period (i) within the compliance period for which the Product that is being replaced would have been provided to Buyer unless otherwise agreed upon by Buyer, (ii) provided that such deliveries do not impose additional costs upon Buyer for which Seller refuses to provide reimbursement, and (iii) not to exceed of the Expected Energy for the previous Contract Year.

## 4.8 **Storage Availability**.

- (a) During the Delivery Term, the Storage Facility shall maintain an Annual Storage Availability during each Contract Year of no less than (the "Guaranteed Storage Availability"), which Annual Storage Availability shall be calculated in accordance with Exhibit P.
- (b) If the Annual Storage Availability during any Contract Year is less than the Guaranteed Storage Availability, then Buyer's payment for the Storage Product shall be calculated by reference to the Availability Adjusted Storage Contract Capacity (as determined in accordance with Exhibit P).
- (c) In years where the Storage Facility is modified to change the capacity, Annual Storage Availability shall be equitably adjusted, provided, however, that in no event will the obligations of Seller by reduced if the change in capacity is for the Seller's benefit and not to maintain compliance with its obligations under this Agreement.

#### 4.9 **Storage Capacity Tests**

- (a) Prior to the Commercial Operation Date, Seller shall schedule and complete a Commercial Operation Storage Capacity Test in accordance with <u>Exhibit O</u>. Thereafter, Seller and Buyer shall have the right to run additional Storage Capacity Tests in accordance with Exhibit O.
- (b) Buyer shall have the right to send one or more representative(s) to witness all Storage Capacity Tests. Buyer shall be responsible for all costs, expenses and fees payable or reimbursable to its representative(s) witnessing any Storage Capacity Test. Except as otherwise specified in <a href="Exhibit O">Exhibit O</a>, all other costs or revenues associated with any Storage Capacity Test shall be borne by, or accrue to, Seller, as applicable.
- (c) Following each Storage Capacity Test, Seller shall submit a testing report in accordance with Exhibit O. If the actual capacity determined pursuant to a Storage Capacity Test differs from the then current Storage Contract Capacity, then the actual capacity determined pursuant to a Storage Capacity Test shall become the new Storage Contract Capacity at the beginning of the day following the completion of the test for all purposes under this Agreement, including compensation under Exhibit C.

- (d) Seller shall, at times and for durations reasonably agreed to by Buyer, conduct necessary testing to ensure the Storage Facility is functioning properly and the Storage Facility is able to respond to Buyer or CAISO dispatch instructions. Any testing of the Storage Facility requested by Buyer after the Commercial Operation Capacity Tests shall be deemed Buyer-instructed dispatches of the Facility ("Buyer Dispatched Test"). Any other test of the Facility (including all tests conducted prior to Commercial Operation, any Commercial Operation Storage Capacity Tests, any Storage Capacity Test conducted if the Storage Contract Capacity immediately prior to such Storage Capacity Test is below of the Installed Storage Capacity, any test required by CAISO (including any test required to obtain CAISO Certification), and other Seller-requested discretionary tests or dispatches that Seller deems necessary for purposes of reliably operating or maintaining the Facility or for re-performing a required test within a reasonable number of days, (considering the circumstances that led to the need for a retest), which shall be within no more than five (5) Business Days of the initial required test) shall be deemed a "Seller Initiated Test".
- (i) For any Seller Initiated Test, other than a Storage Capacity Test, Seller shall notify Buyer no later than twenty-four (24) hours prior thereto (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practices). For any Seller Initiated Test that is a Storage Capacity Test, Seller shall notify Buyer no less than five (5) Business Days prior thereto (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practices).
- (ii) The Storage Facility will be deemed unavailable during any Seller Initiated Test, and Buyer shall not dispatch or otherwise schedule the Storage Facility during such Seller Initiated Test.
- 4.10 <u>WREGIS</u>. Seller shall, at its sole expense, but subject to Section 3.12, 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 Facility Energy are issued and tracked for purposes of satisfying the requirements of the California Renewables Portfolio Standard and transferred in a timely manner to Buyer for Buyer's sole benefit, it being acknowledged that Seller may not be able under WREGIS rules to complete all WREGIS registration requirements prior to the Commercial Operation Date. Seller shall transfer the Renewable Energy Credits to Buyer. Seller shall comply with all Laws, including the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. Seller shall be deemed to have satisfied the warranty in Section 4.10(g), provided that Seller fulfills its obligations under Sections 4.10(a) through (g) below. In addition:
- (a) Prior to the Commercial Operation Date, Seller shall register the Facility with WREGIS and establish an account with WREGIS ("Seller's WREGIS Account"), which Seller shall maintain until the end of the Delivery Term. Seller shall transfer the WREGIS Certificates using "Forward Certificate Transfers" (as described in the WREGIS Operating Rules) from Seller's WREGIS Account to the WREGIS account(s) of Buyer or the account(s) of a designee that Buyer identifies by Notice to Seller ("Buyer's WREGIS Account"). Seller shall

be responsible for all expenses associated with registering the Facility with WREGIS, establishing and maintaining Seller's WREGIS Account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS Account to Buyer's WREGIS Account.

- (b) Seller shall cause Forward Certificate Transfers to occur on a monthly basis in accordance with the certification procedure established by the WREGIS Operating Rules. Since WREGIS Certificates will only be created for whole  $MWh_{AC}$  amounts of Facility Energy generated, any fractional  $MWh_{AC}$  amounts (i.e.,  $kWh_{AC}$ ) will be carried forward until sufficient generation is accumulated for the creation of a WREGIS Certificate.
- (c) Seller shall, at its sole expense, ensure that the WREGIS Certificates for a given calendar month correspond with the Facility Energy for such calendar month as evidenced by the Facility's metered data.
- (d) Due to the ninety (90) day delay in the creation of WREGIS Certificates relative to the timing of invoice payment under Section 8.2, Buyer shall make an invoice payment for a given month in accordance with Section 8.2 before the WREGIS Certificates for such month are formally transferred to Buyer in accordance with the WREGIS Operating Rules and this Section 4.10. Notwithstanding this delay, Buyer shall have all right and title to all such WREGIS Certificates upon payment to Seller in accordance with Section 8.2.
- A "WREGIS Certificate Deficit" means any deficit or shortfall in WREGIS Certificates delivered to Buyer for a calendar month as compared to the Facility Energy for the same calendar month (taking into account the timing of WREGIS' issuance of WREGIS Certificates in normal course) ("Deficient Month") caused by an error or omission of Seller. If any WREGIS Certificate Deficit is caused by, or the result of any action or inaction by Seller, then the amount of Facility Energy in the Deficient Month shall be reduced by the amount of the WREGIS Certificate Deficit for purposes of calculating Buyer's payment to Seller under Article 8 and the Guaranteed Energy Production for the applicable Contract Year; provided, however, that such adjustment shall not apply to the extent that Seller either (x) resolves the WREGIS Certificate Deficit within ninety (90) days after the Deficient Month, (y) provides Replacement Green Attributes (as defined in Exhibit G) within ninety (90) days after the Deficient Month (i) that reflect a production vintage in the same calendar year in which the WREGIS Certifiate Deficit occurs unless otherwise acceptable to Buyer and (ii) provided that such deliveries do not impose additional costs upon Buyer for which Seller refuses to provide reimbursement. Without limiting Seller's obligations under this Section 4.10, if a WREGIS Certificate Deficit is caused solely by an error or omission of WREGIS, the Parties shall cooperate in good faith to cause WREGIS to correct its error or omission.
- (f) If (i) WREGIS changes the WREGIS Operating Rules after the Effective Date or applies the WREGIS Operating Rules in a manner inconsistent with this Section 4.10 after the Effective Date, or (ii) the Parties enable the Storage Facility to be charged from the grid in accordance with Section 3.13, the Parties promptly shall modify this Section 4.10 as reasonably required 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 Facility Energy in the same calendar month.

- (g) The Parties acknowledge and agree that this Section 4.10 reflects an understanding between the Parties that WREGIS Certificates will be created equivalent to the amount of Facility Energy that is generated by the Generating Facility. If the RPS (or other applicable Law) is applied or changes in a manner inconsistent with such understanding, subject to Section 3.12, the parties shall reasonably coordinate to amend or modify this Agreement to carry out the intent hereof, such agreement not to be unreasonable delayed, conditioned, or withheld.
- 4.11 <u>Green-E Certification</u>. Seller shall, at its sole expense but subject to Section 3.12, take all actions and execute all documents or instruments necessary to ensure that the Facility is eligible for Green-e certification.

# ARTICLE 5 TAXES

- Allocation of Taxes and Charges. Seller shall pay or cause to be paid all Taxes on or with respect to the Facility or on or with respect to the sale and making available the Product to Buyer, that are imposed on Product prior to its delivery to Buyer at the Delivery Point. Buyer shall pay or cause to be paid all Taxes on or with respect to the delivery to and purchase by Buyer of Product that are imposed on Product at and after its delivery to Buyer at the Delivery Point (other than withholding or other Taxes imposed on Seller's income, revenue, receipts or employees), if any. If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly pay the Taxes due and then seek and receive reimbursement from the other for such Taxes. In the event any sale of Product hereunder is exempt from or not subject to any particular Tax, Buyer shall provide Seller with all necessary documentation within thirty (30) days after the Effective Date to evidence such exemption or exclusion. If Buyer does not provide such documentation, then Buyer shall indemnify, defend, and hold Seller harmless from any liability with respect to Taxes from which Buyer claims it is exempt.
- 5.2 <u>Cooperation</u>. Each Party shall use commercially reasonable efforts to implement the provisions of and administer this Agreement in accordance with the intent of the Parties to minimize all Taxes, so long as no Party is materially adversely affected by such efforts. The Parties shall cooperate to minimize Tax exposure; *provided*, *however*, that neither Party shall be obligated to incur any financial or operational burden to reduce Taxes for which the other Party is responsible hereunder without receiving due compensation therefor from the other Party. All Product delivered by Seller to Buyer hereunder shall be a sale made at wholesale, with Buyer reselling such Product.

# ARTICLE 6 MAINTENANCE OF THE FACILITY

6.1 <u>Maintenance of the Facility</u>. Seller shall comply with Law and Prudent Operating Practice relating to the operation and maintenance of the Facility and the generation and sale of Product.

- Maintenance of Health and Safety. Seller shall take reasonable safety precautions with respect to the operation, maintenance, repair and replacement of the Facility. If Seller becomes aware of any circumstances relating to the Facility that create an imminent risk of damage or injury to any Person or any Person's property, Seller shall take prompt, reasonable action to prevent such damage or injury and shall give Notice to Buyer's emergency contact identified on Exhibit N of such condition. Such action may include, to the extent reasonably necessary, disconnecting and removing all or a portion of the Facility, or suspending the supply of PV Energy or Discharging Energy to the Delivery Point or Charging Energy to the Storage Facility.
- Facilities and Interconnection Facilities, and Seller's rights and obligations under the Interconnection Agreement, may be subject to certain shared facilities and/or co-tenancy agreements to be entered into among Seller, the Participating Transmission Owner, Seller's Affiliates, and/or third parties pursuant to which certain Interconnection Facilities may be subject to joint ownership and shared maintenance and operation arrangements; *provided* that such agreements (i) shall permit Seller to perform or satisfy, and shall not purport to limit, its obligations hereunder and (ii) provide for separate metering of the Facility.

# ARTICLE 7 METERING

- **Metering**. Seller shall measure the amount of Facility Energy using the Facility 7.1 Meter, which will be subject to adjustment in accordance with applicable CAISO meter requirements and Prudent Operating Practices, including to account for Electrical Losses and Station Use. Seller shall measure the Charging Energy and the Discharging Energy using the Storage Facility Meters. All meters will be operated pursuant to Prudent Operating Practices and any required CAISO-approved calculation methodologies and maintained at Seller's cost. Subject to meeting any applicable CAISO requirements, the meters shall be programmed to adjust for Electrical Losses and Station Use from the Facility to the Delivery Point in a manner subject to Buyer's prior written approval, not to be unreasonably withheld. Metering will be consistent with the Metering Diagram set forth as Exhibit R, a final version of which shall be provided to Buyer at least thirty (30) days before the Commercial Operation Date. Each meter shall be kept under seal, such seals to be broken only when the meters are to be tested, adjusted, modified or relocated. In the event Seller breaks a seal, Seller shall notify Buyer as soon as practicable. In addition, Seller hereby agrees to provide all meter data to Buyer in a form reasonably acceptable to Buyer, and consents to Buyer obtaining from CAISO the CAISO meter data directly relating to the Facility and all inspection, testing and calibration data and reports. Seller and Buyer, or Buyer's Scheduling Coordinator, shall cooperate to allow both Parties to retrieve the meter reads from the CAISO Operational Meter Analysis and Reporting (OMAR) web and/or directly from the CAISO meter(s) at the Facility.
- 7.2 <u>Meter Verification</u>. Annually, if Seller has reason to believe there may be a meter malfunction, or upon Buyer's reasonable request, Seller shall request permission from the CAISO to test the meter. The tests shall be conducted by independent third parties qualified to conduct such tests. Buyer shall be notified seven (7) days in advance of such tests and have a right to be

present during such tests. If such a test is conducted at the request of Buyer, Buyer shall pay for such test unless the testing shows the Facility Meter is inaccurate by more than one percent (1%), in which case Seller shall pay for such test. If a meter is inaccurate it shall be promptly repaired or replaced. If it is not known when the meter inaccuracy commenced (if such evidence exists such date will be used to adjust prior invoices), then the invoices covering the period of time since the last meter test shall be adjusted for the amount of the inaccuracy on the assumption that the inaccuracy persisted during one-half of such period; provided, that (a) such period may not exceed twelve (12) months and (b) such adjustments are accepted by CAISO and WREGIS.

# ARTICLE 8 INVOICING AND PAYMENT; CREDIT

- 8.1 **Invoicing.** Seller shall make good faith efforts to deliver an invoice to Buyer for Product within fifteen (15) Business Days after the end of the prior monthly billing period. Each invoice shall reflect (a) records of metered data, including CAISO metering and transaction data sufficient to document and verify the amount of Product delivered by the Facility for any Settlement Period during the preceding month, including the amount of PV Energy produced by the Generating Facility as read by the Facility Meter, the amount of Charging Energy charged by the Storage Facility and the amount of Discharging Energy delivered from the Storage Facility to the Delivery Point, in each case, as read by the Storage Facility Meter, the amount of Replacement RA and Replacement Product delivered to Buyer (if any), the calculation of Adjusted Facility Energy, Deemed Delivered Energy, and Adjusted Energy Production, the LMP prices at the Delivery Point for each Settlement Period, and the Contract Price applicable to such Product in accordance with Exhibit C; (b) access to any records, including invoices or settlement data from the CAISO, necessary to verify the accuracy of any amount; and (c) be in a format reasonably specified by Buyer, covering the services provided in the preceding month determined in accordance with the applicable provisions of this Agreement. Buyer shall, and shall cause its Scheduling Coordinator to, provide Seller with all reasonable access (including, in real time, to the maximum extent reasonably possible) to any records, including invoices or settlement data from the CAISO, forecast data and other information, all as may be necessary from time to time for Seller to prepare and verify the accuracy of all invoices.
- Payment. Buyer shall make payment to Seller for Product by wire transfer or ACH payment to the bank account provided on each monthly invoice, provided, however, that Seller will give Buyer no less than ten (10) days notice of any account change with respect to the place of payment. Buyer shall pay undisputed invoice amounts within thirty (30) days after receipt of the invoice or the end of the prior monthly billing period, whichever is later. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments made after the due date will be considered late and will bear interest on the unpaid balance. If the amount due is not paid on or before the due date or if any other payment that is due and owing from one Party to another is not paid on or before its applicable due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing statement. Such late payment charge shall be calculated based on the prime rate published on the date of the invoice in The Wall Street Journal, or, if The Wall Street Journal is not published on that day, the next succeeding date of publication, plus two percent (2%) (the "Interest Rate"). If the due date occurs on a day that is

not a Business Day, the late payment charge shall begin to accrue on the next succeeding Business Day.

- 8.3 <u>Books and Records</u>. To facilitate payment and verification, each Party shall maintain all books and records necessary for billing and payments, including copies of all invoices under this Agreement, for a period of at least two (2) years or as otherwise required by Law. Upon ten (10) Business Days' Notice to the other Party, either Party shall be granted reasonable access to the accounting books and records within the possession or control of the other Party pertaining to all invoices generated pursuant to this Agreement. Seller acknowledges that in accordance with California Government Code Section 8546.7, Seller may be subject to audit by the California State Auditor with regard to Seller's performance of this Agreement because the compensation under this Agreement exceeds \$10,000.
- 8.4 Payment Adjustments; Billing Errors. Payment adjustments shall be made if Buyer or Seller discovers there have been good faith inaccuracies in invoicing that are not otherwise disputed under Section 8.5 or an adjustment to an amount previously invoiced or paid is required due to a correction of data by the CAISO; provided, however, that there shall be no adjustments to prior invoices based upon meter inaccuracies. If the required adjustment is in favor of Buyer, Buyer's next monthly payment shall be credited in an amount equal to the adjustment. If the required adjustment is in favor of Seller, Seller shall add the adjustment amount to Buyer's next monthly invoice. Adjustments in favor of either Buyer or Seller shall bear interest, until settled in full, in accordance with Section 8.2, accruing from the date on which the adjusted amount should have been due.
- 8.5 **Billing Disputes**. 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 twenty-four (24) 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. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within five (5) Business Days of such resolution along with interest accrued at the Interest Rate from and including the original due date to but excluding the date paid. Inadvertent overpayments shall be returned via adjustments in accordance with Section 8.4. Any dispute with respect to an invoice is waived if the other Party is not notified in accordance with this Section 8.5 within twenty-four (24) months after the invoice is rendered or subsequently adjusted, except in the event of intentional fraud or misrepresentation by the Seller or to the extent any misinformation was from a third party not affiliated with any Party and such third party corrects its information after the twenty-four-month period. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived.
- 8.6 <u>Netting of Payments</u>. The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in

which case all amounts owed by each Party to the other Party for the purchase and sale of Product during the monthly billing period under this Agreement or otherwise arising out of this Agreement, including any related damages calculated pursuant to <u>Exhibits B</u> and <u>P</u>, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

- 8.7 Seller's Development Security. To secure its obligations under this Agreement, Seller shall deliver Development Security to Buyer within thirty (30) days of the Effective Date. Seller shall maintain the Development Security in full force and effect and Seller shall within ten (10) Business Days after any draw thereon replenish the Development Security in the event Buyer collects or draws down any portion of the Development Security for any reason permitted under this Agreement other than to satisfy a Damage Payment or a Termination Payment. Upon the earlier of (i) Seller's delivery of the Performance Security, or (ii) sixty (60) days after termination of this Agreement, Buyer shall return the Development Security to Seller, less the amounts drawn in accordance with this Agreement. If the Development Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating specified in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Date, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit in the amount of the Development Security and that otherwise meets the requirements set forth in the definition of Development Security.
- Seller's Performance Security. To secure its obligations under this Agreement, Seller shall deliver Performance Security to Buyer on or before the Commercial Operation Date. If the Performance Security is not in the form of cash or Letter of Credit, it shall be substantially in the form of Guaranty set forth in Exhibit L. Seller shall maintain the Performance Security in full force and effect, subject to any draws made by Buyer in accordance with this Agreement, until the following have occurred: (A) the Delivery Term has expired or terminated early; and (B) all payment obligations of the Seller then due and payable under this Agreement, including compensation for penalties, Termination Payment, indemnification payments or other damages are paid in full (whether directly or indirectly such as through set-off or netting). Following the occurrence of both events, Buyer shall promptly return to Seller the unused portion of the Performance Security. If the Performance Security is a Letter of Credit and the issuer of such Letter of Credit (i) fails to maintain the minimum Credit Rating set forth in the definition of Letter of Credit, (ii) indicates its intent not to renew such Letter of Credit and such Letter of Credit expires prior to the Commercial Operation Date, or (iii) fails to honor Buyer's properly documented request to draw on such Letter of Credit by such issuer, Seller shall have ten (10) Business Days to either post cash or deliver a substitute Letter of Credit that meets the requirements set forth in the definition of Performance Security. Seller may at its option exchange one permitted form of Development Security or Performance Security for another permitted form of Development Security or Performance Security, as applicable.
- 8.9 <u>First Priority Security Interest in Cash or Cash Equivalent Collateral</u>. To secure its obligations under this Agreement, and until released as provided herein, Seller hereby

grants to Buyer a present and continuing first-priority security interest ("<u>Security Interest</u>") in, and lien on (and right to net against), and assignment of the Development Security, Performance Security, any other cash collateral and cash equivalent collateral posted pursuant to Sections 8.7 and 8.8 and any and all interest thereon or proceeds resulting therefrom or from the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer, and Seller agrees to take all action as Buyer reasonably requires in order to perfect Buyer's Security Interest in, and lien on (and right to net against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.

Upon or any time after the occurrence and continuation of an Event of Default caused by Seller, an Early Termination Date resulting from an Event of Default caused by Seller, or an occasion provided for in this Agreement where Buyer is authorized to retain all or a portion of the Development Security or Performance Security, Buyer may do any one or more of the following (in each case subject to the final sentence of this Section 8.9):

- (a) Exercise any of its rights and remedies with respect to the Development Security and Performance Security, including any such rights and remedies under Law then in effect;
- (b) Draw on any outstanding Letter of Credit issued for its benefit and retain any cash held by Buyer as Development Security or Performance Security; and
- (c) Liquidate all Development Security or Performance Security (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 this Agreement (Seller remains liable for any amounts owing to Buyer after such application), subject to Buyer's obligation to return any surplus proceeds remaining after these obligations are satisfied in full.

8.10 <u>Financial Statements</u>. In the event a Guaranty is provided as Performance Security in lieu of cash or a Letter of Credit, Seller shall provide to Buyer, or cause the Guarantor to provide to Buyer, unaudited quarterly and annual audited financial statements of the Guarantor (including a balance sheet and statements of income and cash flows), all prepared in accordance with generally accepted accounting principles in the United States, consistently applied.



#### 8.12 **Buyer's Covenants**:

- (a) During any period during the Term, Buyer shall provide to Seller, both upon request and as indicated below: (i) within ninety (90) days following the end of each fiscal quarter, unaudited quarterly financial statement of Buyer (including a balance sheet and statements of income and cash flows) prepared in accordance with generally accepted accounting principals as promulgated by the Government Accounting Standards Board in the United States, consistently applied; and (ii) within one hundred and eighty (180) days following the end of each fiscal year, annual financial statements of Buyer (including a balance sheet and statements of income and cash flows) prepared in accordance with the requirements of California law applicable to Joint Powers Authorities; *provided* that nothing in this Section 8.12 shall require Buyer to provide information that is not generally available to Buyer as part of its normal accounting and financing reporting processes.
- (b) During any period during the Term when Buyer does not have or maintain an Investment Grade Credit Rating, Buyer shall provide to Seller, both upon request and as indicated below: (i) as available, Buyer's annual report; (ii) reserve levels; (iii) subscription\_and opt out rates; and (iv) other financial and operational information as may be reasonably requested by the Seller's financing parties from time to time; *provided* that nothing in this Section 8.12 shall require Buyer to provide information that is not generally available to Buyer as part of its normal accounting and financing reporting processes
- (c) <u>Cooperation with Financing Parties</u>. Buyer shall cooperate with Seller and Seller's financing counterparties to execute and arrange for the delivery of consents and estoppels providing factual confirmations with respect to this Agreement within ten (10) business days of request therefore and other information reasonably requested in connection with the debt or equity (including tax equity) financing of the Facility.

## ARTICLE 9 NOTICES

- 9.1 <u>Addresses for the Delivery of Notices</u>. Except as provided in <u>Exhibit D</u>, any Notice required, permitted, or contemplated hereunder shall be in writing, shall be addressed to the Party to be notified at the address set forth on <u>Exhibit N</u> or at such other address or addresses as a Party may designate for itself from time to time by Notice hereunder.
- 9.2 <u>Acceptable Means of Delivering Notice</u>. Each Notice required, permitted, or contemplated hereunder shall be deemed to have been validly served, given or delivered as follows: (a) if sent by a regularly scheduled overnight delivery carrier with delivery fees either prepaid or an arrangement with such carrier made for the payment of such fees, the next Business Day after the same is delivered by the sending Party to such carrier; or (b) if sent by electronic communication (including electronic mail or other electronic means) and if concurrently with the

transmittal of such electronic communication the sending Party provides a copy of such electronic Notice by hand delivery or express courier, at the time indicated by the time stamp upon delivery; or (c) if delivered in person, upon receipt by the receiving Party. Notwithstanding the foregoing, Notices of outages or other scheduling or dispatch information or requests, may be sent by electronic communication and shall be considered delivered upon successful completion of such transmission.

### ARTICLE 10 FORCE MAJEURE

#### 10.1 **Definition**.

- (a) "Force Majeure Event" means any act or event that delays or prevents a Party from timely performing all or a portion of its obligations under this Agreement or from complying with all or a portion of the conditions under this Agreement if such act or event, despite the exercise of commercially reasonable efforts, cannot be avoided by and is beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance, or noncompliance.
- (b) Without limiting the generality of the foregoing, so long as the following events, despite the exercise of reasonable efforts, cannot be avoided by, and are beyond the reasonable control (whether direct or indirect) of and without the fault or negligence of the Party relying thereon as justification for such delay, nonperformance or noncompliance, a Force Majeure Event may include an act of God or the elements, such as flooding, lightning, hurricanes, tornadoes, or ice storms; explosion; fire; volcanic eruption; flood; epidemic or pandemic, including COVID-19; landslide; mudslide; sabotage; terrorism; earthquake; or other cataclysmic events; an act of public enemy; war; blockade; civil insurrection; riot; civil disturbance; or strikes or other labor difficulties caused or suffered by a Party or any third party except as set forth below.
- Notwithstanding the foregoing, the term "Force Majeure Event" does not (c) include (i) economic conditions that render a Party's performance of this Agreement at the Contract Price unprofitable or otherwise uneconomic (including an increase in component costs for any reason, including foreign or domestic tariffs, Buyer's ability to buy electric energy at a lower price, or Seller's ability to sell the Product, or any component thereof, at a higher price, than under this Agreement); (ii) Seller's inability to obtain permits or approvals of any type for the construction, operation, or maintenance of the Facility, except to the extent such inability is caused by a Force Majeure Event; (iii) the inability of a Party to make payments when due under this Agreement, unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described above; (iv) a Curtailment Order; (v) Seller's inability to obtain sufficient labor, equipment, materials, or other resources to build or operate the Facility except to the extent such inability is caused by a Force Majeure Event; (vi) any equipment failure except if such equipment failure is caused by a Force Majeure Event; or (vii) Seller's inability to achieve Construction Start of the Facility following the Guaranteed Construction Start Date or achieve Commercial Operation following the Guaranteed Commercial Operation Date unless the cause of such inability is an event that would otherwise constitute a Force Majeure Event as described

above; it being understood and agreed, for the avoidance of doubt, that the occurrence of a Force Majeure Event may give rise to a Development Cure Period.

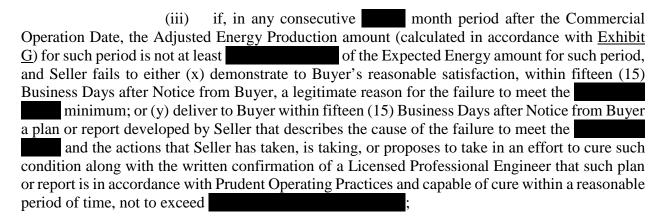
- be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to a Force Majeure Event. The Party rendered unable to fulfill any obligation by reason of a Force Majeure Event shall take reasonable actions necessary to remove such inability. Nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed. Neither Party shall be considered in breach or default of this Agreement if and to the extent that any failure or delay in the Party's performance of one or more of its obligations hereunder is caused by a Force Majeure Event. Notwithstanding the foregoing, the occurrence and continuation of a Force Majeure Event shall not (a) suspend or excuse the obligation of a Party to make any payments due hereunder, (b) suspend or excuse the obligation of Seller to achieve the Guaranteed Construction Start Date or the Guaranteed Commercial Operation Date beyond the extensions provided in <a href="Exhibit B">Exhibit B</a>, or (c) limit Buyer's right to declare an Event of Default pursuant to Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer's rights pursuant to Section 11.2.
- Majeure Event, the Party suffering the Force Majeure Event shall (a) as soon as practicable, notify the other Party in writing of the nature, cause, estimated date of commencement thereof, and the anticipated extent of any delay or interruption in performance, and (b) notify the other Party in writing of the cessation or termination of such Force Majeure Event, all as known or estimated in good faith by the affected Party; *provided*, *however*, that a Party's failure to give timely Notice shall not affect such Party's ability to assert that a Force Majeure Event has occurred unless the delay in giving Notice materially prejudices the other Party. Upon request from Buyer, Seller shall provide documentation demonstrating to Buyer's reasonable satisfaction that the delays described above did not result from Seller's actions or failure to take reasonable actions.
- 10.4 <u>Termination Following Force Majeure Event.</u> If a Force Majeure Event has occurred after the Commercial Operation Date that has caused either Party to be wholly or partially unable to perform its obligations hereunder, and the impacted Party has claimed and received relief from performance of its obligations for period, then either Party may terminate this Agreement upon written Notice to the other Party with respect to the Facility experiencing the Force Majeure Event. Upon any such termination, neither Party shall have any liability to the other Party, save and except for those obligations specified in Section 2.1(b), and Buyer shall promptly return to Seller any Performance Security then held by Buyer, less any amounts drawn in accordance with this Agreement.

# ARTICLE 11 DEFAULTS; REMEDIES; TERMINATION

#### 11.1 **Events of Default**. An "**Event of Default**" shall mean,

(a) with respect to a Party (the "<u>Defaulting Party</u>") that is subject to the Event of Default the occurrence of any of the following:

- (i) the failure by such Party to make, when due, any payment required pursuant to this Agreement and such failure is not remedied within ten (10) Business Days after Notice thereof;
- (ii) 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 such default is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional sixty (60) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts);
- (iii) the failure by such Party to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default set forth in this Section 11.1; and except for (1) failure to deliver Capacity Attributes, the exclusive remedies for which are set forth in Section 3.8, (2) failures to achieve the Guaranteed Energy Production that do not trigger the provisions of Section 11.1(b)(iv), the exclusive remedies for which are set forth in Section 4.7; and (3) failures related to the Annual Storage Availability that do not trigger the provisions of Section 11.1(b)(v), the exclusive remedies for which are set forth in Section 4.8) and such failure is not remedied within thirty (30) days after Notice thereof (or such longer additional period, not to exceed an additional ninety (90) days, if the Defaulting Party is unable to remedy such default within such initial thirty (30) days period despite exercising commercially reasonable efforts);
  - (iv) such Party becomes Bankrupt;
- (v) such Party assigns this Agreement or any of its rights hereunder other than in compliance with Section 14.1 or 14.2, as applicable; or
- (vi) 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) with respect to Seller as the Defaulting Party, the occurrence of any of the following:
- (i) if at any time, Seller delivers or attempts to deliver electric energy to the Delivery Point for sale under this Agreement that was not generated or discharged by the Facility, except for Replacement Product;
- (ii) the failure by Seller to achieve Commercial Operation within days after the Guaranteed Commercial Operation Date, as such date may be extended hereunder, by Seller's payment of Commercial Operation Delay Damages pursuant to Section 2 of Exhibit B, and/or by a Development Cure Period pursuant to Section 4 of Exhibit B;



- (iv) if, in any two consecutive Contract Years, the average Annual Storage Availability is, on an annual basis, less than seventy percent (70%) in each Contract Year;
- (v) if, in any two (2) consecutive Contract Year period during the Delivery Term, the Adjusted Energy Production amount is not at least seventy-five percent (75%) of the Expected Energy amount;
- (vi) if, for any full Contract Year, the Annual Storage Capacity Availability for such Contract Year *multiplied by* the weighted average Storage Contract Capacity for such Contract Year is not at least seventy percent (70%) *multiplied* by the Installed Storage Capacity, and Seller fails to (x) deliver to Buyer within ten (10) Business Days after Notice from Buyer a plan or report developed by Seller that describes the cause of the failure to meet the seventy percent (70%) *multiplied* by the Installed Storage Capacity threshold, and the actions that Seller has taken, is taking, or proposes to take in an effort to cure such condition along with the written confirmation of a Licensed Professional Engineer that such plan or report is in accordance with Prudent Operating Practices and capable of cure within a reasonable period of time, not to exceed one hundred eighty (180) days ("Storage Cure Plan") and (y) complete such Storage Cure Plan in all material respects as set forth therein, including within the timeframe set forth therein;
- (vii) failure by Seller to satisfy the collateral requirements pursuant to Sections 8.7 or 8.8 after Notice and expiration of the cure periods set forth therein, including the failure to replenish the Development Security or Performance Security amount in accordance with this Agreement in the event Buyer draws against either for any reason other than to satisfy a Damage Payment or a Termination Payment;
- (viii) with respect to any Guaranty provided for the benefit of Buyer, the failure by Seller to 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, in each case, in the amount required hereunder within ten (10) Business Days after Seller receives Notice of the occurrence of any of the following events:
  - (A) if any representation or warranty made by the Guarantor in connection with this Agreement is false or misleading in any material

respect when made or when deemed made or repeated, and such default is not remedied within thirty (30) days after Notice thereof;

- (B) the failure of the Guarantor to make any payment required or to perform any other material covenant or obligation in any Guaranty;
  - (C) the Guarantor becomes Bankrupt;
- (D) the Guarantor shall fail to meet the criteria for an acceptable Guarantor as set forth in the definition of Guarantor;
- (E) the failure of the Guaranty to be in full force and effect (other than in accordance with its terms) prior to the indefeasible satisfaction of all obligations of Seller hereunder; or
- (F) the Guarantor shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of any Guaranty; or
- (ix) with respect to any outstanding Letter of Credit provided for the benefit of Buyer that is not then required under this Agreement to be canceled or returned, the failure by Seller to provide for the benefit of Buyer either (1) cash, or (2) a substitute Letter of Credit from a different issuer meeting the criteria set forth in the definition of Letter of Credit, in each case, in the amount required hereunder within ten (10) Business Days after Seller receives Notice of the occurrence of any of the following events:
  - (A) the issuer of the outstanding Letter of Credit shall fail to maintain a Credit Rating of at least A- by S&P or A3 by Moody's;
    - (B) the issuer of such Letter of Credit becomes Bankrupt;
  - (C) the issuer of the outstanding Letter of Credit shall fail to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit;
  - (D) the issuer of the outstanding Letter of Credit shall fail to honor a properly documented request to draw on such Letter of Credit;
  - (E) the issuer of the outstanding Letter of Credit shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such Letter of Credit;
  - (F) such Letter of Credit fails or ceases to be in full force and effect at any time; or
  - (G) Seller shall fail to renew or cause the renewal of each outstanding Letter of Credit on a timely basis as provided in the relevant

Letter of Credit and as provided in accordance with this Agreement, and in no event less than sixty (60) days prior to the expiration of the outstanding Letter of Credit.

- 11.2 <u>Remedies; Declaration of Early Termination Date</u>. If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party ("<u>Non-Defaulting Party</u>") shall have the following rights:
- (a) to send Notice, designating a day, no earlier than the day such Notice is deemed to be received and no later than twenty (20) days after such Notice is deemed to be received, as an early termination date of this Agreement ("<u>Early Termination Date</u>") that terminates this Agreement (the "<u>Terminated Transaction</u>") and ends the Delivery Term effective as of the Early Termination Date;
- (b) to accelerate all amounts owing between the Parties, and to collect as liquidated damages (i) the Damage Payment (in the case of an Event of Default by Seller occurring before the Commercial Operation Date, including an Event of Default under Section 11.1(b)(ii)) subject to the limitations in Section 11.7, or (ii) the Termination Payment calculated in accordance with Section 11.3 below (in the case of any other Event of Default by either Party);
  - (c) to withhold any payments due to the Defaulting Party under this Agreement;
  - (d) to suspend performance; or
- (e) to exercise any other right or remedy available at law or in equity, including specific performance or injunctive relief, except to the extent such remedies are expressly limited under this Agreement;

<u>provided</u>, that payment by the Defaulting Party of the Damage Payment or Termination Payment, as applicable, shall constitute liquidated damages and the Non-Defaulting Party's sole and exclusive remedy for the Terminated Transaction and the Event of Default related thereto.

11.3 **Termination Payment**. The Termination Payment ("**Termination Payment**") for the Terminated Transaction shall be the aggregate of all Settlement Amounts plus any or all other amounts due to or from the Non-Defaulting Party (as of the Early Termination Date) netted into a single amount. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the net Settlement Amount shall be zero. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for the Terminated Transaction as of the Early Termination Date. Third parties supplying information for purposes of the calculation of Gains or Losses may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. The Settlement Amount shall not include consequential, incidental, punitive, exemplary, indirect or business interruption damages. Without prejudice to the Non-Defaulting Party's duty to mitigate, the Non-Defaulting Party shall not have to enter into replacement transactions to establish a Settlement Amount. Each Party agrees and acknowledges

- that (a) the actual damages that the Non-Defaulting Party would incur in connection with the Terminated Transaction would be difficult or impossible to predict with certainty, (b) the Damage Payment or Termination Payment described in Section 11.2 or this Section 11.3 (as applicable) is a reasonable and appropriate approximation of such damages, and (c) the Damage Payment or Termination Payment described in Section 11.2 or this Section 11.3 (as applicable) is the exclusive remedy of the Non-Defaulting Party in connection with the Terminated Transaction but shall not otherwise act to limit any of the Non-Defaulting Party's rights or remedies if the Non-Defaulting Party does not elect a Terminated Transaction as its remedy for an Event of Default by the Defaulting Party.
- 11.4 <u>Notice of Payment of Termination Payment</u>. As soon as practicable after a Terminated Transaction, but in no event later than sixty (60) days after the Early Termination Date, Notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Damage Payment or Termination Payment and whether the Termination Payment is due to or from the Non-Defaulting Party. 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 or from the Non-Defaulting Party, as applicable, within ten (10) Business Days after such Notice is effective.
- 11.5 <u>Disputes With Respect to Termination Payment</u>. 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 five (5) 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. Disputes regarding the Termination Payment shall be determined in accordance with Article 15.
- 11.6 <u>Rights And Remedies Are Cumulative</u>. Except where an express and exclusive remedy or measure of liquidated damages is provided, the rights and remedies of a Party pursuant to this Article 11 shall be cumulative and in addition to the rights of the Parties otherwise provided in this Agreement. Any Non-Defaulting Party shall be obligated to use commercially reasonable efforts to mitigate its Costs, Losses and damages resulting from or arising out of any Event of Default of the other Party under this Agreement.
- 11.7 <u>Seller Pre-COD Liability Limitations</u>. Notwithstanding any other provision of this Agreement, Seller's aggregate liability under or arising out of a termination of this Agreement prior to the Commercial Operation Date shall be limited to an amount equal to the Damage Payment.
- 11.8 <u>Limitation on Seller's Ability to Make or Agree to Third-Party Sales from the Facility after Early Termination Date</u>. If the Agreement is terminated by Buyer prior to the Commercial Operation Date due to Seller's Event of Default, neither Seller nor Seller's Affiliates may sell, market or deliver any Product associated with or attributable to the Facility to a party other than Buyer for a period of two (2) years following the Early Termination Date due to Seller's Event of Default, unless prior to selling, marketing or delivering such Product, or entering into the agreement to sell, market or deliver such Product to a party other than Buyer, Seller or Seller's Affiliates provide Buyer with a written offer to sell the Product which provides Buyer the right to

select in its sole discretion either the terms and conditions materially similar to the terms and conditions contained in this Agreement (including price) or the terms and conditions to which the third party agreed, and Buyer fails to accept such offer within forty-five (45) days of Buyer's receipt thereof.

11.9 <u>Mitigation</u>. Any Non-Defaulting Party shall be obligated to use commercially reasonable efforts to mitigate its Costs, Losses and damages resulting from any Event of Default of the other Party under this Agreement.

## ARTICLE 12 LIMITATION OF LIABILITY AND EXCLUSION OF WARRANTIES.

- 12.1 <u>No Consequential Damages</u>. EXCEPT TO THE EXTENT PART OF AN EXPRESS REMEDY OR MEASURE OF DAMAGES HEREIN, OR INCLUDED IN A LIQUIDATED DAMAGES CALCULATION, OR ARISING FROM FRAUD OR INTENTIONAL MISREPRESENTATION, NEITHER PARTY SHALL BE LIABLE TO THE OTHER OR ITS INDEMNIFIED PERSONS FOR ANY SPECIAL, PUNITIVE, EXEMPLARY, INDIRECT, OR CONSEQUENTIAL DAMAGES, OR LOSSES OR DAMAGES FOR LOST REVENUE OR LOST PROFITS, WHETHER FORESEEABLE OR NOT, ARISING OUT OF, OR IN CONNECTION WITH THIS AGREEMENT, BY STATUTE, IN TORT OR CONTRACT.
- 12.2 Waiver and Exclusion of Other Damages. EXCEPT AS EXPRESSLY SET FORTH HEREIN, THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. ALL LIMITATIONS OF LIABILITY CONTAINED IN THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, THOSE PERTAINING TO SELLER'S LIMITATION OF LIABILITY AND THE PARTIES' WAIVER OF CONSEQUENTIAL DAMAGES, SHALL APPLY EVEN IF THE REMEDIES FOR BREACH OF WARRANTY PROVIDED IN THIS AGREEMENT ARE DEEMED TO "FAIL OF THEIR ESSENTIAL PURPOSE" OR ARE OTHERWISE HELD TO BE INVALID OR UNENFORCEABLE.

FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS AND EXCLUSIVE REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT DAMAGES ONLY. THE VALUE OF ANY TAX CREDITS, DETERMINED ON AN AFTER-TAX BASIS, LOST DUE TO BUYER'S DEFAULT (WHICH SELLER HAS NOT BEEN ABLE TO MITIGATE AFTER USE OF REASONABLE EFFORTS) AND AMOUNTS DUE IN CONNECTION WITH THE

RECAPTURE OF ANY RENEWABLE ENERGY INCENTIVES, IF ANY, SHALL BE DEEMED TO BE DIRECT DAMAGES.

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED OR ANY OTHER EXCLUSIVE REMEDLY IS SET FORTH HEREIN, INCLUDING UNDER SECTIONS 3.8, 4.7, 4.8, 11.2 AND 11.3, AND AS PROVIDED IN EXHIBIT B, EXHIBIT G, AND EXHIBIT P THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, THAT OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT, AND THAT THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE ANTICIPATED HARM OR LOSS. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. THE PARTIES HEREBY WAIVE ANY RIGHT TO CONTEST SUCH PAYMENTS AS AN UNREASONABLE PENALTY.

THE PARTIES ACKNOWLEDGE AND AGREE THAT MONEY DAMAGES AND THE EXPRESS REMEDIES PROVIDED FOR HEREIN ARE AN ADEQUATE REMEDY FOR THE BREACH BY THE OTHER OF THE TERMS OF THIS AGREEMENT, AND EACH PARTY WAIVES ANY RIGHT IT MAY HAVE TO SPECIFIC PERFORMANCE WITH RESPECT TO ANY OBLIGATION OF THE OTHER PARTY UNDER THIS AGREEMENT.

# ARTICLE 13 REPRESENTATIONS AND WARRANTIES; AUTHORITY

- 13.1 <u>Seller's Representations and Warranties</u>. As of the Effective Date, Seller represents and warrants as follows:
- (a) Seller is a limited liability company, duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation, and is qualified to conduct business in the state of California and each jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller.
- (b) Seller has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement, except where such failure does not have a material adverse effect on Seller's performance under this Agreement. The execution, delivery and performance of this Agreement by Seller has been duly authorized by all necessary limited liability company action on the part of Seller and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Seller or any other party to any other agreement with Seller.
- (c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Seller with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law

presently in effect having applicability to Seller, subject to any permits that have not yet been obtained by Seller, the documents of formation of Seller or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Seller is a party or by which any of its property is bound.

- (d) This Agreement has been duly executed and delivered by Seller. This Agreement is a legal, valid and binding obligation of Seller enforceable in accordance with its terms, except as limited by laws of general applicability limiting the enforcement of creditors' rights or by the exercise of judicial discretion in accordance with general principles of equity.
  - (e) The Facility is located in the State of California.
- (f) Seller will be responsible for obtaining all permits necessary to construct and operate the Facility.
- 13.2 <u>Buyer's Representations and Warranties</u>. As of the Effective Date, Buyer represents and warrants as follows:
- (a) Buyer is a joint powers authority and a validly existing community choice aggregator, duly organized, validly existing and in good standing under the laws of the State of California and the rules, regulations and orders of the California Public Utilities Commission, and is qualified to conduct business in each jurisdiction of the Joint Powers Agreement members. All Persons making up the governing body of Buyer are the elected or appointed incumbents in their positions and hold their positions in good standing in accordance with the Joint Powers Agreement and other Law.
- (b) Buyer has the power and authority to enter into and perform this Agreement and is not prohibited from entering into this Agreement or discharging and performing all covenants and obligations on its part to be performed under and pursuant to this Agreement, except where such failure does not have a material adverse effect on Buyer's performance under this Agreement. The execution, delivery and performance of this Agreement by Buyer has been duly authorized by all necessary action on the part of Buyer and does not and will not require the consent of any trustee or holder of any indebtedness or other obligation of Buyer or any other party to any other agreement with Buyer.
- (c) The execution and delivery of this Agreement, consummation of the transactions contemplated herein, and fulfillment of and compliance by Buyer with the provisions of this Agreement will not conflict with or constitute a breach of or a default under any Law presently in effect having applicability to Buyer, the documents of formation of Buyer or any outstanding trust indenture, deed of trust, mortgage, loan agreement or other evidence of indebtedness or any other agreement or instrument to which Buyer is a party or by which any of its property is bound.
- (d) This Agreement has been duly executed and delivered by Buyer. This Agreement is a legal, valid and binding obligation of Buyer enforceable in accordance with its

terms, except as limited by laws of general applicability limiting the enforcement of creditors' rights or by the exercise of judicial discretion in accordance with general principles of equity.

- (e) Buyer warrants and covenants that with respect to its contractual obligations under this Agreement, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (1) suit, (2) jurisdiction of court (provided that such court is limited within a venue permitted in law and under the Agreement), (3) relief by way of injunction, order for specific performance or recovery of property, (4) attachment of assets, or (5) execution or enforcement of any judgment; provided, however that nothing in this Agreement shall waive the obligations or rights set forth in the California Tort Claims Act (Government Code Section 810 et seq.)
- (f) Buyer is a "local public entity" as defined in Section 900.4 of the Government Code of the State of California.
- (g) Buyer cannot assert sovereign immunity as a defense to the enforcement of its obligations under this Agreement.
- 13.3 <u>General Covenants</u>. Each Party covenants that commencing on the Effective Date and continuing throughout the Contract Term:
- (a) It shall continue to be duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and to be qualified to conduct business in California and each jurisdiction where the failure to so qualify would have a material adverse effect on its business or financial condition;
- (b) It shall maintain (or obtain from time to time as required) all regulatory authorizations, approvals and permits necessary for the operation of the Facility and for Seller to legally perform its obligations under this Agreement; and
- (c) It shall perform its obligations under this Agreement in compliance with all terms and conditions in its governing documents and in material compliance with any Law.
- laws, statutes, ordinances, rules and regulations, and orders and decrees of any courts or administrative bodies or tribunals, including without limitation employment discrimination laws and prevailing wage laws. Seller shall use reasonable efforts to ensure that all employees hired by Seller, and its contractors and subcontractors, that will perform construction work or provide services at the Site related to construction of the Facility are paid wages at rates not less than those prevailing for workers performing similar work in the locality as provided by applicable California law, if any ("Prevailing Wage Requirement"). Buyer agrees that Seller's obligations under this Section 13.4 with respect to the Prevailing Wage Requirement will be satisfied upon the execution of a project labor agreement related to construction of the Facility.

## ARTICLE 14 ASSIGNMENT

- 14.1 <u>General Prohibition on Assignments</u>. Except as provided in this Article 14, neither Party may voluntarily assign this Agreement or its rights or obligations under this Agreement, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed. Any Change of Control of Seller (whether voluntary or by operation of law) will be deemed an assignment and will require the prior written consent of Buyer, which consent shall not be unreasonably withheld, conditioned or delayed; *provided*, however, that a Change of Control of Seller shall not require Buyer's consent if the assignee or transferee is a Permitted Transferee. Any assignment made without required written consent, or in violation of the conditions to assignment set out below, shall be null and void. Seller shall be responsible for Buyer's reasonable costs associated with the preparation, review, execution and delivery of documents in connection with any assignment of this Agreement by Seller, including without limitation reasonable attorneys' fees.
- 14.2 <u>Collateral Assignment</u>. Subject to the provisions of this Section 14.2, Seller has the right to assign this Agreement as collateral for any financing or refinancing of the Facility by Seller. In connection with any financing or refinancing of the Facility, Buyer shall in good faith work with Seller and Lender to agree upon a consent to collateral assignment of this Agreement ("<u>Collateral Assignment Agreement</u>"). The Collateral Assignment Agreement must be in form and substance agreed to by Buyer, Seller and Lender, with such agreement not to be unreasonably withheld, and must include, among others, the following provisions:
- (a) Buyer shall give Notice of an Event of Default by Seller to the Person(s) to be specified by Lender in the Collateral Assignment Agreement, before exercising its right to terminate this Agreement as a result of such Event of Default; *provided* that such Notice shall be provided to Lender at the time such Notice is provided to Seller and any additional cure period of Lender agreed to in the Collateral Assignment Agreement shall not commence until Lender has received notice of such Event of Default:
- (b) Following an Event of Default by Seller under this Agreement, Buyer may require Seller or Lender (if Lender has provided the notice set forth in subsection (c) below) to provide to Buyer a report concerning:
- (i) The status of efforts by Seller or Lender to develop a plan to cure the Event of Default;
  - (ii) Impediments to the cure plan or its development;
- (iii) If a cure plan has been adopted, the status of the cure plan's implementation (including any modifications to the plan as well as the expected timeframe within which any cure is expected to be implemented); and
- (iv) Any other information which Buyer may reasonably require related to the development, implementation and timetable of the cure plan.

Seller or Lender must provide the report to Buyer within ten (10) Business Days after Notice from Buyer requesting the report. Buyer will have no further right to require the report with respect to a particular Event of Default after that Event of Default has been cured;

- (c) Lender will have the right to cure an Event of Default on behalf of Seller, only if Lender sends a written notice to Buyer before the later of (i) the expiration of any cure period under this Agreement, and (ii) five (5) Business Days after Lender's receipt of notice of such Event of Default from Buyer, indicating Lender's intention to cure. Lender must remedy or cure the Event of Default within the cure period under this Agreement and any additional cure periods agreed in the Collateral Assignment Agreement up to a maximum of ninety (90) days (or one hundred eighty (180) days in the event of a bankruptcy of Seller or any foreclosure or similar proceeding if required by Lender to cure any Event of Default);
- (d) Lender will have the right to consent before any termination of this Agreement which does not arise out of an Event of Default;
- (e) Lender will receive prior Notice of and the right to approve material amendments to this Agreement, which approval will not be unreasonably withheld, delayed or conditioned;
- (f) 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 assume all of Seller's obligations arising under this Agreement and all related agreements (subject to such limits on liability as are mutually agreed to by Seller, Buyer and Lender as set forth in the Collateral Assignment Agreement); *provided*, before such assumption, if Buyer advises Lender that Buyer will require that Lender cure (or cause to be cured) any Event of Default existing as of the possession date (other than any Event of Default personal to Seller and not reasonably capable of cure) and capable of cure in order to avoid the exercise by Buyer (in its sole discretion) of Buyer's right to terminate this Agreement with respect to such Event of Default, then Lender at its option, and in its sole discretion, may elect to either:
  - (i) Cause such Event of Default to be cured, or
  - (ii) Not assume this Agreement;
- (g) If Lender elects to sell or transfer the Facility (after Lender directly or indirectly, takes possession of, or title to the Facility), or sale of the Facility occurs through the actions of Lender (for example, a foreclosure sale where a third party is the buyer, or otherwise), then Lender must cause the transferee or buyer to assume all of Seller's obligations arising under this Agreement and all related agreements as a condition of the sale or transfer. Such sale or transfer may be made only to an entity that meets the definition of Permitted Transferee; and
- (h) Subject to Lender's cure of any Events of Defaults under the Agreement in accordance with Section 14.2(f), if (i) this Agreement is rejected in Seller's bankruptcy or otherwise terminated in connection therewith Lender shall have the right to elect within forty-five (45) days after such rejection or termination, to enter into a replacement agreement with Buyer

having substantially the same terms as this Agreement for the remaining term thereof, and, promptly after Lender's written request, Buyer must enter into such replacement agreement with Lender or Lender's designee, or (ii) if Lender or its designee, 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) after any such rejection or termination of this Agreement, promptly after Buyer's written request which must be made within forty-five (45) days after Buyer receives notice of such rejection or termination, Lender must itself or must cause its designee to promptly enter into a new agreement with Buyer having substantially the same terms as this Agreement for the remaining term thereof, provided that in the event a designee of 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), such designee (if it is not a Permitted Transferee) shall be approved by Buyer, not to be unreasonably withheld.

- 14.3 <u>Permitted Assignment by Seller</u>. Seller may, without the prior written consent of Buyer, transfer or assign this Agreement to: (a) an Affiliate of Seller or (b) any Person succeeding to all or substantially all of the assets of Seller (whether voluntary or by operation of law); if, and only if:
  - (i) the assignee is a Permitted Transferee;
  - (ii) Seller has given Buyer Notice at least fifteen (15) Business Days before the date of such proposed assignment; and
  - (iii) Seller has provided Buyer a written agreement signed by the Person to which Seller wishes to assign its interests that (x) provides that such Person will assume all of Seller's obligations and liabilities under this Agreement upon such transfer or assignment and (y) certifies that such Person meets the definition of a Permitted Transferee.

Except as provided in the preceding sentence, any assignment by Seller, its successors or assigns under this Section 14.3 shall be of no force and effect unless and until such Notice has been received and accepted by Buyer.

14.4 **Shared Facilities; Portfolio Financing.** Buyer agrees and acknowledges that Seller may elect to finance all or any portion of the Facility or the Interconnection Facilities or the Shared Facilities (1) utilizing tax equity investment, and/or (2) through a Portfolio Financing, which may include cross-collateralization or similar arrangements. In connection with any financing or refinancing of the Facility, the Interconnection Facilities or the Shared Facilities by Seller or any Portfolio Financing, Buyer, Seller, Portfolio Financing Entity (if any), and Lender shall execute and deliver such further consents, approvals and acknowledgments as may be reasonable and necessary to facilitate such transactions provided, however, that Buyer shall not be required to agree to any terms or conditions which are reasonably expected to have a material adverse effect on Buyer and all reasonable attorney's fees incurred by Buyer in connection therewith shall be borne by Seller.

#### 14.5 Limited Assignment By Buyer

Subject to prior written consent by Seller, Buyer may make a limited assignment to an entity that has creditworthiness that is equal to or better than the creditworthiness of Buyer ("Buyer Assignee") of Buyer's right to receive Product (which shall not be for retail sale) and its obligation to make payments to the Seller; provided, however, that (i) Buyer must substantiate the creditworthiness of such Buyer Assignee to Seller's reasonable satisfaction, (ii) any such assignment shall be expressly subject to the Buyer Assignee's assumption of the obligation of timely payment of amounts due under the PPA, and (iii) Buyer will retain all other obligations under this Agreement.

## ARTICLE 15 DISPUTE RESOLUTION

- 15.1 <u>Governing Law</u>. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of California, without regard to principles of conflicts of laws. To the extent enforceable, at such time, each Party waives its respective right to any jury trial with respect to any litigation arising under or in connection with this Agreement.
- 15.2 <u>Venue</u>. The Parties agree that any suit, action or other legal proceeding by or against any party (or its affiliates or designees) with respect to or arising out of this Agreement shall be brought in the federal courts of the United States or the courts of the State of California sitting in San Diego County, California.
- **<u>Dispute Resolution</u>**. In the event of any dispute arising under this Agreement, within ten (10) days following the receipt of a written Notice from either Party identifying such dispute, the Parties shall meet, negotiate and attempt, in good faith, to resolve the dispute quickly, informally and inexpensively. If the Parties are unable to resolve a dispute arising hereunder within the earlier of either thirty (30) days of initiating such discussions, or within forty (40) days after Notice of the dispute, the Parties shall submit the dispute to non-binding mediation prior to seeking any and all remedies available to it at Law in or equity, provided, however, that a dispute as to whether an Event of Default has occurred pursuant to Article 11 shall not be subject to mediation unless the Parties mutually agree. The Parties will cooperate in selecting a qualified neutral mediator selected from a panel of neutrals and in scheduling the time and place of the mediation as soon as reasonably possible, but in no event later than thirty (30) days after the request for mediation is made. The Parties agree to participate in the mediation in good faith and to share the costs of the mediation, including the mediator's fee, equally, but such shared costs shall not include each Party's own attorneys' fees and costs, which shall be borne solely by such Party. If the mediation is unsuccessful, then either Party may seek any and all remedies available to it at law or in equity, subject to the limitations set forth in this Agreement.

# ARTICLE 16 INDEMNIFICATION

#### 16.1 **Mutual Indemnity**.

(a) Each Party (the "Indemnifying Party") agrees to defend, indemnify and

hold harmless the other Party, its directors, officers, agents, attorneys, employees and representatives (each an "<u>Indemnified Party</u>" and collectively, the "<u>Indemnified Group</u>") from and against all third party claims, demands, losses, liabilities, penalties, and expenses, including reasonable attorneys' and expert witness fees, for personal injury or death to Persons and damage to the property of any third party to the extent arising out of, resulting from, or caused by the negligent or willful misconduct of the Indemnifying Party, its Affiliates, its directors, officers, employees or agents (collectively, "<u>Indemnifiable Losses</u>").

- (b) Nothing in this Section shall enlarge or relieve Seller or Buyer of any liability to the other for any breach of this Agreement. Neither Party shall be indemnified for its damages resulting from its sole negligence, intentional acts, or willful misconduct. These indemnity provisions shall not be construed to relieve any insurer of its obligations to pay claims consistent with the provisions of a valid insurance policy.
- 16.2 <u>Notice of Claim</u>. Subject to the terms of this Agreement and upon obtaining knowledge of an Indemnifiable Loss for which it is entitled to indemnity under this Article 16, the Indemnified Party will promptly Notify the Indemnifying Party in writing of any damage, claim, loss, liability or expense which Indemnified Party has determined has given or could give rise to an Indemnifiable Loss under Section 16.1 ("<u>Claim</u>"). The Notice is referred to as a "Notice of Claim". A Notice of Claim will specify, in reasonable detail, the facts known to Indemnified Party regarding the Indemnifiable Loss.
- 16.3 Failure to Provide Notice. A failure to give timely Notice or to include any specified information in any Notice as provided in this Section 16.3 will not affect the rights or obligations of any Party hereunder except and only to the extent that, as a result of such failure, any Party which was entitled to receive such Notice was deprived of its right to recover any payment under its applicable insurance coverage or was otherwise materially damaged as a direct result of such failure and, provided further, Indemnifying Party is not obligated to indemnify any member of the Indemnified Group for the increased amount of any Indemnifiable Loss which would otherwise have been payable to the extent that the increase resulted from the failure to deliver timely a Notice of Claim.
- 16.4 <u>Defense of Claims</u>. If, within ten (10) Business Days after giving a Notice of Claim regarding a Claim to Indemnifying Party pursuant to Section 16.2, Indemnified Party receives Notice from Indemnifying Party that Indemnifying Party has elected to assume the defense of such Claim, Indemnifying Party will not be liable for any legal expenses subsequently incurred by Indemnified Party in connection with the defense thereof; provided, however, that if Indemnifying Party fails to take reasonable steps necessary to defend diligently such Claim within ten (10) Business Days after receiving Notice from Indemnifying Party that Indemnifying Party believes Indemnifying Party has failed to take such steps, or if Indemnifying Party has not undertaken fully to indemnify Indemnified Party in respect of all Indemnifiable Losses relating to the matter, Indemnified Party may assume its own defense, and Indemnifying Party will be liable for all reasonable costs or expenses, including attorneys' fees, paid or incurred in connection therewith. Without the prior written consent of Indemnified Party, Indemnifying Party will not enter into any settlement of any Claim which would lead to liability or create any financial or other obligation on

the part of Indemnified Party for which Indemnified Party is not entitled to indemnification hereunder; provided, however, that Indemnifying Party may accept any settlement without the consent of Indemnified Party if such settlement provides a full release to Indemnified Party and no requirement that Indemnified Party acknowledge fault or culpability. If a firm offer is made to settle a Claim without leading to liability or the creation of a financial or other obligation on the part of Indemnified Party for which Indemnified Party is not entitled to indemnification hereunder and Indemnifying Party desires to accept and agrees to such offer, Indemnifying Party will give Notice to Indemnified Party to that effect. If Indemnified Party fails to consent to such firm offer within ten (10) calendar days after its receipt of such Notice, Indemnified Party may continue to contest or defend such Claim and, in such event, the maximum liability of Indemnifying Party to such Claim will be the amount of such settlement offer, plus reasonable costs and expenses paid or incurred by Indemnified Party up to the date of such Notice.

- 16.5 <u>Subrogation of Rights</u>. Upon making any indemnity payment, Indemnifying Party will, to the extent of such indemnity payment, be subrogated to all rights of Indemnified Party against any Third Party in respect of the Indemnifiable Loss to which the indemnity payment relates; provided that until Indemnified Party recovers full payment of its Indemnifiable Loss, any and all claims of Indemnifying Party against any such Third Party on account of said indemnity payment are hereby made expressly subordinated and subjected in right of payment to Indemnified Party's rights against such Third Party. Without limiting the generality or effect of any other provision hereof, Buyer and Seller shall execute upon request all instruments reasonably necessary to evidence and perfect the above-described subrogation and subordination rights.
- 16.6 <u>Rights and Remedies are Cumulative</u>. Except for express remedies already provided in this Agreement, the rights and remedies of a Party pursuant to this Article 16 are cumulative and in addition to the rights of the Parties otherwise provided in this Agreement.

# ARTICLE 17 INSURANCE

#### 17.1 **Insurance**.

- (a) General Liability. Seller shall maintain, or cause to be maintained at its sole expense, (i) commercial general liability insurance with a minimum of liability limits in the amount of Two Million Dollars (\$2,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate. Coverage shall include products and completed operations, personal & advertising injury insurance, contractual liability, specifically covering Seller's obligations under this Agreement. The policy shall include Buyer as an additional insured but only to the extent of the liabilities assumed hereunder by Seller. The coverage required under this Section 17.1(a) may be provided through a combination of general liability, umbrella liability and/or excess liability policies. Defense costs shall be provided as an additional benefit and not included with the limits of liability. Such insurance shall contain standard cross-liability and severability of interest provisions.
- (b) <u>Umbrella or Excess Liability Insurance</u>. Seller shall maintain, or cause to be maintained at its sole expense, an Umbrella or Excess Liability Insurance policy in a

minimum amount of liability of Ten Million Dollars (\$10,000,000) per occurrence and in the aggregate.

- (c) <u>Workers Compensation Insurance</u>. Seller, if it has employees, shall also maintain at all times during the Contract Term Workers' Compensation and Employers' Liability insurance coverage in accordance with applicable requirements of California Law. Employer's Liability insurance shall be One Million Dollars (\$1,000,000.00) for injury or death occurring as a result of each accident. With regard to bodily injury by disease, the One Million Dollar (\$1,000,000) policy limit will apply to each employee.
- (d) <u>Business Auto Liability Insurance</u>. Seller shall maintain at all times during the Contract Term Business Auto Liability insurance for bodily injury and property damage with limits of One Million Dollars (\$1,000,000) per occurrence. Such insurance shall cover liability arising out of Seller's use of all owned (if any), non-owned and hired vehicles, including trailers or semi-trailers in the performance of the Agreement.
- (e) <u>Construction All-Risk Insurance</u>. Seller shall maintain or cause to be maintained during the construction of the Facility, but only after major electrical generating equipment as arrived at the Facility, prior to the Commercial Operation Date, construction all-risk form property insurance covering the Facility during such construction periods, and naming the Lender (if any) as the loss payee where its interest may appear.
- (f) <u>Subcontractor Insurance</u>. Seller shall require all of its subcontractors to carry the same levels of insurance as Seller where exposure exists. All subcontractors shall include Seller as an additional insured to (i) Commercial General Liability insurance; (ii) Employers' Liability coverage; and (iii) Business Auto Liability insurance for bodily injury and property damage. All subcontractors shall provide a primary and non-contributory endorsement and a waiver of subrogation to Seller for the required coverage pursuant to this Section 17.1(g).
- Agreement and upon annual renewal thereafter, Seller shall deliver to Buyer certificates of insurance evidencing such coverage. Buyer shall be given at least thirty (30) days prior Notice by Seller in the event of any cancellation of coverage. Such insurance shall be primary coverage without right of contribution from any insurance of Buyer. Any other insurance maintained by Seller is for the exclusive benefit of Seller and shall not in any manner inure to the benefit of Buyer.

#### ARTICLE 18 CONFIDENTIAL INFORMATION

Information," whether oral or written which is delivered by Seller to Buyer or by Buyer to Seller including: (a) the terms and conditions of, and proposals and negotiations related to, this Agreement, and (b) information that either Seller or Buyer stamps or otherwise identifies as "confidential" or "proprietary" before disclosing it to the other. Confidential Information does not include (i) information that was publicly available at the time of the disclosure, other than as a

result of a disclosure in breach of this Agreement; (ii) information that becomes publicly available through no fault of the recipient after the time of the delivery; (iii) information that was rightfully in the possession of the recipient (without confidential or proprietary restriction) at the time of delivery or that becomes available to the recipient from a source not subject to any restriction against disclosing such information to the recipient; and (iv) information that the recipient independently developed without a violation of this Agreement.

- **Duty to Maintain Confidentiality**. Confidential Information will retain its character as Confidential Information but may be disclosed by the recipient (the "Receiving Party") if and to the extent such disclosure is required (a) to be made by any requirements of Law, (b) pursuant to an order of a court or (c) in order to enforce this Agreement. If the Receiving Party becomes legally compelled (by interrogatories, requests for information or documents, subpoenas, summons, civil investigative demands, or similar processes or otherwise in connection with any litigation or to comply with any applicable law, order, regulation, ruling, regulatory request, accounting disclosure rule or standard or any exchange, control area or independent system operator request or rule) to disclose any Confidential Information of the disclosing Party (the "Disclosing Party"), Receiving Party shall provide Disclosing Party with prompt notice so that Disclosing Party, at its sole expense, may seek an appropriate protective order or other appropriate remedy. If the Disclosing Party takes no such action after receiving the foregoing notice from the Receiving Party, the Receiving Party is not required to defend against such request and shall be permitted to disclose such Confidential Information of the Disclosing Party, with no liability for any damages that arise from such disclosure. Each Party hereto acknowledges and agrees that information and documentation provided in connection with this Agreement may be subject to the California Public Records Act (Government Code Section 6250 et seq.).
- 18.3 <u>Irreparable Injury; Remedies</u>. Receiving Party acknowledges that its obligations hereunder are necessary and reasonable in order to protect Disclosing Party and the business of Disclosing Party, and expressly acknowledges that monetary damages would be inadequate to compensate Disclosing Party for any breach or threatened breach by Receiving Party of any covenants and agreements set forth in this Article 18. Accordingly, Receiving Party acknowledges that any such breach or threatened breach will cause irreparable injury to Disclosing Party and that, in addition to any other remedies that may be available, in law, in equity or otherwise, Disclosing Party will be entitled to obtain injunctive relief against the threatened breach of this Article 18 or the continuation of any such breach, without the necessity of proving actual damages.
- 18.4 <u>Disclosure to Lenders, Etc.</u>. Notwithstanding anything to the contrary in this Article 18, Confidential Information may be disclosed by Seller to any actual or potential Lender or investor or any of their Affiliates, and Seller's actual or potential agents, consultants, contractors, or trustees, so long as the Person to whom Confidential Information is disclosed agrees in writing to be bound by the confidentiality provisions of this Article 18 to the same extent as if it were a Party.
- 18.5 <u>Public Records Act</u>. Seller and Buyer acknowledge and agree that this Agreement and any documents, notices or confirmations executed in connection therewith are subject to the requirements of the California Public Records Act (Cal. Government Code § 6250 et seq.). Buyer

acknowledges that Seller may submit information to Buyer that the other party considers confidential, proprietary, or trade secret information pursuant to the Uniform Trade Secrets Act (Cal. Civ. Code § 3426 et seq.), or otherwise protected from disclosure pursuant to an exemption to the California Public Records Act (Cal. Government Code §§ 6254 and 6255). Seller acknowledges that Buyer may submit to Seller information that Buyer considers confidential or proprietary or protected from disclosure pursuant to exemptions to the California Public Records Act (Government Code sections 6254 and 6255). Upon request or demand of any third person or entity not a party to this Agreement ("Requestor") for production, inspection and/or copying of information designated by a Party as confidential information (such designated information, the "Confidential Information" and the disclosing Party, the "Disclosing Party"), the Party receiving such request (the "Receiving Party") as soon as practical, shall notify the Disclosing Party that such request has been made as specified in the Cover Sheet. The Disclosing Party shall be solely responsible for taking whatever legal steps are necessary to protect information deemed by it to be Confidential Information and to prevent release of information to the Requestor by the Receiving Party. If the Disclosing Party takes no such action after receiving the foregoing notice from the Receiving Party, the Receiving Party shall be permitted to comply with the Requestor's demand and is not required to defend against it.

18.6 <u>Press Releases</u>. Neither Party shall issue (or cause its Affiliates to issue) a press release regarding the transactions contemplated by this Agreement unless both Parties have agreed upon the contents of any such public statement.

## ARTICLE 19 MISCELLANEOUS

- 19.1 Entire Agreement; Integration; Exhibits. This Agreement, together with the Cover Sheet and Exhibits attached hereto constitutes the entire agreement and understanding between Seller and Buyer with respect to the subject matter hereof and supersedes all prior agreements relating to the subject matter hereof, which are of no further force or effect. The Exhibits attached hereto are integral parts hereof and are made a part of this Agreement by reference. The headings used herein are for convenience and reference purposes only. In the event of a conflict between the provisions of this Agreement and those of the Cover Sheet or any Exhibit, the provisions of first the Cover Sheet, and then this Agreement shall prevail, and such Exhibit shall be corrected accordingly. 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 Party as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.
- 19.2 <u>Amendments</u>. This Agreement may only be amended, modified or supplemented by an instrument in writing executed by duly authorized representatives of Seller and Buyer; *provided*, that, for the avoidance of doubt, this Agreement may not be amended by electronic mail communications.
- 19.3 **No Waiver**. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

- 19.4 <u>No Agency, Partnership, Joint Venture or Lease</u>. Seller and the agents and employees of Seller shall, in the performance of this Agreement, act in an independent capacity and not as officers or employees or agents of Buyer. Under this Agreement, Seller and Buyer intend to act as energy seller and energy purchaser, respectively, and do not intend to be treated as, and shall not act as, partners in, co-venturers in or lessor/lessee with respect to the Facility or any business related to the Facility. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement or, to the extent set forth herein, any Lender) or Indemnified Party.
- 19.5 <u>Severability</u>. In the event that any provision of this Agreement is unenforceable or held to be unenforceable, the Parties agree that all other provisions of this Agreement have force and effect and shall not be affected thereby. The Parties shall, however, use their best endeavors to agree on the replacement of the void, illegal or unenforceable provision(s) with legally acceptable clauses which correspond as closely as possible to the sense and purpose of the affected provision and this Agreement as a whole.
- 19.6 <u>Mobile-Sierra</u>. Notwithstanding any other provision of this Agreement, neither Party shall seek, nor shall they support any third party seeking, to prospectively or retroactively revise the rates, terms or conditions of service of this Agreement through application or complaint to FERC pursuant to the provisions of Section 205, 206 or 306 of the Federal Power Act, or any other provisions of the Federal Power Act, absent prior written agreement of the Parties. Further, absent the prior written agreement in writing by both Parties, the standard of review for changes to the rates, terms or conditions of service of this Agreement proposed by a Party 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). Changes proposed by a non-Party or FERC acting *sua sponte* shall be subject to the most stringent standard permissible under applicable law.
- 19.7 <u>Counterparts; Electronic Signatures</u>. This Agreement may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument and each of which shall be deemed an original. The Parties may rely on electronic, facsimile or scanned signatures as originals.
- 19.8 <u>Electronic Delivery</u>. Delivery of an executed signature page of this Agreement by electronic format (including portable document format (.pdf)) shall be the same as delivery of an original executed signature page.
- 19.9 **<u>Binding Effect.</u>** This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns.
- 19.10 No Recourse to Members of Buyer. Buyer is organized as a Joint Powers Authority in accordance with the Joint Exercise of Powers Act of the State of California (Government Code Section 6500, et seq.) pursuant to its Joint Powers Agreement and is a public entity separate from its constituent members. Buyer shall solely be responsible for all debts, obligations and liabilities accruing and arising out of this Agreement. Seller shall have no rights and shall not make any claims, take any actions or assert any remedies against any of Buyer's

constituent members, or the employees, directors, officers, consultants or advisors or Buyer or its constituent members, in connection with this Agreement.

- 19.11 **Forward Contract**. The Parties acknowledge and agree that this Agreement constitutes a "forward contract" within the meaning of the U.S. Bankruptcy Code, and Buyer and Seller are "forward contract merchants" within the meaning of the U.S. Bankruptcy Code. Each Party further agrees that, for all purposes of this Agreement, each Party waives and agrees not to assert the applicability of the provisions of 11 U.S.C. § 366 in any bankruptcy proceeding wherein such Party is a debtor. In any such proceeding, each Party further waives the right to assert that the other Party is a provider of last resort to the extent such term relates to 11 U.S.C. § 366 or another provision of 11 U.S.C. § 101-1532.
- 19.12 **Further Assurances**. Each of the Parties hereto agree to provide such information, execute and deliver any instruments and documents and to take such other actions as may be necessary or reasonably requested by the other Party which are not inconsistent with the provisions of this Agreement and which do not involve the assumptions of obligations other than those provided for in this Agreement, to give full effect to this Agreement and to carry out the intent of this Agreement.
- Agreement or any provisions hereof incapable of being performed or administered, then any Party may request that Buyer and Seller enter into negotiations to make the minimum changes to this Agreement necessary to make this Agreement capable of being performed and administered, while attempting to preserve to the maximum extent possible the benefits, burdens, and obligations set forth in this Agreement as of the Effective Date. Upon delivery of such a request, Buyer and Seller shall engage in such negotiations in good faith. If Buyer and Seller are unable, within sixty (60) days after delivery of such request, to agree upon changes to this Agreement or to resolve issues relating to changes to this Agreement, then any Party may submit issues pertaining to changes to this Agreement to the dispute resolution process set forth in Article 15. Notwithstanding the foregoing, (i) a change in cost shall not in and of itself be deemed to render this Agreement or any of the provisions hereof incapable of being performed or administered, and (ii) all of unaffected provisions of this Agreement shall remain in full force and effect during any period of such negotiation or dispute resolution.

[Signatures on following page]

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

JVR Energy Park, LLC	SAN DIEGO COMMUNITY POWER, a California joint powers authority
By: Name: Title:	By: Name: Title:

#### **EXHIBIT A**

#### **FACILITY DESCRIPTION**

**Site Name**: JVR Energy Park

Site includes all or some of the following APNs:

05-00 (portion); 614-100-20-00 (portion); 660-020-05-00 (portion);

County: San Diego

**CEQA Lead Agency**: San Diego County

Type of Generating Facility: Solar photovoltaic

**Operating Characteristics of Generating Facility**: See Cover Sheet

Type of Storage Facility: DC-coupled lithium-ion

**Operating Characteristics of Storage Facility**: See **Exhibit Q** 

**Operating Restrictions of Storage Facility**: See Exhibit Q

**Guaranteed PV Capacity**: See definition in Section 1.1

**Storage Contract Capacity**: See definition in Section 1.1

Facility PNode: To be established prior to the Commercial Operation Date at Facility

**Interconnection Point** 

Facility Meter: See Exhibit R

**Storage Facility Meter Location(s)**: See Exhibit R

Facility Interconnection Point: New switchyard to be named "Carrizo Gorge Switchyard," as

further described in the Interconnection Agreement

Participating Transmission Owner: San Diego Gas & Electric Company

#### **EXHIBIT B**

# MAJOR PROJECT DEVELOPMENT MILESTONES AND COMMERCIAL OPERATION

#### 1. <u>Major Project Development Milestones</u>.

- (a) "<u>Construction Start</u>" will occur upon Seller's execution of an engineering, procurement, and construction contract (or similar agreement) and issuance thereunder of a notice to proceed that authorizes the contractor to mobilize to Site and begin physical construction at the Site. The date of Construction Start will be evidenced by and subject to Seller's delivery to Buyer of a certificate substantially in the form attached as <u>Exhibit J</u> hereto, and the date certified therein by Seller shall be the "<u>Construction Start Date</u>." The Seller shall cause Construction Start to occur no later than the Guaranteed Construction Start Date.
- (b) If Construction Start is not achieved by the Guaranteed Construction Start Date, Seller shall pay Daily Delay Damages to Buyer on account of such delay. Daily Delay Damages shall be payable for each day for which Construction Start has not begun by the Guaranteed Construction Start Date. Daily Delay Damages shall be payable to Buyer by Seller until Seller reaches Construction Start of the Facility. On or before the tenth (10th) day of each month, Buyer shall invoice Seller for Daily Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller's receipt of such invoice, Seller shall pay Buyer the amount of the Daily Delay Damages set forth in such invoice. Daily Delay Damages shall be refundable to Seller pursuant to Section 2(b) of this Exhibit B. The Parties agree that Buyer's receipt of Daily Delay Damages shall be Buyer's sole and exclusive remedy for Seller's unexcused delay in achieving the Guaranteed Construction Start Date, but shall (x) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer's right to declare an Event of Default pursuant to Section 11.1(b)(ii) and receive a Damage Payment upon exercise of Buyer's default right pursuant to Section 11.2.
- 2. <u>Commercial Operation of the Facility</u>. "<u>Commercial Operation</u>" means the condition existing when (i) Seller has provided Notice to Buyer substantially in the form of <u>Exhibit H</u> (the "<u>COD Certificate</u>"), and (ii) Seller has notified Buyer in writing that it has provided the required documentation to Buyer and met the conditions for achieving Commercial Operation. The "<u>Commercial Operation Date</u>" shall be the later of (x) ninety (90) days before the Guaranteed Commercial Operation Date or (y) the date specified in the COD Certificate.
- (a) Seller shall cause Commercial Operation for the Facility to occur by the Guaranteed Commercial Operation Date. Seller shall notify Buyer that it intends to achieve Commercial Operation at least sixty (60) days before the anticipated Commercial Operation Date.
- (b) If Seller achieves Commercial Operation by the Guaranteed Commercial Operation Date, all Daily Delay Damages paid by Seller shall be refunded to Seller, in addition to any interest actually accrued on such Daily Delay Damages. Seller shall include the request for refund of the Daily Delay Damages (and associated interest) with the first invoice to Buyer after Commercial Operation.

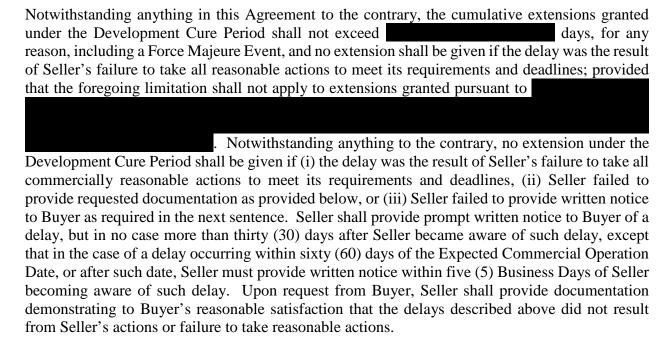
- Operation Date, Seller shall pay Commercial Operation Delay Damages to Buyer for each day after the Guaranteed Commercial Operation Date until the Commercial Operation Date. Commercial Operation Delay Damages shall be payable to Buyer by Seller until the Commercial Operation Date. On or before the tenth (10<sup>th</sup>) of each month, Buyer shall invoice Seller for Commercial Operation Delay Damages, if any, accrued during the prior month and, within ten (10) Business Days following Seller's receipt of such invoice, Seller shall pay Buyer the amount of the Commercial Operation Delay Damages set forth in such invoice. The Parties agree that Buyer's receipt of Commercial Operation Delay Damages shall be Buyer's sole and exclusive remedy for Seller's unexcused delay in achieving the Commercial Operation Date on or before the Guaranteed Commercial Operation Date, but shall (x) not be construed as Buyer's declaration that an Event of Default has occurred under any provision of Section 11.1 and (y) not limit Buyer's right to declare an Event of Default under Section 11.2(b)(ii) and receive a Damage Payment upon exercise of Buyer's rights pursuant to Section 11.2.
- 3. <u>Termination for Failure to Achieve Commercial Operation</u>. If the Facility has not achieved Commercial Operation within days after the Guaranteed Commercial Operation Date, as such date may be extended hereunder, Buyer may elect to terminate this Agreement in accordance with Sections 11.1(b)(ii) and 11.2.
- 4. <u>Extension of the Guaranteed Dates</u>. The Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date both shall, subject to notice and documentation requirements set forth below, be automatically extended, subject to reasonable verification by Buyer, on a day-for-day basis (the "<u>Development Cure Period</u>") for the duration of any and all delays arising out of the following circumstances:
- (a) Seller has not acquired a final and non-appealable major use permit or any other material permits, consents, licenses, approvals, or authorizations in final and non-appealable form from any Government Authority required for Seller to own, construct, interconnect, operate or maintain the Facility, despite the exercise of diligent and commercially reasonable efforts by Seller, including the timely filing of applications for such permits, consents, licenses, approvals or authorization so as to provide sufficient time for processing under normal circumstances to meet the Guaranteed Construction Start Date and the Guaranteed Commercial Operation Date; or



- (c) a Force Majeure Event occurs; or
- (d) the Interconnection Facilities or Network Upgrades are not complete and ready for the Facility to connect and sell Product at the Delivery Point by the Guaranteed Commercial Operation Date, despite the exercise of commercially reasonable efforts by Seller; or

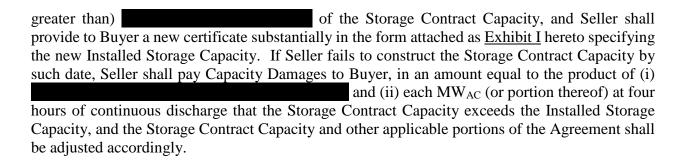


(f) Buyer has not made all necessary arrangements to receive the Facility Energy at the Delivery Point by the Guaranteed Commercial Operation Date.



### 5. Failure to Reach Guaranteed PV Capacity or Storage Contract Capacity.

- (a) Guaranteed PV Capacity. If, at Commercial Operation, the Installed PV Capacity is less than one hundred percent (100%) of the Guaranteed PV Capacity, Seller shall have one hundred twenty (120) days after the Commercial Operation Date to install additional capacity and/or Network Upgrades such that the Installed PV Capacity is equal to (but not greater than) the Guaranteed PV Capacity, and Seller shall provide to Buyer a new certificate substantially in the form attached as <a href="Exhibit I">Exhibit I</a> hereto specifying the new Installed PV Capacity. If Seller fails to construct the Guaranteed PV Capacity by such date, Seller shall pay "Capacity Damages" to Buyer, in an amount equal to the product of (i) and (ii) each MW<sub>AC</sub> (or portion thereof) that the Guaranteed PV Capacity exceeds the Installed PV Capacity, and the Guaranteed PV Capacity and other applicable portions of the Agreement shall be adjusted accordingly.
- (b) Storage Contract Capacity. If, at Commercial Operation, the Installed Storage Capacity is less than one hundred percent (100%) of the Storage Contract Capacity, Seller shall have one hundred eighty (180) days after the Commercial Operation Date to install additional capacity and/or Network Upgrades such that the Installed Storage Capacity is equal to (but not



#### **EXHIBIT C**

#### **COMPENSATION**

Buyer shall compensate Seller for the Product in accordance with this <u>Exhibit C</u>.

- (a) <u>Renewable Rate</u>. For each MWh of Adjusted Facility Energy in each Settlement Period, Buyer shall pay Seller the Renewable Rate.
- (b) <u>Deemed Delivered Energy</u>. For each Settlement Period, Buyer shall pay Seller the Renewable Rate for each MWh of Deemed Delivered Energy.
- (c) Excess Contract Year Deliveries Over
  the amount of Facility Energy plus the amount of Deemed Delivered Energy for such Contract Year exceeds
  of the Expected Energy for such Contract Year, the price to be paid for additional Facility Energy or Deemed Delivered Energy in such Contract Year in excess of
  of the Expected Energy shall be equal to the lesser of (a) the Delivery Point LMP for the Real Time Market for the applicable Settlement Interval in which the Facility Energy or Deemed Delivered Energy is provided or (b)

If, at any point in any Contract Year, the amount of Facility Energy plus the amount of Deemed Delivered Energy for such Contract Year exceeds of the Expected Energy for such Contract Year, the price to be paid for additional Facility Energy or Deemed Delivered Energy in such Contract Year in excess of

- (d) <u>Excess Settlement Interval Deliveries</u>. If during any Settlement Interval, Seller delivers PV Energy + Adjusted Discharging Energy in excess of the product of the Guaranteed PV Capacity and the duration of the Settlement Interval, expressed in hours ("<u>Excess MWh</u>"), then the price applicable to all such excess MWh<sub>AC</sub> in such Settlement Interval shall be and if there is a Negative LMP during such Settlement Interval, Seller shall pay to Buyer an amount equal to the absolute value of the Negative LMP times such excess MWh<sub>AC</sub> ("<u>Negative LMP Costs</u>").
- (e) <u>Curtailment Payments</u>. Seller shall receive no compensation from Buyer for Facility Energy provided in violation of a Curtailment Order. Buyer shall pay for Deemed Delivered Energy.

#### (f) Storage Rate.

(i) Each month of the Delivery Term (and pro-rated for the first and last month of the Delivery Term if the Delivery Term does not start on the first day of a calendar month), Buyer shall pay Seller a Monthly Capacity Payment equal to the <u>Storage Rate multiplied by</u> the <u>Availability Adjusted Storage Contract Capacity</u>, as determined under <u>Exhibit P</u>. Without limiting Buyer's obligation to pay Seller for Discharging Energy included in Adjusted Facility Energy,

such payment constitutes the entirety of the amount due to Seller from Buyer for the Storage Product.

(ii) Storage Capacity Availability Payment True-Up. Each month during the Delivery Term, Buyer shall calculate the year-to-date (YTD) Availability Adjusted Storage Contract Capacity for the applicable Contract Year in accordance with Exhibit P. If (A) such YTD Annual Storage Capacity Availability is less than ninety percent (90%) of the Guaranteed Storage Availability, or (B) the final Annual Storage Capacity Availability is less than the Guaranteed Storage Availability, Buyer shall (1) withhold the Storage Capacity Availability Payment True-Up Amount from the next Monthly Capacity Payment(s) (the "Storage Capacity Availability Payment True-Up"), and (2) provide Seller with a written statement of the calculation of the YTD Annual Storage Capacity Availability and the Storage Capacity Availability Payment True-Up Amount; provided, if the Storage Capacity Availability Payment True-Up Amount is a negative number for any month prior to the final year-end Storage Capacity Availability Payment True-Up calculation, Buyer shall not be obligated to reimburse Seller any previously withheld Storage Capacity Availability Payment True-Up Amount, except as set forth in the following sentence. If Buyer withholds any Storage Capacity Availability Payment True-Up Amount pursuant to this subsection (d)(ii), and if the final year-end Storage Capacity Availability Payment True-Up Amount is a negative number, Buyer shall pay to Seller the positive value of such amount together with the next Monthly Capacity Payment due to Seller.

# "Storage Capacity Availability Payment True-Up Amount" means an amount equal to A x B - C, where:

- A = The sum of the year-to-date Monthly Capacity Payments
- B = The Capacity Availability Factor
- C = The sum of any Storage Capacity Availability Payment True-Up Amounts previously subject to withholding by Buyer in the applicable Contract Year.

### "Capacity Availability Factor" means:

(A) If the YTD Availability Adjusted Storage Contract Capacity times the Storage Contract Capacity is equal to or greater than the Guaranteed Storage Availability times the Storage Contract Capacity, then:

Capacity Availability Factor = 0

(B) If the YTD Annual Storage Capacity Availability times the Storage Contract Capacity is less than the Guaranteed Storage Availability times the Storage Contract Capacity, but greater than or equal to Capacity, then:

Capacity Availability Factor = Guaranteed Storage Availability - YTD Annual Storage Capacity Availability

(C) If the YTD Annual Storage Capacity Availability times the Storage Contract Capacity is less than of the Installed Storage Capacity, then:

Capacity Availability Factor = ((

provided that, if the result of any of the calculations in clauses (A) through (C) above is greater than 1.0, then the Capacity Availability Factor shall be deemed to be equal to 1.0.

- (g) <u>Test Energy</u>. Test Energy is compensated at the Test Energy Rate in accordance with Section 3.6.
- (h) <u>Tax Credits</u>. The Parties agree that the neither the Renewable Rate, the Storage Rate nor the Test Energy Rate are subject to adjustment or amendment if Seller fails to receive any Tax Credits, or if any Tax Credits expire, are repealed or otherwise cease to apply to Seller or the Facility in whole or in part, or Seller or its investors are unable to benefit from any Tax Credits. Seller shall bear all risks, financial and otherwise, throughout the Contract Term, associated with Seller's or the Facility's eligibility to receive Tax Credits or to qualify for accelerated depreciation for Seller's accounting, reporting or Tax purposes. The obligations of the Parties hereunder, including those obligations set forth herein regarding the purchase and price for and Seller's obligation to deliver Facility Energy and Product, shall be effective regardless of whether the sale of Facility Energy is eligible for, or receives Tax Credits during the Contract Term.

#### **EXHIBIT D**

#### SCHEDULING COORDINATOR RESPONSIBILITIES

### **Scheduling Coordinator Responsibilities.**

- Buyer as Scheduling Coordinator for the Facility. Upon Initial Synchronization of (a) the Facility to the CAISO Grid and through the end of the Delivery Term, Buyer shall be the Scheduling Coordinator or designate a qualified third party to provide Scheduling Coordinator services with the CAISO for the Facility for the delivery and the receipt of Test Energy and the Product at the Delivery Point and for the purposes of conducting Storage Capacity Tests. At least thirty (30) days prior to the Initial Synchronization of the Facility to the CAISO Grid, (i) Seller shall take all actions and execute and deliver to Buyer and the CAISO all documents necessary to authorize or designate Buyer (or Buyer's designee) as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization of the Facility to the CAISO Grid, and (ii) Buyer shall, and shall cause its designee to, take all actions and execute and deliver to Seller and the CAISO all documents necessary to authorize or designate Buyer or its designee as the Scheduling Coordinator for the Facility effective as of the Initial Synchronization of the Facility to the CAISO Grid. On and after Initial Synchronization of the Facility to the CAISO Grid, Seller shall not authorize or designate any other party to act as the Facility's Scheduling Coordinator, nor shall Seller perform for its own benefit the duties of Scheduling Coordinator, and Seller shall not revoke Buyer's authorization to act as the Facility's Scheduling Coordinator unless agreed to by Buyer. Buyer (as the Facility's SC) shall submit Schedules to the CAISO in accordance with this Agreement and the applicable CAISO Tariff, protocols and Scheduling practices for Product on a day-ahead, hour-ahead, fifteen-minute market or real time basis, as determined by Buyer.
- (b) <u>Notices</u>. Buyer (as the Facility's SC) shall provide Seller with access to a web-based system through which Seller shall submit to Buyer and the CAISO all notices and updates required under the CAISO Tariff regarding the Facility's status, including, but not limited to, all outage requests, forced outages, forced outage reports, clearance requests, or must offer waiver forms. Seller will cooperate with Buyer to provide such notices and updates. If the web-based system is not available, Seller shall promptly submit such information to Buyer and the CAISO (in order of preference) telephonically or by electronic mail transmission to the personnel designated to receive such information.
- costs (including penalties, Imbalance Energy costs, and other charges) and shall be entitled to all CAISO revenues (including credits, Imbalance Energy revenues, and other payments), including revenues associated with CAISO dispatches, bid cost recovery, Inter-SC Trade credits, or other credits in respect of the Product Scheduled or delivered from the Facility. Seller shall be responsible for all CAISO penalties resulting from any failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement (except to the extent such non-compliance is caused by Buyer's failure to perform its duties as Scheduling Coordinator for the Facility). The Parties agree that any Availability Incentive Payments (as defined in the CAISO Tariff) are for the benefit of the Seller and for Seller's account and that any Non-Availability

Charges (as defined in the CAISO Tariff) are the responsibility of the Seller and for Seller's account. In addition, if during the Delivery Term, the CAISO implements or has implemented any sanction or penalty related to scheduling, outage reporting, or generator operation, and any such sanctions or penalties are imposed upon the Facility or to Buyer as Scheduling Coordinator due to failure by Seller to abide by the CAISO Tariff or the outage notification requirements set forth in this Agreement, the cost of the sanctions or penalties shall be the Seller's responsibility.

- CAISO Settlements. Buyer (as the Facility's SC) shall be responsible for all (d) settlement functions with the CAISO related to the Facility. Buyer shall render a separate invoice to Seller for any CAISO payments, charges or penalties ("CAISO Charges Invoice") for which Seller is responsible under this Agreement. CAISO Charges Invoices shall be rendered after settlement information becomes available from the CAISO that identifies any such CAISO charges. Notwithstanding the foregoing, Seller acknowledges that the CAISO will issue additional invoices reflecting CAISO adjustments to such CAISO charges. Buyer will review, validate, and if requested by Seller under paragraph (e) below, dispute any charges that are the responsibility of Seller in a timely manner and consistent with Buyer's existing settlement processes for charges that are Buyer's responsibilities. Subject to Seller's right to dispute and to have Buyer pursue the dispute of any such invoices, Seller shall pay the amount of CAISO Charges Invoices within ten (10) Business Days of Seller's receipt of the CAISO Charges Invoice. If Seller fails to pay such CAISO Charges Invoice within that period, Buyer may net or offset any amounts owing to it for these CAISO Charges Invoices against any future amounts it may owe to Seller under this Agreement. The obligations under this Section with respect to payment of CAISO Charges Invoices shall survive the expiration or termination of this Agreement.
- (e) <u>Dispute Costs</u>. Buyer (as the Facility's SC) may be required by Seller to dispute CAISO settlements in respect of the Facility. Seller agrees to pay Buyer's costs and expenses (including reasonable attorneys' fees) associated with its involvement with such CAISO disputes to the extent they relate to CAISO charges payable by Seller with respect to the Facility that Seller has directed Buyer to dispute.
- (f) <u>Terminating Buyer's Designation as Scheduling Coordinator</u>. At least thirty (30) days prior to expiration of this Agreement or as soon as reasonably practicable upon an earlier termination of this Agreement, the Parties will take all actions necessary to terminate the designation of Buyer as Scheduling Coordinator for the Facility as of 11:59 p.m. on such expiration date.
- (g) <u>Master File and Resource Data Template</u>. Seller shall provide the data to the CAISO (and to Buyer) that is required for the CAISO's Master File and Resource Data Template (or successor data systems) for the Facility consistent with this Agreement. Neither Party shall change such data without the other Party's prior written consent, such consent not to be unreasonably withheld.
- (h) <u>NERC Reliability Standards</u>. Buyer (as Scheduling Coordinator) shall cooperate reasonably with Seller to the extent necessary to enable Seller to comply, and for Seller to demonstrate Seller's compliance with, NERC reliability standards. This cooperation shall include the provision of information in Buyer's possession that Buyer (as Scheduling Coordinator) has

provided to the CAISO related to the Facility or actions taken by Buyer (as Scheduling Coordinator) related to Seller's compliance with NERC reliability standards.

- (i) <u>Clipped PV Energy</u>. Scheduling Coordinator will utilize Clipped PV Energy as Charging Energy to the extent that is commercially reasonable.
- (j) <u>Charging and Discharging periods</u>. Scheduling Coordinator will set Charging Notices and Discharging Notices at periods where it is commercially reasonable and in accordance with Operating Restrictions, the CAISO tariff, and the Interconnection Agreement.

#### **EXHIBIT E**

#### PROGRESS REPORTING FORM

Each Progress Report must include the following items:

- 1. Executive Summary.
- 2. Facility description.
- 3. Site plan of the Facility.
- 4. Progress with respect to completion of interconnection with SDG&E.
- 5. Gantt chart schedule showing progress on achieving each of the Milestones.
- 6. Description of any material planned changes to the Facility or the site.
- 7. Summary of activities during the previous calendar quarter or month, as applicable.
- 8. Forecast of activities scheduled for the current calendar quarter.
- 9. Written description about the progress relative to Seller's Milestones, including whether Seller has met or is on target to meet the Milestones.
- 10. List of issues that are likely to potentially affect Seller's Milestones.
- 11. A status report of start-up activities including a forecast of activities ongoing and after start-up, a report on Facility performance including performance projections for the next twelve (12) months.
- 12. If applicable, prevailing wage reports as required by Law.
- 13. Progress and schedule of all major agreements, contracts, permits, approvals, technical studies, financing agreements and major equipment purchase orders showing the start dates, completion dates, and completion percentages.
- 14. Pictures, in sufficient quantity and of appropriate detail, in order to document construction and startup progress of the Facility, the interconnection into the Transmission System and all other interconnection utility services.
- 15. Supplier Diversity Reporting (if applicable). Format to be mutually agreed by Buyer and Seller.
- 16. Any other documentation, reasonably requested by Buyer, evaluated by Seller and agreed if agreed to by both parties.

EXHIBIT F-1

Average Expected Energy for Contract Year 1

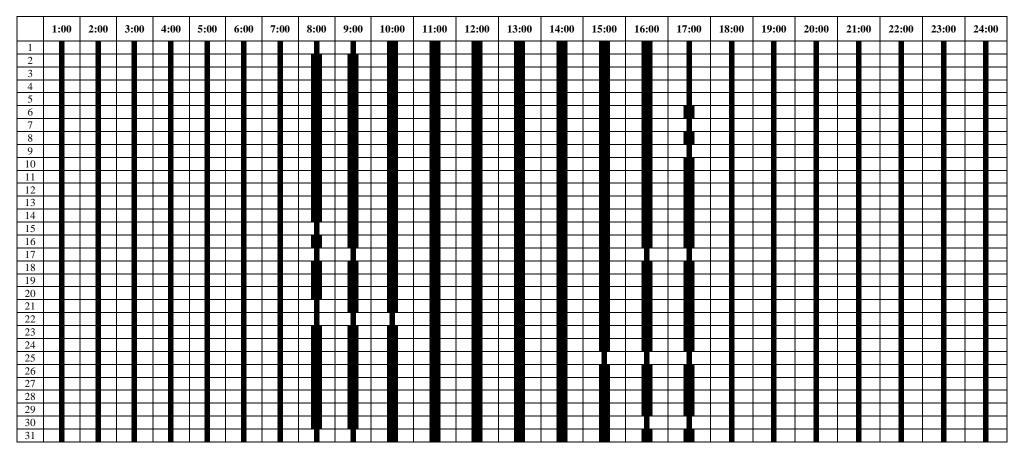
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### **EXHIBIT F-2**

### **Available Generating Capacity for Contract Year 1**

The following tables are provided for informational purposes only, and shall not constitute, or be deemed to constitute, an obligation of any of the Parties to this Agreement.

### Available Generating Capacity, MWAC Per Hour - January



# Available Generating Capacity, MWAC Per Hour – February

	1:00	2:00	3:00	4:00	5:00	6:00	7:00	8:00	9:00	10:00	11:00	12:00	13:00	14:00	15:00	16:00	17:00	18:00	19:00	20:00	21:00	22:00	23:00	24:00
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### Available Generating Capacity, MW<sub>AC</sub> Per Hour – September

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# Available Generating Capacity, $MW_{AC}$ Per Hour October

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### Available Generating Capacity, MWAC Per Hour - November

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# Available Generating Capacity, MWAC Per Hour December

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#### **EXHIBIT G**

#### GUARANTEED ENERGY PRODUCTION DAMAGES CALCULATION

In accordance with Section 4.7, if Seller fails to achieve the Guaranteed Energy Production during any Performance Measurement Period, a liquidated damages payment shall be due from Seller to Buyer, calculated as follows:

$$[(A - B) * (C - D)]$$

where:

 $\underline{A} =$  the Guaranteed Energy Production amount for the Performance Measurement Period, in MWh<sub>AC</sub>

 $\underline{B}$  = the Adjusted Energy Production amount for the Performance Measurement Period, in MWh<sub>AC</sub>

 $\underline{C}$  = Price for Replacement Product for the Contract Year, in \$/MWh<sub>AC</sub>, which shall be calculated by Buyer in a commercially reasonable manner. Buyer is not required to enter into a replacement transaction in order to determine this amount.

D = the Renewable Rate for the Contract Year, in \$/MWh<sub>AC</sub>

"<u>Adjusted Energy Production</u>" shall mean the sum of the following: Adjusted Facility Energy + Deemed Delivered Energy + Lost Output + Replacement Energy.

"<u>Lost Output</u>" has the meaning given in Section 4.7 of the Agreement. The Lost Output shall be calculated in the same manner as Deemed Delivered Energy is calculated, in accordance with the definition thereof.

"Replacement Energy" means energy produced by a facility other than the Facility that, at the time delivered to Buyer, qualifies under Public Utilities Code 399.16(b)(1), and has Green Attributes that meet the same compliance requirements as the Energy being replaced, including with respect to the timeframe for retirement of such Green Attributes, if any, as the Green Attributes that would have been generated by the Facility during the Contract Year for which the Replacement Energy is being provided.

"Replacement Green Attributes" means Renewable Energy Credits of the same Portfolio Content Category (i.e., PCC1) as the Green Attributes portion of the Product and of the same timeframe for retirement as the Renewable Energy Credits that would have been generated by the Facility.

"<u>Replacement Product</u>" means (a) Replacement Energy, and (b) Replacement Green Attributes.

No payment shall be due if the calculation of (A - B) or (C - D) yields a negative number.

Within sixty (60) days after each Contract Year, Buyer will send Seller Notice of the amount of damages owing, if any, which shall be payable to Buyer before the later of (a) thirty (30) days of such Notice and (b) ninety (90) days after each Performance Measurement Period, provided that the amount of damages owing shall be adjusted to account for Replacement Product, if any, delivered after each applicable Performance Measurement Period.

#### **EXHIBIT H**

#### FORM OF COMMERCIAL OPERATION DATE CERTIFICATE

This certification ("Certification") of Commercial Operation is delivered by[lic	ensed
professional engineer] ("Engineer") to San Diego Community Power, a California joint p	owers
authority ("Buyer") in accordance with the terms of that certain Renewable Power Pu	rchase
Agreement dated ("Agreement") by and between [] ("Seller	") and
Buyer. All capitalized terms used in this Certification but not otherwise defined herein shal	l have
the respective meanings assigned to such terms in the Agreement.	

As of \_[DATE]\_, Engineer hereby certifies and represents to Buyer the following:

- 1. The Generating Facility is operational, reliable and interconnected, fully integrated and synchronized with the Transmission System.
- 2. Seller has installed equipment for the Generating Facility with a nameplate capacity of no less than ninety-five percent (95%) of the Guaranteed PV Capacity.
- 3. Seller has installed equipment for the Storage Facility with a nameplate capacity of no less than ninety-five percent (95%) of the Storage Contract Capacity.
- 4. The Generating Facility's testing included a performance test demonstrating peak electrical output of no less than ninety-five percent (95%) of the GuaranteedPV Capacity for the Generating Facility at the Delivery Point, adjusted for ambient conditions on the date of the Facility testing, and such peak electrical output, as adjusted, was [peak output in  $MW_{AC}$ ].
- 5. The Storage Facility is fully capable of charging, storing and discharging energy up to no less than ninety-five percent (95%) of the Storage Contract Output and is receiving instructions to charge, store and discharge energy, all within the operational constraints and subject to the applicable Operating Restrictions.
- 6. Authorization to parallel the Facility was obtained by the PTO, [Name of Participating Transmission Owner as appropriate] on \_[DATE]\_.
- 7. The PTO has provided documentation supporting full unrestricted release for Commercial Operation by [Name of Participating Transmission Owner as appropriate] on \_[DATE]\_.
- 8. The CAISO has provided notification supporting Commercial Operation, in accordance with the CAISO Tariff on <code>[DATE]</code> .

EXECUT	TED by [LICENSED	PROFESSIONAI	L ENGINEER]
this	day of	, 20	
			[LICENSED PROFESSIONAL ENGINEER]
			By:
			Its:
			Date:

### **EXHIBIT I**

### FORM OF INSTALLED CAPACITY CERTIFICATE

This certification (" <u>Certification</u> ") of Installed engineer] (" <u>Engineer</u> ") to to San Diego Commu (" <u>Buyer</u> ") in accordance with the terms of that dated (" <u>Agreement</u> ") by and between capitalized terms used in this Certification but respective meanings assigned to such terms in the	unity Power, a California joint powers authority certain Renewable Power Purchase Agreement [] (" <u>Seller</u> ") and Buyer. All t not otherwise defined herein shall have the
I hereby certify the following:	
1. The performance test for the Ge output of MW <sub>AC</sub> at the Delivery Point, as adj performance test;	enerating Facility demonstrated peak electrical justed for ambient conditions on the date of the
2. The Storage Capacity Test den capability that can be sustained for four (4) cons MW <sub>AC</sub> to the Delivery Point, in accordance variety protocols set forth in Section 4.9 and Exhibit O;	with the testing procedures, requirements and
3. The sum of 1. and 2. is MW <sub>AC</sub>	and shall be the Installed Capacity.
EXECUTED by [LICENSED PROFESSIONAL	ENGINEER]
this, 20	
	[LICENSED PROFESSIONAL ENGINEER]
	By:
	Its:
	Date:

# **EXHIBIT J**

### FORM OF CONSTRUCTION START DATE CERTIFICATE

This certification of Construction Start Date (" <u>Certification</u> ") is delivered by [
accordance with the terms of that certain Renewable Power Purchase Agreement dated
"Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification
out not otherwise defined herein shall have the respective meanings assigned to such terms in the
Agreement.
Seller hereby certifies and represents to Buyer the following:
1. Construction Start (as defined in Exhibit B of the Agreement) has occurred, and a
copy of the notice to proceed that Seller issued to its contractor as part of Construction Start is attached hereto;
2. the Construction Start Date occurred on (the "Construction Star
Date"); and
3. the precise Site on which the Facility is located is, which must be within the
boundaries of the previously identified Site:
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N WITNESS WHEREOF, the undersigned has executed this Certification on behalf of Seller as of the day of
SELLER ENTITY]
Ву:
its:
Date:

#### **EXHIBIT K**

#### FORM OF LETTER OF CREDIT

[Issuing Bank Letterhead and Address]

IRREVOCABLE STANDBY LETTER OF CREDIT NO. [XXXXXXX]

Date:
Bank Ref.:
Amount: US\$[XXXXXXXX]
Expiry Date:

Beneficiary:

San Diego Community Power, a California joint powers authority

Ladies and Gentlemen:

By the order of \_\_\_\_\_ ("<u>Applicant</u>"), we, [insert bank name and address] ("<u>Issuer</u>") hereby issue our Irrevocable Standby Letter of Credit No. [XXXXXXX] ("<u>Letter of Credit</u>") in favor of San Diego Community Power, a California joint powers authority] ("<u>Beneficiary</u>"), for an amount not to exceed the aggregate sum of U.S. \$[XXXXXX] (United States Dollars [XXXXX] and 00/100), pursuant to that certain Renewable Power Purchase Agreement dated as of \_\_\_\_\_ and as amended ("<u>Agreement</u>") between Applicant and Beneficiary. This Letter of Credit shall become effective immediately and shall expire on [Insert Date ] which is one year after the issue date of this Letter of Credit, or any expiration date extended in accordance with the terms hereof ("Expiration Date").

Funds under this Letter of Credit are available to Beneficiary by presentation on or before the Expiration Date of a dated statement purportedly signed by your duly authorized representative, in the form attached hereto as Exhibit A, containing one of the two alternative paragraphs set forth in paragraph 2 therein, referencing our Letter of Credit No. [XXXXXXXX] ("Drawing Certificate").

The Drawing Certificate may be presented by (a) physical delivery, (b) as a PDF attachment to an e-mail to [bank email address] or (c) facsimile to [bank fax number [XXX-XXXXXX]] confirmed by [e-mail to [bank email address]] Transmittal by facsimile or email shall be deemed delivered when received.

The original of this Letter of Credit (and all amendments, if any) is not required to be presented in

connection with any presentment of a Drawing Certificate by Beneficiary hereunder in order to receive payment.

We hereby agree with the Beneficiary that all documents presented under and in compliance with the terms of this Letter of Credit, that such drafts will be duly honored upon presentation to the Issuer on or before the Expiration Date. All payments made under this Letter of Credit shall be made with Issuer's own immediately available funds by means of wire transfer in immediately available United States dollars to Beneficiary's account as indicated by Beneficiary in its Drawing Certificate or in a communication accompanying its Drawing Certificate.

Partial draws are permitted under this Letter of Credit, and this Letter of Credit shall remain in full force and effect with respect to any continuing balance.

It is a condition of this Letter of Credit that the Expiration Date shall be deemed automatically extended without an amendment for a one year period beginning on the present Expiration Date hereof and upon each anniversary for such date, unless at least one hundred twenty (120) days prior to any such Expiration Date we have sent to you written notice by overnight courier service that we elect not to extend this Letter of Credit, in which case it will expire on the date specified in such notice. No presentation made under this Letter of Credit after such Expiration Date will be honored.

Notwithstanding any reference in this Letter of Credit to any other documents, instruments or agreements, this Letter of Credit contains the entire agreement between Beneficiary and Issuer relating to the obligations of Issuer hereunder.

This Letter of Credit shall be subject to the provisions (to the extent that such provisions are not inconsistent with this Letter of Credit) of the International Chamber of Commerce International Standby Practices (ICC publication no. 590, 1998) (the "ISP98") with regard to all matters not provided for herein, and, to the extent not inconsistent with the ISP98, this Letter of Credit shall be governed by and interpreted in accordance with the laws of the State of New York, without giving effect to any choice of law rules that would require the application of laws of another jurisdiction.

Please address all correspondence regarding this Letter of Credit to the attention of the Letter of Credit Department at [insert bank address information], referring specifically to Issuer's Letter of Credit No. [XXXXXXX]. For telephone assistance, please contact Issuer's Standby Letter of Credit Department at [XXX-XXXX-XXXX] and have this Letter of Credit available.

[Dank Name]	
[Insert officer name]	

[Donle Nome]

[Insert officer title]

# (DRAW REQUEST SHOULD BE ON BENEFICIARY'S LETTERHEAD)

Drawir	ng Certificate		
[Insert	Bank Name and	Address]	
powers (the "l	s authority, as ber Letter of Credit'	neficiary (the "Beneficiary") o	of San Diego Community Power, a California joint of the Irrevocable Letter of Credit No. [XXXXXXX] ame] (the "Bank") by order of (the
1.	* *	Beneficiary are party to that cer_, 20 (the "Agreement").	rtain Renewable Power Purchase Agreement dated as
because a Seller Event of I		r Event of Default (as such ter led for in the Agreement whe	Letter of Credit in the amount of U.S. \$
	OR		
	which equals the maintain the Le but has failed t	e full available amount under etter of Credit in force and effe	the Letter of Credit, because Applicant is required to ect beyond the expiration date of the Letter of Credit a replacement Letter of Credit or other acceptable ch expiration date.
3.	-	-	ntative of San Diego Community Power, a California secute and deliver this Drawing Certificate on behalf
			quested amount to San Diego Community Power, a mmediately available funds to the following account:
	[Specify account	nt information]	
			San Diego Community Power a California joint powers authority
			By: Name: Title: Date:

## **EXHIBIT L**

## FORM OF GUARANTY

between [], a [] ("Guarantor"), and San Diego Community Power, a California joint powers authority (together with its successors and permitted assigns, "Buyer").
Recitals
A. Buyer and [SELLER ENTITY], a ("Seller"), entered into that certain Renewable Power Purchase Agreement (as amended, restated or otherwise modified from time to time, the "PPA") dated as of [], 20
B. Guarantor is entering into this Guaranty as Performance Security to secure Seller's obligations under the PPA, as required by Section 8.8 of the PPA.
C. It is in the best interest of Guarantor to execute this Guaranty inasmuch as Guarantor will derive substantial direct and indirect benefits from the execution and delivery of the PPA.
D. Initially capitalized terms used but not defined herein have the meaning set forth in the PPA.
<u>Agreement</u>
1. Guaranty. For value received, Guarantor does hereby unconditionally, absolutely and irrevocably guarantee, as primary obligor and not as a surety, to Buyer the prompt payment by Seller of any and all amounts and payment obligations now or hereafter owing from Seller to Buyer under the PPA, including, without limitation, compensation for penalties, the Termination Payment, indemnification payments or other damages, as and when required pursuant to the terms of the PPA (the "Guaranteed Amount"), provided, that Guarantor's aggregate liability under or arising out of this Guaranty shall not exceed Dollars (\$). The Parties understand and agree that any payment by Guarantor or Seller of any portion of the Guaranteed Amount shall thereafter reduce Guarantor's maximum aggregate liability hereunder on a dollar-for-dollar basis. This Guaranty is an irrevocable, absolute, unconditional and continuing guarantee of the full and punctual payment, and not of collection, of the Guaranteed Amount and, except as otherwise expressly addressed herein, is in no way conditioned upon any requirement that Buyer first attempt to collect the payment of the Guaranteed Amount from Seller, any other guarantor of the Guaranteed Amount or any other Person or entity or resort to any other means of obtaining payment of the Guaranteed Amount. In the event Seller shall fail to duly, completely or punctually pay any Guaranteed Amount as required pursuant to the PPA, Guarantor shall promptly pay such amount as required herein.

2. <u>Demand Notice</u>. For avoidance of doubt, a payment shall be due for purposes of this Guaranty only when and if a payment is due and payable by Seller to Buyer under the terms and conditions of the Agreement. If Seller fails to pay any Guaranteed Amount as required pursuant to

the PPA for five (5) Business Days following Seller's receipt of Buyer's written notice of such failure (the "<u>Demand Notice</u>"), then Buyer may elect to exercise its rights under this Guaranty and may make a demand upon Guarantor (a "<u>Payment Demand</u>") for such unpaid Guaranteed Amount. A Payment Demand shall be in writing and shall reasonably specify in what manner and what amount Seller has failed to pay and an explanation of why such payment is due and owing, with a specific statement that Buyer is requesting that Guarantor pay under this Guaranty. Guarantor shall, within five (5) Business Days following its receipt of the Payment Demand, pay the Guaranteed Amount to Buyer.

- 3. Scope and Duration of Guaranty. This Guaranty applies only to the Guaranteed Amount. This Guaranty shall continue in full force and effect from the Effective Date until the earlier of the following: (x) all Guaranteed Amounts have been paid in full (whether directly or indirectly through set-off or netting of amounts owed by Buyer to Seller), or (y) replacement Performance Security is provided in an amount and form required by the terms of the PPA. Further, this Guaranty (a) shall remain in full force and effect without regard to, and shall not be affected or impaired by any invalidity, irregularity or unenforceability in whole or in part of this Guaranty, and (b) subject to the preceding sentence, shall be discharged only by complete performance of the undertakings herein. Without limiting the generality of the foregoing, the obligations of the Guarantor hereunder shall not be released, discharged, or otherwise affected and this Guaranty shall not be invalidated or impaired or otherwise affected for the following reasons:
  - (i) the extension of time for the payment of any Guaranteed Amount, or
  - (ii) any amendment, modification or other alteration of the PPA, or
  - (iii) any indemnity agreement Seller may have from any party, or
- (iv) any insurance that may be available to cover any loss, except to the extent insurance proceeds are used to satisfy the Guaranteed Amount, or
- (v) any voluntary or involuntary liquidation, dissolution, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar proceeding affecting, Seller or any of its assets, including but not limited to any rejection or other discharge of Seller's obligations under the PPA imposed by any court, trustee or custodian or any similar official or imposed by any law, statue or regulation, in each such event in any such proceeding, or
- (vi) the release, modification, waiver or failure to pursue or seek relief with respect to any other guaranty, pledge or security device whatsoever, or
- (vii) any payment to Buyer by Seller that Buyer subsequently returns to Seller pursuant to court order in any bankruptcy or other debtor-relief proceeding, or
- (viii) those defenses based upon (A) the legal incapacity or lack of power or authority of any Person, including Seller and any representative of Seller to enter into the PPA or perform its obligations thereunder, (B) lack of due execution, delivery, validity or enforceability, including of

the PPA, or (C) Seller's inability to pay any Guaranteed Amount or perform its obligations under the PPA, or

(ix) any other event or circumstance that may now or hereafter constitute a defense to payment of the Guaranteed Amount, including, without limitation, statute of frauds and accord and satisfaction:

<u>provided</u> that Guarantor reserves the right to assert for itself any defenses, setoffs or counterclaims that Seller is or may be entitled to assert against Buyer.

- 4. <u>Waivers by Guarantor</u>. Guarantor hereby unconditionally waives as a condition precedent to the performance of its obligations hereunder, with the exception of the requirements in Paragraph 2, (a) notice of acceptance, presentment or protest with respect to the Guaranteed Amounts and this Guaranty, (b) notice of any action taken or omitted to be taken by Buyer in reliance hereon, (c) any requirement that Buyer exhaust any right, power or remedy or proceed against Seller under the PPA, and (d) any event, occurrence or other circumstance which might otherwise constitute a legal or equitable discharge of a surety. Without limiting the generality of the foregoing waiver of surety defenses, it is agreed that the occurrence of any one or more of the following shall not affect the liability of Guarantor hereunder:
- (i) at any time or from time to time, without notice to Guarantor, the time for payment of any Guaranteed Amount shall be extended, or such performance or compliance shall be waived;
- (ii) the obligation to pay any Guaranteed Amount shall be modified, supplemented or amended in any respect in accordance with the terms of the PPA;
- (iii) subject to Section 10, any (a) sale, transfer or consolidation of Seller into or with any other entity, (b) sale of substantial assets by, or restructuring of the corporate existence of, Seller or (c) change in ownership of any membership interests of, or other ownership interests in, Seller; or
- (iv) the failure by Buyer or any other Person to create, preserve, validate, perfect or protect any security interest granted to, or in favor of, Buyer or any Person.
- 5. <u>Subrogation</u>. Notwithstanding any payments that may be made hereunder by the Guarantor, Guarantor hereby agrees that until the earlier of payment in full of all Guaranteed Amounts or expiration of the Guaranty in accordance with Section 3, it shall not be entitled to, nor shall it seek to, exercise any right or remedy arising by reason of its payment of any Guaranteed Amount under this Guaranty, whether by subrogation or otherwise, against Seller or seek contribution or reimbursement of such payments from Seller.
- 6. Representations and Warranties. Guarantor hereby represents and warrants that (a) it has all necessary and appropriate [limited liability company][corporate] powers and authority and the legal right to execute and deliver, and perform its obligations under, this Guaranty, (b) this Guaranty constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights or general principles of equity, (c) the

execution, delivery and performance of this Guaranty does not and will not contravene Guarantor's organizational documents, any applicable Law or any contractual provisions binding on or affecting Guarantor, (d) there are no actions, suits or proceedings pending before any court, governmental agency or arbitrator, or, to the knowledge of the Guarantor, threatened, against or affecting Guarantor or any of its properties or revenues which may, in any one case or in the aggregate, adversely affect the ability of Guarantor to enter into or perform its obligations under this Guaranty, and (e) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or Governmental Authority, and no consent of any other Person (including, any stockholder or creditor of the Guarantor), that has not heretofore been obtained is required in connection with the execution, delivery, performance, validity or enforceability of this Guaranty by Guarantor.

7. <u>Notices</u>. Notices under this Guaranty shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, and (ii) four Business Days after mailing if sent by certified, first class mail, return receipt requested. If transmitted by facsimile, such notice shall be deemed received when the confirmation of transmission thereof is received by the party giving the notice. Any party may change its address or facsimile to which notice is given hereunder by providing notice of the same in accordance with this Paragraph 8.

If delivered to Buyer, to it at	[] Attn: [] Fax: []
If delivered to Guarantor, to it at	[] Attn: [] Fax: []

- 8. <u>Governing Law and Forum Selection</u>. This Guaranty shall be governed by, and interpreted and construed in accordance with, the laws of the United States and the State of California, excluding choice of law rules. The Parties agree that any suit, action or other legal proceeding by or against any party (or its affiliates or designees) with respect to or arising out of this Guaranty shall be brought in the federal courts of the United States or the courts of the State of California sitting in San Diego County, California.
- 9. <u>Miscellaneous</u>. This Guaranty shall be binding upon Guarantor and its successors and assigns and shall inure to the benefit of Buyer and its successors and permitted assigns pursuant to the PPA. No provision of this Guaranty may be amended or waived except by a written instrument executed by Guarantor and Buyer. This Guaranty is not assignable by Guarantor without the prior written consent of Buyer. No provision of this Guaranty confers, nor is any provision intended to confer, upon any third party (other than Buyer's successors and permitted assigns) any benefit or right enforceable at the option of that third party. This Guaranty embodies the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior

or contemporaneous agreements and understandings of the parties hereto, verbal or written, relating to the subject matter hereof. If any provision of this Guaranty is determined to be illegal or unenforceable (i) such provision shall be deemed restated in accordance with applicable Laws to reflect, as nearly as possible, the original intention of the parties hereto and (ii) such determination shall not affect any other provision of this Guaranty and all other provisions shall remain in full force and effect. This Guaranty may be executed in any number of separate counterparts, each of which when so executed shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument. This Guaranty may be executed and delivered by electronic means with the same force and effect as if the same was a fully executed and delivered original manual counterpart.

[Signature on next page]

IN WITNESS WHEREOF, the undersigned has caused this Guaranty to be duly executed and delivered by its duly authorized representative on the date first above written.

GUARANTOR:
[]
By:
Printed Name:
Title:
DINZED.
BUYER:
[]
By:
Printed Name:
Title:
By:
Printed Name:
Title:

#### **EXHIBIT M**

## FORM OF REPLACEMENT RA NOTICE

This Replacement RA Notice (this "Notice") is delivered by [SELLER ENTITY] ("Seller") to San Diego Community Power, a California joint powers authority] ("Buyer") in accordance with the terms of that certain Renewable Power Purchase Agreement dated ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Notice but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.

Pursuant to Section 3.8(b) of the Agreement, Seller hereby provides the below Replacement RA product information:

#### Unit Information<sup>1</sup>

No	
Name	
Location	
CAISO Resource ID	
Unit SCID	
Prorated Percentage of Unit Factor	
Resource Type	
Point of Interconnection with the CAISO	
Controlled Grid ("substation or transmission	
line")	
Path 26 (North or South)	
LCR Area (if any)	
Deliverability restrictions, if any, as described	
in most recent CAISO deliverability	
assessment	
Run Hour Restrictions	
Delivery Period	

Month	Unit CAISO NQC (MW)	Unit Contract Quantity (MW)
January		
February		
March		
April		
May		
June		
July		
August		
September		
October		
November		
December		

<sup>&</sup>lt;sup>1</sup> To be repeated for each unit if more than one.

By:			

[SELLER ENTITY]

Its:

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

# **EXHIBIT N**

# **NOTICES**

("Seller")	San Diego Community Power, a California joint powers authority ("Buyer")	
All Notices:	All Notices:	
Street:	San Diego Community Power	
City:	Attn: Chief Executive Officer	
Attn:	San Diego Community Power	
Phone:	815 E Street, Suite 12716	
Facsimile:	San Diego, CA 92112	
Email:	Phone: (619) 236-6563	
	E-mail: <u>bcarnahan@sdcommunitypower.org</u>	
With a copy to:		
Street:		
City:		
Attn:		
Phone:		
Facsimile:		
Email:		
Reference Numbers:	Reference Numbers:	
Duns:		
Federal Tax ID Number:		
Invoices:	Invoices:	
Attn:	Attn: Michael Maher	
Phone:	Phone: (415) 526-3020	
Facsimile:	Email: mmaher@mahercpa.com	
E-mail:		
Scheduling:	Scheduling:	
Attn:	Tenaska Power Services CO.	
Phone:	Attn: Kara Whillock, Tenaska Power Services	
Facsimile:	Co.	
E-mail:	Phone: 972-333-6122	
	Email: <u>kwhillock@tnsk.com</u>	
	Day Ahead: (817) 303-1115	
	Real Time: (817) 303-1852	
	Facsimile: (817) 303-1104	

("Seller")	San Diego Community Power, a California joint powers authority ("Buyer")	
Confirmations:	Confirmations:	
Attn:	Attn: Chief Executive Officer	
Phone:	San Diego Community Power	
Facsimile:	815 E Street, Suite 12716	
E-mail:	San Diego, CA 92112	
	Phone: (619) 236-6563	
	E-mail: <u>bcarnahan@sdcommunitypower.org</u>	
Payments:	Payments:	
Attn:	Attn: Michael Maher	
Phone:	Phone: (415) 526-3020	
Facsimile:	Email: mmaher@mahercpa.com	
E-mail:		
Wire Transfer:	Wire Transfer:	
BNK:		
ABA:		
ACCT:		
With additional Notices of an Event of	With additional Notices of an Event of	
Default to:	Default to:	
Attn:	Ryan Baron,	
Phone:	Best Best & Krieger LLP	
E-mail:	18101 Von Karman Ave., Suite 1000	
	Irvine CA 92612	
With a copy to:	Phone: (949) 263-6568	
	Email: ryan.baron@bbklaw.com	
<b>Emergency Contact:</b>	<b>Emergency Contact:</b>	
Attn:	Attn: Chief Executive Officer	
Phone:	San Diego Community Power	
Facsimile:	815 E Street, Suite 12716	
E-mail:	San Diego, CA 92112	
	Phone: (619) 236-6563	
	E-mail: <u>bcarnahan@sdcommunitypower.org</u>	

#### **EXHIBIT O**

#### STORAGE CAPACITY TESTS

## **Storage Capacity Test Notice and Frequency**

- A. <u>Commercial Operation Date Storage Capacity Test</u>. Upon no less than ten (10) Business Days prior Notice to Buyer, Seller shall schedule and complete a Commercial Operation Storage Capacity Test prior to the Commercial Operation Date. Such initial Commercial Operation Storage Capacity Test (and any subsequent Commercial Operation Storage Capacity Test permitted in accordance with <u>Exhibit B</u>) shall be performed in accordance with this <u>Exhibit O</u> and shall establish the Installed Storage Capacity hereunder based on the actual Power capacity of the Storage Facility determined by such Commercial Operation Storage Capacity Test(s).
- B. Subsequent Storage Capacity Tests. Following the Commercial Operation Storage Capacity Test(s), but not more than once per Contract Year within the first quarter of each Contract Year, upon no less than ten (10) Business Days prior Notice to Seller, Buyer shall have the right to require Seller to schedule and complete a Storage Capacity Test. In addition, Buyer shall have the right to require a retest of the most recent Storage Capacity Test at any time upon no less than five (5) Business Days prior written Notice to Seller if Buyer provides data with such Notice reasonably indicating that the then-current Storage Contract Capacity has varied materially from the results of the most recent prior Storage Capacity Test. Seller shall have the right to perform a Storage Capacity Test or run a retest of any Storage Capacity Test at any time during any Contract Year upon five (5) Business Days' prior written Notice to Buyer (or any shorter period reasonably acceptable to Buyer consistent with Prudent Operating Practice).
- C. <u>Test Results and Re-Setting of Storage Contract Capacity</u>. No later than five (5) days following any Storage Capacity Test, Seller shall submit a testing report detailing results and findings of the test. The report shall include Storage Facility Meter readings and plant log sheets verifying the operating conditions and output of the Storage Facility. In accordance with Section 4.9(b) of the Agreement and Part II(I) below, after the Commercial Operation Storage Capacity Test(s), the Storage Contract Capacity determined pursuant to such Capacity Test shall become the new Storage Contract Capacity at the beginning of the day following the completion of the test for calculating the Contract Price and all other purposes under this Agreement.

## **Storage Capacity Test Procedures**

#### PART I. GENERAL.

A. Each Storage Capacity Test (including the Commercial Operation Storage Capacity Test, each subsequent Storage Capacity Test, and all re-tests thereof permitted under paragraph B above) shall be conducted in accordance with Prudent Operating Practices and the provisions of this Exhibit O. For ease of reference, a Storage Capacity Test is sometimes referred to in this Exhibit O as a "SCT". Buyer or its representative may be present for the SCT and may, for informational purposes only, use its own metering equipment for verification purposes (at Buyer's sole cost).

## B. Conditions Prior to Testing.

- (1) The EMS shall be successfully configured to communicate and exchange data with the Battery Management System ("BMS"), Seller's SCADA system (if applicable), Buyer's SCADA device, and a historian device (if separate) for the calculation, recording and archiving of data points.
- (2) The Remote Terminal Unit (RTU) testing should be successfully completed prior to any testing. The interface between Buyer's RTU and the SCADA System should be fully tested and functional prior to starting any testing, including verification of the data transmission pathway between the Buyer's RTU and Seller's EMS interface and the ability to record SCADA Systems data.
- (3) Commissioning shall be successfully completed per manufacturer guidance on all applicable installed Facility equipment, including verification that all controls, set points, and instruments of the BMS and EMS are configured.
- (4) Any SCTs requiring the availability of Charging Energy shall be conducted when the Generating Facility is producing at a rate equal to or above the Storage Contract Output *divided by* four (4) hours, continuously for a five (5)-hour period; *provided* that Seller may waive such conditions at its sole discretion. Any SCTs that are required or allowed to occur under this Exhibit O that take place in the absence of the above condition being satisfied shall be subject to a mutually agreed upon adjustment (such agreement not to be unreasonably withheld) between Seller and Buyer with respect to the allowed charging time for such SCT and/or Storage Facility Charging Loss Factor definition, which adjustment(s) shall be commensurate with then-existing irradiance limitations.
- (5) Any SCTs measuring Discharging Energy shall be conducted when the Generating Facility is not delivering Energy to the Facility meter.

#### PART II. REOUIREMENTS APPLICABLE TO ALL STORAGE CAPACITY TESTS.

## A. <u>Purpose of Test</u>. Each SCT shall:

- (1) Test Charging from the Generating Facility at the Storage Facility Meter to establish Storage Facility Charging Loss Factor and charging ramp rate.
- (2) Test Discharging from the Storage Facility to the Delivery Point at the Facility Meter to establish Storage Facility Discharging Loss Factor, discharging ramp rate, and Storage Contract Capacity,.
- B. <u>Parameters</u>. During each SCT, the following parameters shall be measured and recorded simultaneously for the Storage Facility, at a minimum of two (2) second intervals:

- (1) time (seconds);
- (2) Charging Power (MW<sub>DC</sub>) at the Storage Facility Meter;
- (3) Stored Energy Level (MWh<sub>DC</sub>) at the Storage Facility Meter, either directly measured or derived;
- (4) Discharging Power (MW<sub>AC</sub>) at the Facility Meter;
- C. <u>Site Conditions</u>. During each SCT, the following conditions at the Site shall be measured and recorded simultaneously at thirty (30) minute intervals:
  - (1) Relative humidity (%);
  - (2) Barometric pressure (inches Hg) at facility weatherstation nearest to Storage Facility; and
  - (3) Ambient air Temperature (°F).
- D. <u>Test Elements</u>. Each SCT shall include the following test elements, during which time the Storage Facility may be regulated between 0.95 power factor leading and lagging as needed to comply with CAISO reactive power requirements:
  - (1) The discharging of the Storage Facility to its minimum SoC as allowed by the Storage Facility's control system and Operating Restrictions;
  - (2) Once at Minimum SoC, holding the Storage Facility in an active-standby state for at least 30 minutes to allow for thermal normialization of batteries:
  - (3) The charging of the Storage Facility at a constant power charge rate no larger than per Operating Restrictions until the SoC reaches at least 90%, continued by the receipt of charging Energy as sustained until the SoC reaches 100%, not to exceed five (5) hours of total charging time;
  - (4) The measurement of the time from when the charge signal is sent until the constant power charge rate is achieved (dividing the constant power charge rate by this measurement will determine the updated charging ramp rate);
  - (5) The measurement of Energy, as measured by the Storage Facility Meter, that is required to charge the Storage Facility until a 100% SoC is achieved;
  - (6) Once at Maximum SoC, the Storage Facility shall be held in an active-standby state for at least 30 minutes to allow for thermal normilzation of the batteries;

- (7) The discharging of the Storage Facility for four (4) continuous hours at a constant power discharge rate (in MW<sub>AC</sub> as measured at the Facility Meter) no greater than the Storage Contract Output divided by for four (4) hours;
- (8) The measurement of the time from when the discharge signal is sent until the constant power discharge rate is achieved (dividing the constant power charge rate by this measurement will determine the updated discharging ramp rate);
- (9) The measurement of Energy, as measured by the Storage Facility Meter, that is discharged from the Storage Facility to the Delivery Point until the minimum SoC allowed by Operating Restrictions is achieved as indicated by the battery management system.

#### E. Test Conditions.

- (1) General. At all times during a SCT, the Storage Facility shall be operated in compliance with Prudent Operating Practices and all operating protocols recommended, required or established by the manufacturer for the Storage Facility. Buyer shall ensure that the Storage Facility has charged and discharged at least eighty percent (80%) of one (1) Cycle in the 24-hour period prior to the beginning of the SCT.
- (2) <u>Abnormal Conditions</u>. If abnormal operating or grid conditions that prevent the recordation of any required parameter occur during a SCT (including a level of irradiance that does not permit the Generating Facility to produce sufficient Charging Energy), Seller may postpone or reschedule all or part of such SCT in accordance with Part II.F below.
- (3) <u>Instrumentation and Metering</u>. Seller shall provide all instrumentation, metering and data collection equipment required to perform the SCT. The instrumentation, metering and data collection equipment electrical meters shall be calibrated in accordance with Prudent Operating Practice, and as applicable, the CAISO Tariff.
- F. <u>Incomplete Test</u>. Except as provided in Part I(D), If any SCT is not completed in accordance herewith, Buyer may in its sole discretion: (i) accept the results up to the time the SCT stopped; (ii) require that the portion of the SCT not completed, be completed within a reasonable specified time period; or (iii) require that the SCT be entirely repeated. Notwithstanding the above, if Seller is unable to complete a SCT due to a Force Majeure Event or the actions or inactions of Buyer or the CAISO or the PTO, Seller shall be permitted to reconduct such SCT on dates and at times reasonably acceptable to the Parties.
- G. <u>Final Report</u>. Within fifteen (15) Business Days after the completion of any SCT, Seller shall prepare and submit to Buyer a written report of the results of the SCT,

which report shall include:

- (1) a record of the personnel present during the SCT that served in an operating, testing, monitoring or other such participatory role;
- (2) the measured data for each parameter set forth in Part II.A through D, as applicable, including copies of the raw data taken during the test;
- (3) the current level of Storage Contract Capacity, the amount of Energy required to fully charge the battery, the current charge and discharge ramp rate, and the Maximum Stored Energy Level, each determined by the SCT, including supporting calculations; and
- (4) Seller's statement of either Seller's acceptance of the SCT or Seller's rejection of the SCT results and reason(s) therefor.

Within ten (10) Business Days after receipt of such report, Buyer shall notify Seller in writing of either Buyer's acceptance of the SCT results or Buyer's rejection of the SCT and reason(s) therefor.

If either Party reasonably rejects the results of any SCT, such SCT shall be repeated in accordance with Part II.F.

- H. <u>Supplementary Storage Capacity Test Protocol</u>. No later than sixty (60) days prior to commencing Storage Facility construction, Seller shall deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) a supplement to this <u>Exhibit O</u> with additional and supplementary details, procedures and requirements applicable to Storage Capacity Tests based on the then current design of the Storage Facility ("<u>Supplementary Storage Capacity Test Protocol</u>"). Thereafter, from time to time, Seller may deliver to Buyer for its review and approval (such approval not to be unreasonably delayed or withheld) any Seller recommended updates to the then current Supplementary Storage Capacity Test Protocol (and each update thereto), once approved by Buyer, shall be deemed an amendment to this Exhibit O.
- I. Adjustment to Storage Contract Capacity. The result of dividing (i) the lesser of (a) the Storage Contract Output, and (b) the total amount of Facility Energy delivered to the Delivery Point as measured at the Facility Meter (expressed in MWh<sub>AC</sub>) during the first four (4) hours of discharge; divided by (ii) four (4) hours; shall be the new Storage Contract Capacity in accordance with Section 4.9(c) of the Agreement.
- J. <u>Adjustment to Storage Facility Charging Loss Factor</u>. Using the measurements from the test procedure measuring constant power charging from SoC of 0% to SoC of no less than 90%, the result of dividing (i) the average Charging Power

(expressed in  $MWh_{DC}$ ) as measured at the Storage Facility Meter, by (ii) the Storage Facility's maximum Charging Power allowed under Operating Restrictions (expressed in  $MWh_{DC}$ ) at the DC bus of the inverter, shall be the new Storage Facility Charging Loss Factor.

K. <u>Adjustment to Storage Facility Discharging Loss Factor</u>. The result of (i) the total change in Discharging Energy (expressed in MWh<sub>AC</sub>) at the Facility meter divided by (ii) the total change in Stored Energy Level (expressed in MWh<sub>DC</sub>) at the Storage Facility Meter, as measured during the four (4) hour constant power discharging test, shall be the new Storage Facility Discharging Loss Factor.

#### **EXHIBIT P**

## STORAGE FACILITY AVAILABILITY

#### **Annual Storage Availability**

(a) <u>Calculation of Annual Storage Availability</u>. Seller shall calculate the "<u>Annual Storage Availability</u>" in a given Contract Year using the formula set forth below:

Annual Storage Availability (%) =

$$\frac{1}{Annual\ On\ Peak\ Hours}*\sum_{h=1}^{Annual\ On\ Peak\ Hours}MIN[(ASPC(h)), (ASEC(h))]$$

Where:

Annual On Peak Hours – the sum of all On-Peak Hours in a given Contract Year.

ASPC(h) = "Available Storage Power Capacity" - In a given On-Peak Hour, the deliverable power capacity of the Storage Facility at the Delivery Point (as determined by the EMS, adjusted for losses) divided by the Storage Contract Capacity.

ASEC(h) = "Available Storage Energy Capacity" - In a given On-Peak Hour, the deliverable Stored Energy Level in MWh<sub>AC</sub> at the Delivery Point if the SOC was 100%, *divided by* the result of (i) the Storage Contract Capacity multiplied by (ii) four (4) hours.

ASPC and ASEC shall only be deemed unavailable (in whole or in part) if the Storage Facility is not able to deliver corresponding Storage Product for any reason other than the occurrence of any of the following (each, an "Excused Event"): a Force Majeure Event, Buyer Bid Curtailment, Buyer Curtailment Orders, Curtailment Orders, Buyer Default, Storage Capacity Tests, System Emergencies, Transmission System Outage, Battery Augmentation, or the Operating Restrictions in Exhibit Q. For the avoidance of doubt, ASPC and ASEC during an On-Peak Hour coinciding with an Excused Event shall be calculated as if an Excused Event had not occurred.

If the Storage Facility was previously deemed unavailable (in whole or in part) for a period of time, and Seller provides a revised Notice indicating the Storage Facility is available for such period of time by 5:00 A.M. of the morning Buyer schedules or bids the Storage Facility in the Day-Ahead Market, the Storage Facility will be deemed to be available to the extent set forth in the revised Notice.

If the Storage Facility was previously deemed unavailable (in whole or in part) for a period of time, and Seller provides a revised Notice indicating the Storage Facility is available for such period of time at least sixty (60) minutes prior to the time the Buyer is required to schedule or bid the Storage Facility in the Real-Time Market, and the Storage Facility is dispatched in the Real-Time Market, the Storage Facility will be deemed to be available to the extent set forth in the revised Notice.

## **Availability Adjustment**

The applicable "<u>Availability Adjusted Storage Contract Capacity</u>" is calculated by multiplying the Storage Contract Capacity by the Availability Adjustment ("<u>Availability Adjustment</u>" or "<u>AA</u>"), which is calculated as follows:

(i) If the Annual Storage Availability is greater than or equal to the Guaranteed Storage Availability, then:

$$AA =$$

(ii) If the Annual Storage Availability is less than the Guaranteed Storage Availability, but greater than or equal to \(\bigcup\_{\pi}\), then:

(iii) If the Annual Storage Availability is less than , then:

$$AA =$$

# **EXHIBIT Q**

# **OPERATING RESTRICTIONS**

The Storage Facility shall be subject to the following Operating Restrictions:

	Description	Value	Notes
1.	Storage Contract Capacity		
2.	Maximum Stored Energy Level		
3.	Minimum Stored Energy Level		
4.	Maximum Charging Capacity		
5.	Minimum Charging Capacity		
6.	Maximum Discharging Capacity		
7.	Minimum Discharging Capacity		
8.	Maximum State of Charge (SOC) during Charging		
9.	Minimum State of Charge (SOC) during Discharging		
10.	Annual Average State of Charge Range (SOC)		Measured during each Contract Year
11.	Annual Cycle Limit		Not to exceed the stated value  Measured during each Contract Year
12.	Daily Dispatch Limits		Not to exceed the stated value See Cover Sheet

13.	Ramp rate		
14.	Charging Energy source	The Storage Facility will only be charged by the Generating Facility	
15.	EMS/BMS limits	Any limits on imposed on Storage Facility operation by the EMS or BMS for the protection or preservation of person or property.	Limts shall be respected.

# **EXHIBIT R**

## **METERING DIAGRAM**

